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CIRCUIT COURTS OF APPEALS, CIRCUIT
AND DISTRICT COURTS, AND COMMERCE
COURT OF THE UNITED STATES

OCTOBER—NOVEMBER, 1911

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JUDGES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS THE CIRCUIT AND DISTRICT COURTS, AND THE COMMERCE COURT

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¹ Appointed December 20, 1910. Designated to serve five years in Commerce Court.

² Died October 9, 1911.

³ Appointed January 31, 1911. Designated to serve four years in Commerce Court.

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| Hon. LOYAL E. KNAPPEN, Circuit Judge..... | Grand Rapids, Mich. |

⁴ Died October 14, 1911.

⁵ Resigned to take effect October 3, 1911.

⁶ Appointed Circuit Judge to take effect October 3, 1911, in place of Henry F. Severens, Circuit Judge.

| | |
|--|---------------------|
| Hon. ANDREW M. J. COCHRAN, District Judge, E. D. Kentucky..... | Maysville, Ky. |
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* Appointed Circuit Judge to take effect October 3, 1911, in place of Henry F. Severens, Circuit Judge.

⁷ Appointment effective October 3, 1911, in place of Arthur C. Denison, District Judge.

⁸ Appointed January 31, 1911. Designated to serve one year in Commerce Court.

⁹ Died October 7, 1911.

¹⁰ Appointed January 31, 1911. Designated to serve two years in Commerce Court.

NINTH CIRCUIT

| | |
|---|---------------------|
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| Hon. JULIAN W. MACK, Associate Judge..... | Washington, D. C. |

¹¹ Appointed January 31, 1911. Designated to serve three years in Commerce Court.

¹² Resignation effective October 15, 1911.

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CASES
ARGUED AND DETERMINED
IN THE
UNITED STATES CIRCUIT COURTS OF APPEALS
THE CIRCUIT AND DISTRICT COURTS
AND THE COMMERCE COURT

UNION PAC. R. CO. v. CITY OF GREELEY et al.†

SAME v. DENVER, L. & N. W. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. June 21, 1911.)

Nos. 3,483, 3,484.

1. PUBLIC LANDS (§ 83*)—GRANT TO RAILROADS—RIGHT OF WAY.

The effect of Act March 3, 1869, c. 127, 15 Stat. 324, authorizing the Union Pacific Railroad Company, Eastern Division, to adopt the roadbed of the Denver Pacific Railway & Telegraph Company between Denver and Cheyenne as a part of its line, and to grant to the Denver Company the perpetual use of its right of way, was to extend to such company the grant of right of way over the public lands 400 feet wide made to the Eastern Division by Act July 2, 1864, c. 216, 13 Stat. 356. That grant was an absolute grant in present, remaining as a float until the definite location or actual construction of the road, and, by virtue of the act of 1869, the Denver Company acquired title to such right of way over all lands which were public lands on July 2, 1864, and all persons acquiring title to, or rights in, any of such lands after that date took subject to such right of way. Reed, District Judge, dissenting.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 83.*]

2. PUBLIC LANDS (§ 83*)—GRANT OF RAILROAD RIGHT OF WAY—CONSTRUCTION.

The filing by the Union Pacific Railroad Company, Eastern Division, of a map of its general route, prior to the transfer of its rights to the Denver Company, required to obtain a tentative withdrawal of its land grant from sale or entry by the Interior Department, did not affect the grant of right of way, which, unlike the land grant, was subject to no conditions that the lands should be free from homestead or other claims at the date of definite location of its line, but was absolute.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 83.*]

3. PUBLIC LANDS (§ 79*)—GRANT OF RAILROAD RIGHT OF WAY—CONSTRUCTION—ADVERSE RIGHTS.

A mere settlement upon a tract of public land does not initiate any right in the settler which will defeat a subsequent grant of right of way over such land to a railroad company, but his rights in that respect at most could only date from the time he filed his declaratory statement.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 244-246; Dec. Dig. § 79.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. EMINENT DOMAIN (§ 280*)—EQUITABLE ESTOPPEL—RIGHTS WHICH MAY BE ACQUIRED.

Property which can be acquired by the exercise of the power of eminent domain may be acquired for the same public use by the application of the doctrine of equitable estoppel.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 280.*]

5. RAILROADS (§ 82*)—RIGHT OF WAY THROUGH PUBLIC LANDS—ACQUISITION IN OCCUPANCY BY OTHER CORPORATIONS.

The predecessor in interest of complainant railroad company obtained by grant from Congress right of way for its road 400 feet wide through the public lands, and also title to every alternate section of such lands under the same grant. Certain of such lands were sold under its authority to a colony and conveyed by deed, reserving a right of way of 200 feet. The colony also acquired title to adjoining lands and conveyed to the company a right of way over the same 100 feet wide, with 100 feet additional for station grounds, which conveyance was accepted by the company. The colony then laid out and platted on its lands what is now the defendant city of Greeley, with streets and blocks extending to the 100 and 150 feet right of way, and such streets were improved and the lots sold and fenced and improved by the purchasers. From time to time during 40 years complainant and its predecessors purchased and paid for lots within the 400 feet limits of the original right of way, and also obtained from the city franchises to use streets thereon. Various other railroad companies also obtained franchises, and purchased and occupied with their lines and buildings lots within such limits, one of which was organized and owned and controlled by complainant's predecessor. *Held* that, as against the city and such other public service corporations having the power of eminent domain, complainant was estopped to assert title to or right of way over, the lands lying outside of the 100 and 200 feet limits in which it had acquiesced for such length of time. Sanborn, Circuit Judge, dissenting.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 82.*]

Appeals from the Circuit Court of the United States for the District of Colorado.

Suit in equity by the Union Pacific Railroad Company against the City of Greeley and others, and against the Denver, Laramie & Northwestern Railway Company. Decree for defendants in each case, and complainant appeals. Affirmed.

Clayton C. Dorsey (Wm. V. Hodges and N. H. Loomis, on the brief), for appellant.

Henry McAllister, Jr., E. E. Whitted, and A. D. Quaintance (Joseph C. Ewing, F. J. Green, John D. Milliken, Joseph C. Helm, James E. Kelby, Joel F. Vaile, and William N. Vaile, on the brief), for appellees.

William P. Malburn (Charles S. Thomas, W. H. Bryant, and George L. Nye, on the brief), amici curiæ.

Before SANBORN, Circuit Judge, and W. H. MUNGER and REED, District Judges.

W. H. MUNGER, District Judge. These suits involve the same question. They were commenced by complainant in the court below to remove clouds upon the title to its alleged right of way through certain tracts of land in Weld county, Colo. (between Denver in that state and Cheyenne, Wyo.), and to procure injunctions prohibiting any

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

interference with the full use and enjoyment of such claimed right of way. Complainant claims a right of way 400 feet in width through the tracts in question by virtue of the grant of right of way by Congress to the Union Pacific Railroad and its branches. The respondents deny that complainant has a right of way through the tracts of land in question 400 feet in width by virtue of any act of Congress, and farther allege certain facts as an estoppel.

[1] In the determination of the case it becomes important to first inquire what right of way, if any, was granted by Congress through the lands in question.

July 1, 1862, Congress passed the first of the Pacific Railroad acts under which complainant bases any right. Act July 1, 1862, c. 120, 12 Stat. 489. This act in brief provided for the incorporation of the Union Pacific Railroad Company and the construction of a railroad commencing at the one-hundredth meridian in Nebraska, between the south margin of the valley of the Republican river and the north margin of the valley of the Platte river, and extending to the western boundary of Nevada; also authorized the construction of certain branch lines, commencing at the Missouri river, to connect with the main line at the one-hundredth meridian. This act granted to said main line and branches a right of way over the public lands of the United States 400 feet in width, and, to aid in the construction of the roads, granted five alternate sections of public lands designated by odd numbers within the limits of ten miles on each side of each of said roads, which had not been sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim had not attached at the time the line of said road should be definitely fixed. An exception was also contained as to mineral lands. To aid further in the construction, a grant of bonds was made. The act provided also that, upon the acceptance of the act by the company, and the filing of a map within two years of the passage of the act, designating the general route of said road as near as might be, the Secretary of the Interior should cause the lands within 15 miles of said designated route to be withdrawn from pre-emption, private entry, and sale, thus affording the company protection in its grant of lands from subsequent disposition by sale, pre-emption or homestead entry in case of a deviation or variation between the general and finally adopted route to the extent of 5 miles on each side of the line of general route. By the ninth section of the act, the Leavenworth, Pawnee & Western Railroad Company was designated as one of the branches, given the benefit of the same grant of right of way and lands in aid of its construction, such branch road to connect with the main line at the one-hundredth meridian. These respective grants were made subject to the right to the use of the said roads by the government for postal, military and other purposes, the particulars in respect to which it is unnecessary here to specify.

The grant of the right of way and of the aid lands were each in present. The grant of the right of way differed from the grant of lands in this: The grant of right of way was absolute, containing no reservations or exceptions, while as to the alternate sections

of land, it excepted from the grant the lands which had been "sold, reserved or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed." These grants, while in present and effective from the date of the passage of the act, remained as a float until the filing of the map of the definite location. Upon the filing of the map of the definite location, the grant became fixed and definite. As to the right of way, parties who, after the passage of the act and before the map of definite location was filed, acquired any of the public lands by purchase, pre-emption or homestead entry, took the same subject to the right of way being definitely located thereon. *R. R. Co. v. Baldwin*, 103 U. S. 426, 26 L. Ed. 578.

The act contained the following provision:

"And the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said road and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefit of the same for postal, military and other purposes, Congress may, at any time, having due regard for the rights of said companies named herein, add to, alter, amend or repeal this act."

As the right of way claimed by complainant in these cases is based upon the grant to the branch line designated as the Leavenworth, Pawnee & Western Railroad Company, we shall deal with the amendatory acts only to the extent that that branch was affected.

On July 2, 1864, Congress passed an act (Act July 2, 1864, c. 216, 13 Stat. 356) amending the act of July 1, 1862. This amendatory act doubled the land grant by giving to the roads ten of the alternate sections on each side of the line thereof, subject to the same exceptions as in the original act, and directed the withdrawal by the Secretary of the Interior of the lands within the limits of twenty-five miles on each side of the road upon the filing of a map showing the general route. Section 9 of the amendatory act contained this provision:

"That any company authorized by this act to construct its road and telegraph line from the Missouri river to the initial point aforesaid may construct its road and telegraph line so as to connect with the Union Pacific Railroad at any point westwardly of such initial point, in case such company shall deem such westward connection more practicable or desirable; and in aid of the construction of so much of its road and telegraph line as shall be a departure from the route hereinbefore provided for its road such company shall be entitled to all the benefits and be subject to all the conditions and restrictions of this act."

It farther provided, however, that the branch lines should not receive bonds from the United States to aid in the construction of such portion of the road as should be extended to a connection with the Union Pacific Railroad west of the one-hundredth degree of longitude. The Leavenworth, Pawnee & Western Railroad Company in the meantime changed its name to the Union Pacific Railroad Company, Eastern Division. By this amendatory act the grant of the right of way and the alternate sections in aid of the construction of the road was extended over the public lands west of the one-hundredth meridian,

continued as a float as under the original act until the definite location of the road. *Mo., Kas. & Texas Ry. Co. v. Kas. Pac. Ry. Co.*, 97 U. S. 491-494, 24 L. Ed. 1095; *U. S. v. Kas. Pac. Ry. Co.*, 99 U. S. 455-457, 25 L. Ed. 289; *Stuart v. U. P. R. Co.*, 178 Fed. 753, 103 C. C. A. 89.

We are cited to the case of *U. P. R. Co. v. Harris*, 215 U. S. 386, 30 Sup. Ct. 138, 54 L. Ed. 246, as holding that the grant of the right of way west of the one-hundredth meridian did not take effect until the passage of the subsequent act of July 3, 1866 (Act July 3, 1866, c. 159, 14 Stat. 79). That case and the effect of the decision was fully considered by this court in *Stuart v. U. P. R. Co.*, *supra*. In the opinion written by Mr. Justice Van Devanter, then Circuit Judge, the *Harris* Case was by him analyzed. With that opinion we are now content.

The act of 1866 extended the time to designate the general route of the road and to file a map thereof until the 1st day of December, 1866, and provided that its connection with the main line of the Union Pacific should not be at a point more than fifty miles westwardly from the meridian of Denver in Colorado. This act of 1866 contained no grant of lands or right of way; simply extended the time in which to file the map showing the general route of the road and fixed the most westwardly point at which it could connect with the main line of the Union Pacific. Such being our interpretation of the before-mentioned acts of Congress, it follows that the grant of the right of way, after the passage of the act of July 2, 1864, existed as an inchoate right over any of the public lands, west of the one-hundredth meridian to any point upon the main line of the Union Pacific which might be selected by the Union Pacific Railroad Company, Eastern Division. If, then, the lands in question were unappropriated public lands on July 2, 1864, the company's right to construct its road over the same and obtain a right of way 400 feet in width is undeniable and the subsequent entry of the lands by individuals under the land laws of the United States was subject to such inchoate right being exercised by the company.

In the meantime, in the year 1867, the Denver Pacific Railway & Telegraph Company incorporated under the laws of the state of Colorado and prior to March 3, 1869, located and graded a line of road from Denver to a connection with the main line of the Union Pacific at Cheyenne, Wyo. That road not having a right of way over the public lands, Congress by an act passed March 3, 1869 (Act March 3, 1869, c. 127, 15 Stat. 324), authorized and empowered the Union Pacific Railroad Company, Eastern Division, to contract with the Denver Pacific Railway & Telegraph Company for the construction, operation, and maintenance of that part of its line of railroad and telegraph between Denver and the connection with the main line of the Union Pacific at Cheyenne, to adopt the roadbed already graded by said Denver Pacific Railway & Telegraph Company as its line, and to grant to Denver Pacific Railway & Telegraph Company the perpetual use of its right of way and depot grounds, and to transfer to it all the rights and privileges, subject to all the obligations pertaining to said part of its line, and all the provisions of law for the

operation of the Union Pacific and its branches and connections as a continuous line should apply the same as if the road from Denver to Cheyenne had been constructed by the said Union Pacific Railroad Company, Eastern Division, but the Union Pacific Railroad Company, Eastern Division, was not authorized to fix the rates of tariff for the Denver & Pacific Railway & Telegraph Company. The two companies, the Union Pacific Railroad Company, Eastern Division, and the Denver Pacific, were authorized to mortgage their respective portions of said road for an amount not exceeding \$32,000 per mile to enable them respectively to borrow money to construct the road, and each of the companies should receive patents to the alternate sections of land along their respective lines of road in like manner and within the same limits as then provided for by law in case of lands granted to the Union Pacific Railway Company, Eastern Division. This act, in the case of *U. S. v. U. P. Ry. Co.*, 148 U. S. 562, 13 Sup. Ct. 724, 37 L. Ed. 560, was construed not as a new and independent grant, but as a continuation of the grant before made to the Union Pacific Railroad Company, Eastern Division, and an adoption of the grade of the Denver Pacific Railroad Company between Denver and Cheyenne, as a part of the continuous line of the Union Pacific, Eastern Division, from the Missouri river to its connection with the main line at Cheyenne.

As we have before said, the grant of the lands and the right of way was an inchoate right, consisting of a float, until the line was definitely fixed between Denver and Cheyenne over the route then graded by the Denver Pacific Company, and in the case of *U. S. v. U. P. Ry. Co.*, supra, it was specifically held that this inchoate right to that portion of the land grant was transferred to the Denver Pacific Company. If the inchoate right to the granted lands could be transferred by authority of Congress we perceive no reason why the inchoate right to the right of way could not also be thus transferred.

[2] The road filed a map after the passage of the act of July 2, 1864, showing the general route of its line forming a connection with the main line at the one-hundredth meridian, and after the passage of the act of 1866 it filed another map showing the general route to Denver, thence northerly along the South Platte river to the Cache le Poudre river, thence westerly to a point near what is now Ft. Collins, the main line of the Union Pacific not having at that time been constructed that far westerly; the exact point of junction could not be determined. We regard the filing of the map of general route unimportant in the determination of this controversy. A map showing the general route of the proposed line of road was a requirement for the purpose of enabling the Interior Department to withdraw from disposition lands which might accrue to the Company under the grant of alternate sections. As to the right of way, that remained a float until the filing of a map of definite location or, without such map, until the actual construction or completion of sections of the road and acceptance thereof by the government. Then only did the right of way become fixed, definite, and certain. The language of the several acts plainly distinguishes the difference in this respect between the grant of

the right of way and the grant of lands. *Bybee v. O. & C. R. Co.*, 139 U. S. 663, 11 Sup. Ct. 641, 35 L. Ed. 305; *U. S. v. Southern Pac. R. Co.*, 146 U. S. 570-599, 13 Sup. Ct. 152, 36 L. Ed. 1091; *Nielsen v. Northern Pac. R. Co.* (C. C. A.) 184 Fed. 601.

[3] We next proceed to ascertain if the lands in question were, on the 2d of July, 1864, public lands. The only claim made that at that date any portion of the lands had been withdrawn from the category of public lands is based upon the fact that one Andrew Lemon on June 23, 1865, filed in the local land office his declaratory statement under the pre-emption laws as to a portion of the lands. In such declaratory statement he alleged his settlement upon the land as of May 1, 1864, it thus appearing that, while his settlement antedated the passage of the act of July 2, 1864, he filed no declaration of claim in the land office until nearly one year after the passage of that act. The mere settlement upon the land did not initiate in him any right which defeated the grant of right of way. His rights in that respect at most could only date from the time he filed his declaratory statement in the local land office. *Northern Pac. R. Co. v. Colburn*, 164 U. S. 383, 17 Sup. Ct. 98, 41 L. Ed. 479; *Russian-American Packing Co. v. U. S.*, 199 U. S. 570, 26 Sup. Ct. 157, 50 L. Ed. 314.

The question remains to be considered whether the complainant is now estopped from asserting a claim as against respondents to the right of way over such lands the full width of four hundred feet. The facts upon which the claim of estoppel is based may be briefly summarized as follows:

After the passage of the act of March 3, 1869, and under date of March 19, 1869, the Union Pacific Railway Company, Eastern Division, and the Denver Pacific Railway & Telegraph Company entered into a contract in writing, whereby the Denver Pacific Railway & Telegraph Company completed a line of road between Denver and Cheyenne, and the Union Pacific Railway Company, Eastern Division, transferred to it its grant of right of way and aid lands acquired under the before-mentioned acts of Congress. The road between Denver and Cheyenne was constructed, and the commissioners appointed to examine and report to the President made a report showing the construction of the road, which report was accepted by the President of the United States and the Secretary of the Interior. Under date of August 10, 1869, the Denver Pacific Railway & Telegraph Company executed upon all its property, including the right of way and the odd-numbered sections granted to aid in the construction of the road, a mortgage or trust deed, to secure an issue of bonds, in the sum of \$2,500,000. The trustees therein named qualified and under the terms and authority given by said mortgage or trust deed executed and acknowledged their written authorization and power of attorney to John Evans, one of their number, authorizing him to make conveyances of any of the mortgaged property upon request of the Denver Pacific Railway & Telegraph Company, such power being authorized by the laws of the then territory of Colorado and the terms of the trust deed. Pursuant to the authority given in said deed of trust, John Evans, as trustee, duly conveyed, on or about the 13th day of April, 1870, to

Horace Greeley, as trustee, in trust for Nathan C. Meeker, Robert A. Cameron, Henry T. West and their associates, known and designated as the Union Colony, section 17 and a portion of section 5, which included a part of the lands in controversy in this action, reserving as the right of way of the railway company a strip only 200 feet in width.

In the year 1870, a committee, representing an association of persons desirous of settling in the territory of Colorado, selected the site of the present city of Greeley and the surrounding country as the location for such settlement, and duly incorporated the Union Colony of Colorado under the laws of the then territory of Colorado. That immediately upon the incorporation of the Union Colony, it acquired by good and sufficient warranty deeds of conveyance from the respective entrymen and patentees the title other than that of the Denver Company to a right of way, if any, to all of the lands involved in this controversy, together with other lands. None of the deeds to the Union Colony for any of such lands contained reservations of any character of any right of way of the Denver Pacific Railway & Telegraph Company or any other company, excepting the tract before mentioned conveyed by Evans, trustee, although the Denver Pacific Railway & Telegraph Company had constructed its road over the premises prior to the acquisition of title by the Union Colony Company. After so acquiring title, and before August 23, 1870, the Union Colony surveyed and platted into blocks, lots, streets, alleys and avenues, the town (now city) of Greeley and duly filed with the county recorder of Weld county its plat, and on the 21st day of October, 1870, the Union Colony made, executed and delivered to the Denver Pacific Railway & Telegraph Company a right of way of 50 feet on each side of the center line or track of said Denver Pacific Railway & Telegraph Company through said town of Greeley, the entire width of said right of way being 100 feet, commencing at the southeast corner of the town plat of said town of Greeley and running north through blocks 101, 100, 82, 79, 62, 39, 22, 19 and 2, as platted, and a right of way of 200 feet along the line or track of said railway company within blocks 42 and 59, being one hundred and fifty feet through said blocks on the east side of said railway company's track and fifty feet on the west side, said two hundred foot strip being for depot grounds and depot purposes, and in said deed said Union Colony agreed to lay out and construct along and east of said right of way a street sixty-six feet wide, running north and south within said blocks 42 and 59, and the railway company, in consideration of said deed, agreed to erect within three months from the date thereof a good and substantial building for a freight and passenger depot.

The Union Pacific Railway Company, Eastern Division, pursuant to an act of Congress of March 3, 1869 (15 Stat. 348), changed its name to Kansas Pacific Railway Company, and in January, 1880, the Union Pacific Railroad Company (main line), the Kansas Pacific Railway Company, and the Denver Pacific Railway & Telegraph Company entered into articles of consolidation, forming a new and consolidated company under the name of "the Union Pacific Railway Company," which acquired all the right and interest of the three com-

panies in the respective roads. The Union Pacific Railway Company made purchases of portions of lots lying within the claimed 400-foot right of way from the grantees of the Union Colony, paying valuable considerations therefor as follows: March 3, 1886, from Henry Hoyt; March 15, 1886, from Joseph Joyce; under date of August 11, 1900, the complainant, Union Pacific Railroad Company, from James M. Freeman and Emma Freeman; on October 25, 1901, the complainant, Union Pacific Railroad Company from the Greeley Sugar Company. All of said deeds were by the Union Pacific Railway Company duly filed for record, and the railway company for the first time went into actual possession and occupancy of said lands. At various times complainant and its predecessors in title, being desirous of constructing, maintaining and operating various railroad tracks upon certain streets, avenues, alleys, and public places in Greeley, within the now claimed 400-foot right of way, applied to the board of trustees of the town of Greeley, and the city council of the city of Greeley, after the town became a city, for the right and privilege so to do, and said bodies did thereupon under the laws of the state of Colorado, enact certain ordinances to that end, which were duly approved by the mayor, and thereafter the complainant and its predecessors accepted said ordinances and grants, and did construct, maintain, and operate, and complainant is now maintaining and operating, the tracks authorized by said ordinances. Such ordinances, according to their respective numbers, their respective dates of approval, and the names of the respective grantees therein designated, are:

Ordinance No. 50, approved March 16, 1886, to the Union Pacific Railway Company (complainant's predecessor).

Ordinance No. 102, approved September 17, 1901, to Union Pacific Railroad Company (complainant).

Ordinance No. 104, approved December 5, 1901, to Union Pacific Railroad Company (complainant).

Ordinance No. 107, approved May 20, 1902, to Union Pacific Railroad Company (complainant).

Ordinance No. 111, approved December 2, 1902, to Union Pacific Railroad Company (complainant).

Ordinance No. 191, approved June 15, 1909, to Union Pacific Railroad Company (complainant).

Under the laws of the state of Colorado in effect during the year 1909, the city council of Greeley had no power to grant the use of, or the right to lay down any railroad track in any street to complainant except upon the written consent of the owners of the land, representing more than one-half of the frontage of the street, or so much thereof as was sought to be used for railroad purposes. Under the statute complainant did, prior to the passage of said Ordinance No. 191, file with the city council of Greeley the written consent of the owners of land representing frontage of the streets sought to be used for its railroad purposes under said ordinance. All the persons signing such consent were grantees of and claimed title as the owners of lots fronting on said street and derived their title under the Union Colony.

Immediately after the making and filing by the Union Colony of the

town plat before mentioned in 1870, said Union Colony began to sell and dispose of the lots, blocks, and parcels of land except streets, avenues, and alleys shown thereon, including all the lots, blocks and parcels of land abutting upon lines drawn 50 feet distant from and parallel to and on either side of the center line of the track of the Denver Pacific Railway & Telegraph Company, except the additional strip 100 feet wide through blocks 42 and 59 conveyed to the company as before stated for depot purposes.

Prior to the year 1874 the Union Colony had sold and conveyed by bargain and sale deeds which made no exceptions of or reference to any reserved railroad right of way, practically all of the said lots, blocks and parcels of land abutting upon said 100-foot right of way strip, and prior to the year 1880 the Union Colony had so sold and conveyed all of the said land, including all of the land now claimed to be owned by the respective respondents herein, lying within the 400-foot strip now claimed by complainant and outside of the 100-foot strip. Such sales were made to a large number of persons for good and valuable considerations, in reliance upon said title of the Union Colony and without knowledge of any claim of the Denver Pacific Railway & Telegraph Company to any portion thereof, and their conveyances were forthwith recorded in the office of the recorder of Weld county. Such deeds purported to convey the fee-simple title to the respective parcels of land described therein. The purchasers of said lands thereupon entered into the actual and exclusive possession, occupancy and use of the respective parcels of land so conveyed to them, and thereafter, from time to time, such lots, blocks, and parcels of land passed by deed of conveyance, for valuable considerations, from party to party, none containing any exceptions or reservations as to any right of way of the Denver Pacific Railway & Telegraph Company and its successors. The grantees of the Union Colony, from time to time, made, executed, and delivered mortgages or trust deeds upon their respective lots and lands, the same covering or affecting lots or parcels of land wholly or partly within the 400-foot strip now claimed by complainant but outside of the 100-foot strip, and upon many of said lots and parcels of land, partly or wholly within said strip, buildings and other structures, both residence and business, some large and extensive, have been erected by such grantees and occupied by them for their respective purposes, upon the faith of their respective titles under the Union Colony. The total of all such improvements so placed upon any or all of the premises on either side of the 100-foot strip and lying within said claimed 400-foot strip within said city aggregate at least \$250,000, many of such buildings and improvements upon such property still standing upon the said property. Many of such grantees of the Union Colony, shortly after their purchase of said properties, erected around the boundaries of the same, and particularly along the line of the 100-foot strip, fences or other boundary monuments, and the Denver Pacific Railway & Telegraph Company and its successors, including complainant, have from time to time erected and maintained their own fences along the same line, and in the business portion of the city of Greeley buildings have been erected along such line. Such

private fences were constructed from 30 to 40 years ago and still remain along such line. Complainant herein, nor any of its predecessors in title, have used or occupied any portion of said lots or lands outside of the said 100-foot strip excepting only certain lots or parcels of land which the complainant or its predecessors in interest purchased from grantees of the Union Colony, as before specified, and excepting tracks laid upon streets, avenues, or alleys of the city under ordinances or franchises from said town.

The city of Greeley from time to time granted rights and privileges to various parties to construct telegraph, telephone, electric light and power lines and gas mains and pipes, over, under, and along such streets and alleys and portions thereof lying within such claimed 400-foot strip, and said railway tracks, lines, mains, and pipes have been constructed in pursuance thereof; some for 21 years. The city of Greeley has, from time to time since 1889, laid, constructed, maintained, and is now maintaining, its municipal water and sewer pipes and appurtenances, through, under, and along such claimed 400-foot strip and the railway tracks and along divers of such intersecting streets, avenues, and alleys, and the various grantees of the Union Colony, in occupation and possession of the various lots and parcels of land abutting upon the 100-foot strip have connected their respective buildings with such mains and pipes for water and sewer purposes. All of the foregoing rights and privileges were granted, and all of said lines and tracks were laid, and all of said water and sewer mains and pipes and connections therewith were constructed and maintained without any protest or objection upon the part of complainant or its predecessors until shortly before the commencement of this suit.

In January, 1881, the Greeley, Salt Lake & Pacific Railway Company was incorporated under the laws of the state of Colorado for the purpose of operating a line of railroad from Greeley in a westerly direction. Said corporation was created by persons interested in and connected with the Union Pacific Railway Company, Sidney Dillon being the president of both railroads, and the stock of the Greeley, Salt Lake & Pacific Company was, at the time of its organization, and for many years afterwards, owned and controlled by or in the interest of the Union Pacific Railway Company. Said Greeley, Salt Lake & Pacific Company immediately after its organization applied to the board of trustees of the town of Greeley for permission to construct and operate its track across, along and over certain streets and alleys and other public places in the town of Greeley, and ordinances were passed granting such right, and the said Greeley, Salt Lake & Pacific Company also purchased right of way from various lot owners and condemned other property, for right of way, all within complainant's claimed 400-foot right of way, but outside of the 50 feet from the center of its main track. All of such titles by purchase and condemnation proceedings and by such ordinances were procured and accepted by said Greeley Company while the same was under the control and ownership of the Union Pacific Company, and the said Greeley, Salt Lake & Pacific Company constructed its road along and over such lands and within the claimed 400-foot right of way, and said Greeley, Salt Lake & Pa-

cific Company, about the 1st of June, 1883, executed and delivered to Frederick L. Ames and Ezra H. Baker (who were then directors of the Union Pacific Railway Company) as trustees, its certain mortgage or deed of trust, wherein and whereby the said Greeley, Salt Lake & Pacific Company conveyed to the said Ames and Baker, for the purpose of securing an issue of bonds by said Greeley Company, all of the railroad property and franchises of its said company, together with all rights of way and easements acquired or owned or which it might thereafter at any time acquire or own, for the purpose of right of way, and all depots and other houses, structures and fixtures of the Greeley, Salt Lake & Pacific Company.

On the 18th of March, 1890, the Union Pacific Railway Company, still owning or controlling the stock and bonds of the Greeley, Salt Lake & Pacific Company, caused the said company, with divers other Colorado railroad corporations, whose stock or bonds were then controlled or owned by the Union Pacific Railway Company, to be consolidated under the statutes of Colorado into the Union Pacific, Denver & Gulf Railway Company, and the Union Pacific Railway Company continued to be the owner, and in control of the stock and a large amount of bonds, of the consolidated Gulf Company, until the subsequent appointment of receivers hereinafter mentioned. After the consolidation of said companies into the Union Pacific, Denver & Gulf Railway Company said company executed and delivered to the American Loan & Trust Company of Boston its mortgage or deed of trust, to secure an issue of its bonds, upon all of the property, right of way, etc., of such Gulf Company, and a requisite portion of the bonds of said Union Pacific, Denver & Gulf Railway Company were exchanged for the first-mortgage bonds formerly issued by the Greeley, Salt Lake & Pacific Company, at the time of said consolidation outstanding, said bonds of the Greeley Company being then owned by the Union Pacific Company. That by virtue of such exchange of securities all of the bonds of the Greeley, Salt Lake & Pacific Railway Company passed into the treasury of the Union Pacific, Denver & Gulf Railway Company and by it pledged as collateral security for its bonds.

In November, 1894, the then trustees in the mortgage before mentioned by the Denver Pacific Railway & Telegraph Company to John Edgar Thompson, Adolphus Meier and John Evans, as trustees, instituted a suit in the Circuit Court of the United States for the district of Colorado, to foreclose said mortgage. Receivers were appointed, who took possession and operated said road, and such proceedings were had therein that a decree of foreclosure was entered directing the sale of the mortgaged premises, and the master directed to make the sale, which he did, in March, 1898. By such sale complainant became the purchaser and received a deed for the mortgaged premises, which was duly confirmed by the court in May, 1898. In the latter part of October or first of November, 1894, the American Loan & Trust Company, as trustee, filed a bill in the Circuit Court of the United States for the district of Colorado, to foreclose the mortgage before mentioned, executed by the Union Pacific, Denver & Gulf Railway. Receivers were appointed and such proceedings had therein that a decree of foreclo-

sure and sale was entered and the property of said Union Pacific, Denver & Gulf Railway Company was sold on the 16th day of November, 1898, by the master, to J. Kennedy Tod, Henry Budge, and E. C. Henderson. Said sale was confirmed by the court, and in December, 1898, the purchasers conveyed the same to the Colorado Southern Railway Company, which company has since been in the possession of and operating said road.

Certain fundamental rules of estoppel are stated by text-writers as follows:

"It is a fundamental rule of law that, where a party's declaration or conduct has induced a third party to act in a particular manner, he will not afterwards be permitted to deny the truth of the admission if the consequences would be to work an injury to such third person or to someone claiming under him. * * * The doctrine of estoppel is applied to promote justice and fair dealing." 2 Beach on Modern Equity Jurisprudence, § 1092.

"A person who negligently and culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict cannot afterwards dispute that fact in an action against the person whom he himself assisted in deceiving." Bigelow on Estoppel, 565.

"He who is silent when conscience requires him to speak shall be debarred from speaking when conscience requires him to keep silent." 2 Herman on Estoppel, § 937.

"Where a party negligently and culpably stands by and allows another to contract on the faith of an understanding which he can contradict, he is afterwards estopped from disputing the facts in an action against the person whom he has assisted in deceiving, upon the principle that between innocent parties he who causes the injury must suffer." Section 938, *Id.*

"The principle that one should be estopped from asserting a right to property upon which he has by his own conduct misled another, who supposed himself to be the owner, to make expenditures, is often applied where one owning an estate stands by and sees another erecting improvements on it in the belief that he has the title or an interest in it, and does not interfere to prevent the work or inform the party of his own title. There is in such conduct a manifest intention to deceive or such gross negligence as to amount to constructive fraud." Section 975, *Id.*

In *Wendell v. Van Renssalaer*, 1 Johns. Ch. (N. Y.) 344-354, Chancellor Kent stated the rule as follows:

"There is no principle better established in this court nor one founded on more solid considerations of equity and public utility than that which declares that, if one man knowingly, though he does it passively by looking on, suffers another to purchase and expend money on land under an erroneous opinion of title, without making known his claim, he shall not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound by this equitable estoppel."

Among the cases which recognize and fully sustain the foregoing principles are *Trenton Banking Co. v. Duncan*, 86 N. Y. 221; *Anderson v. Armstead*, 69 Ill. 452; *Perce v. Arbuckle*, 22 Minn. 417; *Morgan v. Railroad Co.*, 96 U. S. 716, 24 L. Ed. 743; *Kirk v. Hamilton*, 102 U. S. 68, 26 L. Ed. 79; *Evans et al. v. Snyder et al.*, 64 Mo. 516.

But it is claimed, on authority of *Northern Pacific Railway Co. v. Townsend*, 190 U. S. 257, 23 Sup. Ct. 671, 47 L. Ed. 1044, and *Union Pacific R. Co. v. Kindred*, 168 Fed. 648, 94 C. C. A. 112, that these

well-established and now elementary principles of estoppel as to ordinary property rights are not applicable in those cases for the reason that, Congress having granted the right of way for a public purpose, the grant cannot be impaired by alienation or otherwise. Whether these principles of estoppel could be applied for the benefit of a private use we need not now inquire. Each of the respondents are public corporations, in whose behalf the police power of the state could be exercised to condemn a necessary part of complainant's right of way for public use to an extent which would not prevent complainant from fully performing its duty to the public, and it would seem to be a reasonable and just rule to say that property which can be acquired by the exercise of the power of eminent domain may be acquired for the same public use by the application of equitable estoppel. [4] The decisions in the cases of *Northern Pacific Railway Co. v. Townsend*, and *Union Pacific R. Co. v. Kindred*, *supra*, in no respect conflict with such view. In those cases the question involved was simply whether a portion of the right of way could be acquired by a private person for an exclusively private use by an application of the doctrine of adverse possession. No principle of estoppel was involved or applicable to the facts in either of those cases.

In *Northern Pacific Railway Co. v. City of Spokane*, 64 Fed. 506, 12 C. C. A. 246, which involved the question of the dedication of a public road across the right of way, it was said:

"The nature of the right of way over public lands, which the railroad company obtained by the grant, was not different from that which it acquired over private lands by purchase or by condemnation proceedings under the laws of the several states through which it passed. Whether the company acquired the fee to the lands covered by its right of way or not, no reason is apparent why it may not dedicate public easements over and across the same and by its own act grant to the public all the rights which the latter may obtain by the exercise of its right of eminent domain. * * * It has been held that trustees holding lands for public uses, and corporations having public duties, may dedicate to public use for highways, when such use is not inconsistent with the purposes for which the lands were vested in trust or incompatible with the duties required."

North Coast Ry. v. Northern Pac. Ry. Co., 48 Wash. 529, 94 Pac. 112, was a case in which plaintiff sought to condemn a portion of defendant's right of way longitudinally. In that case it was contended that no part of the right of way was subject to appropriation by any other railroad company, such contention being based upon the theory that Congress, in granting the right of way of 400 feet in width, conclusively determined that such width was necessary for the public purposes of the grant, basing the claim upon the decision in *Northern Pacific Railway Co. v. Townsend*, *supra*. The court, after quoting from the language in *Northern Pac. Ry. Co. v. Townsend*, said:

"It will be observed from the language quoted that the court had under consideration a question of title claimed through adverse possession by an individual for private purposes; and it was stated in unmistakable language that in such a case the courts cannot say that the full amount of the original grant is no longer needed. Such a case, involving only individual and private considerations, is very different from one which involves public necessities. In order that it might be clearly understood that the court recognized such a necessary distinction, the following language was used in the same

opinion: 'Of course, nothing that has been said in any wise imports that a right of way granted through the public domain within a state is not amenable to the police power of the state. Congress must have assumed when making this grant, for instance, that in the natural order of events, as settlements were made along the line of the railroad, crossings of the right of way would become necessary, and that other limitations in favor of the general public upon an exclusive right of occupancy by the railroad of its right of way might be justly imposed. But such limitations are in no sense analogous to claim of adverse ownership for private use.' It seems clear from the quotation last made that the federal Supreme Court recognizes the power of the state to determine whether the whole of a right of way which has been created by federal grant through an act of Congress is actually needed as against the requirements of the public service which arise with the increase of commerce and transportation necessities. It has been repeatedly held by this court that the power exists in this state when public necessity requires it for one railway or public service corporation to condemn a part of the right of way of another railway company or public service corporation which is not necessary for the exercise of the latter's franchise. (Citing authorities.) It has also been repeatedly held by other courts that a right of way of a railroad company which has been acquired for that express purpose through a federal grant is not exempt from the operation of state laws of eminent domain. (Citing authorities.) It is true the most, if not all, of the last-cited cases related to crossings of other railroads over a right of way acquired by federal grant, whereas, the tract here sought is not for mere crossing purposes, but is a longitudinal tract, about three-fifths of a mile in length, to be carved out of claimant's right of way. The principle as to the power of eminent domain is, however, the same in both cases, depending upon the necessities of the occupying railroad and those of the public service. This court has held that a longitudinal portion of a right of way may be condemned by another railway corporation where the occupying railway does not actually need it, and where it is needed by the other in the interest of the public service."

[5] That complainant's right of way was acquired by virtue of an act of Congress does not exclude, under a proper state of facts, the doctrine of equitable estoppel, we think recognized by the court in *Spokane & British Columbia Ry. Co. v. Washington & Great Northern Ry. Co.*, 219 U. S. 166, 31 Sup. Ct. 182, 55 L. Ed. 159, heard on error from the Supreme Court of the state of Washington, a case involving rights under a grant by Congress of a railroad right of way, the court refusing to consider the question of estoppel for the reason that that was not a federal question.

In the case before us, the Greeley, Salt Lake & Pacific Railway Company was given life by action on the part of the Union Pacific Railway Company (complainant's predecessor), and given a permanent situs upon a portion of its unused and unrequired right of way. It was started in its operation as a public carrier by the Union Pacific Railway Company, its property represented to include such unused and unrequired portion of the right of way mortgaged by officers of the Union Pacific Railway Company. Through the foreclosure of such mortgage respondent, Colorado & Southern Railway Company, acquired its rights. To permit complainant to now come into a court of equity and successfully invoke the court's aid by a decree holding that the Colorado & Southern Railway Company is a mere licensee would be to sanction a most palpable fraud.

The respondent, the Greeley & Denver Railway Company owns and operates a line of road from Denver to Greeley and operates and

maintains its street railroad over and along certain of the streets and avenues of said city of Greeley, and in March, 1908, the city council of the city of Greeley granted to it a franchise to construct and operate its right of way over and across certain of the streets of the city of Greeley. The portions of its line of road which encroaches upon complainant's claimed 400-foot right of way is the portion on Seventh avenue from the south side of Tenth street to the north side of Seventh street in said city, and the only portion within the 100-foot strip is where it crosses complainant's right of way on Third street practically at right angles. The Greeley & Denver Railway Company has expended large sums of money in the construction and equipment of its road in the full faith and belief that said streets were properly and legally laid out and used by the public as such for some 40 years, and had no actual knowledge that complainant claimed any interest outside of the 100-foot right of way until about the time of the commencement of this action; that the ordinance of March, 1908, by which it, the Greeley & Denver Railway Company, was authorized to construct its road over certain of the streets and alleys of the city was published as required by law and that the acts and doings of said respondent, in constructing its track along said streets and avenues were well known to the general public, and complainant had knowledge of such construction work on Seventh avenue but made no complaint to said Greeley & Denver Railway Company until it commenced the construction of its road on Third street across complainant's right of way at right angles, when complainant commenced this action.

The Denver, Laramie & Northwestern Railway Company owns and operates a railroad from Denver into the city of Greeley and has under construction its line of road northerly from the city of Greeley. It organized the Greeley Terminal Railway Company, said terminal company owning and holding its terminal facilities and right of way in said city. Such terminal company obtained from the city council of Greeley authority to construct its line through and over certain of the streets in said city, but none of the right of way of the Denver, Laramie & Northwestern Railway Company or the Greeley Terminal Railway Company encroaches upon the 100-foot strip of complainant's right of way. It has at large expense purchased and obtained property from individuals apparently owning through mesne conveyances from the Union Colony, and in possession of portions of said 400-foot right of way outside of the 100-foot strip, removed buildings and obstructions therefrom and prepared the same for the laying of its tracks without any complaint upon the part of complainant until the commencement of this action.

The Chicago, Burlington & Quincy Railroad Company obtained by purchase and by condemnation proceedings, at an expense of many thousands of dollars, for the construction of its line of road, property included within complainant's claimed 400-foot strip and outside of the 100-foot strip, such purchases and condemnation proceedings being from and against the parties who acquired title by mesne conveyances from said Union Colony and upon a considerable portion of said property were dwelling houses and business buildings which had for

a long time theretofore been occupied as such, and claimed to be owned by the parties having title through said Union Colony, and without any protest from complainant or any of its predecessors. All of which was acquired openly and publicly, without any protest upon the part of complainant until about the time of the commencement of this action.

Considering all of the foregoing facts, that the acquisition of the property by the respondents is for public and not for private use, that the portion of the same which encroaches upon complainant's alleged right of way is not now required by the complainant, and, so far as is disclosed by the evidence, will not be necessary in the near future, to enable complainant to fully and freely discharge its duties to the public, we think complainant fully estopped from now claiming as against these respondents that it is entitled to the present possession of the entire 400-foot right of way; that the decree of the court below was right, and it is, therefore, affirmed.

REED, District Judge (concurring in part, and dissenting in part). I concur in the foregoing opinion that appellant is now estopped from claiming or having a right of way over the lands in controversy through the defendant city of Greeley in excess of 100 feet in width, except through blocks 42 and 59 in said city where its right of way and depot grounds are 200 feet in width as decreed by the Circuit Court; but I am of opinion that appellant's alleged right of way dates only from the act of Congress of March 3, 1869.

The lands over which the appellant claims its right of way are in section 32, township 6, and sections 5, 8, and 17, township 5 north, in range 65 west, in Weld county, Colo., and about midway between Denver, Colo., and Cheyenne, Wyo. The subdivisions thereof over which the appellant claims its right of way, except those in section 17, had been sold by the United States, or were subject to uncanceled pre-emption, homestead, or other claims of record in the local land office at Denver and recognized by that office as valid, at the time of the passage of the act of March 3, 1869, and were not then public lands of the United States. *Kansas Pacific Co. v. Dunmeyer*, 113 U. S. 629, 637, 5 Sup. Ct. 566, 23 L. Ed. 1122.

Appellant claims its right of way over these lands under the act of Congress of July 1, 1862 (12 Stat. 489), as the successor in title and interest of the Leavenworth, Pawnee & Western Railroad Company, one of the grantees named in said act, whose name was subsequently changed to the Union Pacific Railroad Company, Eastern Division, and later to the Kansas Pacific Railway Company (which for convenience will hereinafter be called the Kansas Company) and the acts of July 2, 1864 (13 Stat. 356), July 3, 1866 (14 Stat. 79); and of the Kansas Company and the Denver Pacific Railway & Telegraph Company under the act of March 3, 1869 (15 Stat. 324).

The acts of 1862, 1864, and 1866 were reviewed at some length by this court in the recent case of *Stuart v. Union Pacific Railroad Company* (this appellant) 178 Fed. 753, 103 C. C. A. 89, and the applicable parts thereof are set forth in the opinion in that case, and

need not be here repeated in full. The land involved in that suit is in the vicinity of, but easterly from, the city of Denver, and the road crossing it is that part of the line of the Kansas Company between the western boundary of Kansas and the city of Denver. A consideration of the act of March 3, 1869, was not necessary to a determination of that case, and it is there but little considered. That act is material to the determination of this controversy, and is as follows:

"Section 1. That the Union Pacific Railway Company, Eastern Division, be, and it hereby is, authorized to contract with the Denver Pacific Railway & Telegraph Company, a corporation existing under the laws of the territory of Colorado, for the construction, operation, and maintenance of that part of its line of railroad and telegraph between Denver City and its point of connection with the Union Pacific Railroad, which point shall be at Cheyenne, and to adopt the roadbed already graded by said Denver Pacific Railway & Telegraph Company as said line, and to grant to said Denver Pacific Railway & Telegraph Company the perpetual use of its right of way and depot grounds, and to transfer to it all the rights and privileges, subject to all the obligations pertaining to said part of its line.

"Sec. 2. That the said Union Pacific Railway Company, Eastern Division, shall extend its railroad and telegraph to a connection at the city of Denver, so as to form with that part of its line herein authorized to be constructed, operated and maintained by the Denver Pacific Railway & Telegraph Company, a continuous line of railroad and telegraph from Kansas City, by way of Denver to Cheyenne. And all the provisions of law for the operation of the Union Pacific Railroad, its branches and connections, as a continuous line, without discrimination, shall apply the same as if the road from Denver to Cheyenne had been constructed by the said Union Pacific Railway Company, Eastern Division; but nothing herein shall authorize the said Eastern Division company to operate the road or fix the rates of tariff for the Denver Pacific Railway & Telegraph Company.

"Sec. 3. That said companies are hereby authorized to mortgage their respective portions of said road, as herein defined, for an amount not exceeding \$32,000 per mile, to enable them respectively to borrow money to construct the same; and that each of said companies shall receive patents to the alternate sections of land along their respective lines of road, as herein defined, in like manner and within the same limits as is provided by law in the case of lands granted to the Union Pacific Railway Company, Eastern Division: Provided, that neither of the companies hereinbefore mentioned shall be entitled to subsidy in United States bonds under the provisions of this act."

After the passage of the act of 1862, the Kansas Company in July of that year filed with the Secretary of the Interior a map showing the general route of its road from the mouth of the Kansas river to Ft. Riley, Kan., thence northwesterly along the Republican river to a point on the 100th meridian of longitude in the then territory of Nebraska between the valleys of the Republican and Platte rivers, as required by that act. After the passage of the act of 1864, and in January, 1865, it filed another map designating substantially the same route shown in its map of 1862. February 21, 1866, after the expiration of the time for filing any map under the act of 1864, the company prepared another map, designating a route from Ft. Riley westwardly along the Smokey Hill river to the western boundary of Kansas and presented it to the Secretary of the Interior for approval. That officer refused to file or approve the same upon the ground that after designating its route by the map of 1862, which had been duly approved, and upon which the lands had been withdrawn from market,

the route could not rightly be changed without legislative permission to do so; and in this he was sustained by the then Attorney General of the United States. And see *United States v. Northern Pacific R. Co.* 152 U. S. 284, 292, 293, 14 Sup. Ct. 598, 38 L. Ed. 443. Thereupon the company applied to Congress for such legislation and procured the passage of the act of 1866. Under that act the Kansas Company, on July 11th after its passage, prepared and filed with the Secretary of the Interior a map changing the route as designated in the maps of 1862 and 1864, from Ft. Riley northwesterly along the Republican river to the 100th meridian in Nebraska, to one westerly from Ft. Riley along the Smokey Hill river to the western boundary of Kansas, far to the south of the route from Ft. Riley northwardly as shown in the prior maps; and on November 28, 1866, it prepared and filed another map showing a continuation of that route westwardly from the Kansas boundary to Ft. Collins, Colo., by way of Denver. These maps were duly approved by the Secretary of the Interior; and upon the lines designated therein the road was built by the Kansas Company from Ft. Riley to Denver and accepted by the President in October, 1872, when its right to the lands and right of way as far as Denver became complete.

In the summer of 1867 the main line of the Union Pacific Railroad Company was constructed to a point 106 miles northeasterly from Denver, to what is now the city of Cheyenne in Wyoming, and the village of that name came into existence about August of that year. The Kansas Company had not then constructed its road westwardly from Ft. Riley beyond some point in Kansas near thereto, and the people of Denver were in much doubt of its ever being built to that city. In November, 1867, the Denver Pacific Railway & Telegraph Company was incorporated under the laws of Colorado by residents of that territory for the purpose of building a road from Denver to a connection with the Union Pacific Railroad at Cheyenne, and the citizens of Denver and the county of Arapahoe, in which that city is situated, subscribed and paid \$500,000 in aid of its construction. Shortly thereafter that company (which will be called the Denver Company) surveyed and established its route for such road from Denver along the South Platte river to what is now the city of Greeley, and thence northerly to Cheyenne, and in 1868 graded its road from Denver to Cheyenne, and over the land in controversy, which land was in 1870, included in a plat of the village of Greeley, and is now within the limits of that city. On March 16, 1869, after the passage of the act of March 3d of that year, the Kansas Company, as it was authorized by that act to do, made a contract with the Denver Company to construct the road from Denver to Cheyenne upon the line and roadbed so established and graded by the Denver Company, and the Denver Company built the road pursuant to that contract and that act to a connection with the Union Pacific road at Cheyenne in about 1872, and afterwards maintained and operated the same upon that line as an independent road, but as a part of a continuous line from the mouth of the Kansas river to Cheyenne, until it was consolidated with and became a part of the road of the appellant; and

it has ever since been operated by the appellant and its predecessors in title as a part of its road.

Accepting the decision in *Stuart v. Railroad Company* as the correct interpretation of the Acts of 1862, 1864, and 1866, so far as they relate to the construction of the road from Ft. Riley to Denver, without again considering that question, it does not follow, as it seems to me, that the route established by the Denver Company, and upon which it built the road from Denver to Cheyenne, was authorized by any act of Congress prior to that of March 3, 1869. The Kansas Company never filed any map showing the general route, or definite location of its road from Denver to Cheyenne, or to any other point on the line of the Union Pacific Railroad; though the Acts of 1862, 1864, and 1866, each required that it file a map of the general route of its road, showing its connection with that of the main line of the Union Pacific Company. Its map of November 28, 1866, designates a route from Denver northeasterly along the South Platte river to its junction with the Cache la Poudre river near to what is now the city of Greeley, thence nearly at right angles westerly along that river to Ft. Collins, and in an east and west direction over a part of the lands now in controversy within the city of Greeley; and it was evidently intended to afterwards extend it from Ft. Collins to a connection with the Union Pacific Railroad main line, westerly of the meridian of Denver, as authorized by the act of 1866, when that road should be constructed; but the authority to so extend it was revoked by the act of 1869, and it was never extended, and no road was ever built upon that route.

Section 2 of the act of 1869 shows upon its face that the route from Denver to Cheyenne was first authorized by that act. Its language is:

"That the said Union Pacific Railway Company, Eastern Division, shall extend its railroad and telegraph to a connection at the city of Denver, so as to form with that part of its line herein authorized to be constructed, operated and maintained by the Denver Pacific Railway & Telegraph Company, a continuous line of railroad and telegraph from Kansas City, by way of Denver to Cheyenne; but nothing herein shall authorize the said Eastern Division Company to operate the road or fix the rates of tariff for the Denver Pacific Railway & Telegraph Company."

The building of the road by the Denver Company upon the route so established by it in 1867 and 1868 was not, therefore, a mere deviation in construction of the road of the Kansas Company upon the route shown by its map from Denver to Ft. Collins, but was the construction of a road wholly upon a line and route established by the Denver Company as an independent corporation created under the laws of Colorado, and having no connection whatever with the Kansas Company prior to the contract between them of March 16, 1869. The Denver Company in so establishing and grading its road of course acquired no right of way, or other rights under the grant of Congress to the Kansas Company, and could not possibly acquire any until its route and roadbed were incorporated into and made a part of the road from the mouth of the Kansas river to Cheyenne by authority of Congress. Upon so adopting the route and road of the Denver Com-

pany, the Kansas Company abandoned its route from Denver to Ft. Collins; and the right of way for the road established and built by the Denver Company attached under its contract with that company pursuant to the act of March 3, 1869, and at the very earliest as of the date of that act only. If the Kansas Company had built its road through the city of Greeley upon the route designated by its map of November 28, 1866, or if the Denver Company had done so, there would be room to say under the authority of *Railroad Co. v. Baldwin*, 103 U. S. 426, 26 L. Ed. 578, and like cases, that the right of way for such road would attach as of the date of the act of 1866; and that deviations in the line of construction so as to include the lands in controversy was permissible; but no road was ever built upon that route, and it was abandoned as hereinbefore stated. The fact that the road of the Denver Company was built as far as Greeley along the South Platte river, near to the route of the Kansas Company, as shown in its map of November 28, 1866, does not alter the situation. The road from Denver to Cheyenne was not only first authorized by the act of 1869, but by that act it was expressly required that it should be built from Denver to Cheyenne, and the authority of the Kansas Company under prior acts to build a road to some other connection with the Union Pacific road is revoked by that act.

In *Union Pacific Railroad Company (this appellant) v. Harris*, 215 U. S. 386, 30 Sup. Ct. 138, 54 L. Ed. 246, the land there involved, which is in Saline county, Kan., westerly from Ft. Riley, was settled upon in April, 1861, under the pre-emption law then in force by one who preserved his rights under that entry until September, 1865, when he transmuted it to a homestead settlement and continued in possession until 1872, when he received a patent therefor from the government. It was the contention of the railroad company that because the settler in 1865 changed his pre-emption entry to a homestead settlement his right to the land attached as of that date only, which, being subsequent to the act of 1864, was inferior to its rights under that act. But Mr. Justice Brewer in delivering the opinion of the court said:

"Any possible rights of the railroad company in this land commence with the act of July 3, 1866, for while the acts of 1864 and 1866 were in amendment of the act of 1862, yet the route prescribed by the acts of 1862 and 1864 was far to the east of this land, and only by the act of 1866 was the company authorized to construct a road through or near it. True, as held in *Railroad Company v. Baldwin*, 103 U. S. 426, 26 L. Ed. 578 (and other cases), the grant of the right of way is absolute, and takes effect as of the date of the grant. *But that date must be found in an act prescribing the finally adopted route.*"

Conceding, as held in the *Stuart Case*, that sections 9 and 12 of the act of 1864 authorized the Kansas Company to build its road to Denver, then the act "prescribing the finally adopted route" as far as Denver might be found in that act. But the authority under section 12 of the act of 1864, "to make its road westward until it meets and connects with the Central Pacific Company of California *on the same line*," which plainly means the line of the Union Pacific road from its initial point on the 100th meridian in Nebraska to a connection with

the Central Pacific, was revoked by the act of 1866, which required a connection with the Union Pacific Railroad, "but not at a point more than 50 miles west from the meridian of Denver in Colorado." But this does not require the road to go to Denver, though it permits a connection with the Union Pacific Railroad at some point on the line of that road between its initial point in Nebraska on the 100th meridian, and the meridian of Denver. Such a connection had not been made at the time of the passage of the act of March 3, 1869, and it is entirely plain that the permission to go farther west than the meridian of Denver was revoked by that act, the road required to be built from Denver to Cheyenne, which is somewhat easterly from Denver, and there connect with the Union Pacific road. The act of 1869, is, therefore, the first and only act of Congress "prescribing the route for this road from Denver to Cheyenne"; and if the grant of the right of way takes effect as of the date of an act "prescribing the finally adopted route," and this is not controverted, the conclusion is unavoidable that the right of either the Kansas or the Denver Company to a right of way from Denver to Cheyenne under any act of Congress attaches, if at all as against pre-emption, homestead, or other claims of record in the proper land office, as of the date of the act of March 3, 1869, only. *United States v. Northern Pacific Ry. Co.*, 152 U. S. 284-292, 298, 14 Sup. Ct. 598, 38 L. Ed. 443.

The subdivisions of the sections of land named over which appellant claims its right of way, and the existing homestead settlements, pre-emptions and other claims of record thereon at the time of the passage of the act of 1869, as shown by the local land office at Denver, are as follows:

The south half of the southwest quarter of section 32, and the north half of the northwest quarter of section 5: On June 23, 1865, Andrew D. Lemon filed a pre-emption declaratory statement upon these tracts. He made final proofs and paid for the land in February, 1867, and a patent was issued to him October 1st following. The records show that Lemon first settled upon the land May 1, 1864. (One-half mile of the right of way claimed is over these subdivisions.)

The southeast quarter of the southwest quarter of section 5: September 22, 1866, Knute Nelson filed a pre-emption claim for this tract and 40 acres in section 8, alleging settlement thereon upon that date. January 21, 1873, the entry was canceled, for some reason, by the Commissioner of the General Land Office, and the tract was patented to the Denver Company April 24, 1875, as inuring to it under the act of 1869.

The southwest quarter of the southeast quarter of section 5: September 19, 1866, Calvin Roher filed a pre-emption claim upon this tract. September 18, 1885, D. P. Terrell filed a homestead application therefor, which was rejected and an appeal taken. July 8, 1886, the mayor of the city of Greeley entered the same for cash under the town-site act for the benefit of the inhabitants of said city, and a patent was issued therefor for the benefit of the city October 3, 1889.

The northeast quarter of the northwest quarter of section 8: This tract was included in the pre-emption claim of Knute Nelson, filed

September 22, 1866, and canceled January 21, 1873, as before stated. October 9, 1869, Lewis F. Bartels entered the land for cash and a patent was issued to him therefor December 15, 1870.

The west half of the northeast quarter of section 8: December 1, 1866, D. H. Williams filed a homestead entry upon this land. April 20, 1870, he made final proof, and a patent was issued to him for the land September 20, 1870.

The west half of the southeast quarter of section 8: November 24, 1866, John S. Reed filed a pre-emption claim for this tract, alleging settlement upon that date. November 6, 1868, Cornelius C. Conklin filed a pre-emption claim alleging settlement by him on August 20, 1868. June 14, 1869, Conklin made final proofs, and a patent was issued to him November 25, 1870.

Section 17: This section was selected by the Denver Company October 13, 1874, as inuring to it under the act of 1869, and a patent was issued to it therefor, with other lands, April 24, 1875. No pre-emption or homestead claims are shown to have been filed upon this land.

The acceptance by the Land Department of the government of these several entries withdrew these lands from the category of public lands, and from the operation of the act of 1869. *Railroad Company v. Dunmeyer*, 113 U. S. 629, 5 Sup. Ct. 566, 28 L. Ed. 1122; *Hastings, etc., Railroad Co. v. Whitney*, 132 U. S. 359, 10 Sup. Ct. 112, 33 L. Ed. 363; *United States v. Northern Pacific Ry. Co.*, 152 U. S. 284-298, 14 Sup. Ct. 598, 38 L. Ed. 443; *Northern Pacific Ry. Co. v. Trodick*, 221 U. S. 208, 31 Sup. Ct. 607, 55 L. Ed. 704.

If the right of way over these lands attached in favor of the Kansas Company as of the date of the act of 1864, or of 1866, without the filing of any map, or the construction of any road authorized by them, such right of way of course antedates these several claims, except that of Lemon which was settled upon in May, 1864, previous to the act of that year. It is true that mere settlement upon and occupation of the public lands, without more, does not vest any right in the settler to the land as against the government. But it has been the uniform holding of the land department, and of the Supreme Court, under the pre-emption and homestead laws, that one who in good faith settles upon and improves a tract of land, subject at the time of such settlement to private entry, or to homestead settlement, with intent to pre-empt or procure the same as a homestead, will be given the prior right to acquire the land upon compliance with the law, as against one who claims a right thereto arising subsequent to such settlement. *Buxton v. Traver*, 130 U. S. 232-236, 9 Sup. Ct. 509, 32 L. Ed. 920; *Frisbie v. Whitney*, 9 Wall. 187-195, 19 L. Ed. 668; *Nelson v. Northern Pacific Ry. Co.*, 188 U. S. 108-125, 23 Sup. Ct. 302, 47 L. Ed. 406; *Northern Pacific Ry. Co. v. Trodick*, 221 U. S., 31 Sup. Ct., 55 L. Ed., above.

But I am unable to believe that it was intended by these acts of Congress to give to the Kansas Company an unlimited right to build its road upon any line it might thereafter select, between the mouth of the Kansas river and the western boundary of Nevada, regardless of

the rights of settlers or others who might acquire interests in the land before the route was selected and the required map thereof filed with the Secretary of the Interior. *Washington & Idaho R. R. Co. v. Osborn*, 160 U. S. 103-109, 16 Sup. Ct. 219, 40 L. Ed. 356. The right of way and the granted lands are both in aid of the construction of the road, and the map of general route is as essential to give precision to the right of way as it is to the granted lands. *Missouri, K. & T. Ry. Co. v. Cook*, 163 U. S. 491-496, 497, 16 Sup. Ct. 1093, 41 L. Ed. 239; *United States v. Northern Pacific Ry. Co.*, 152 U. S., 14 Sup. Ct., 38 L. Ed., above. As to the lands, those to which a pre-emption, homestead, or other right to acquire them from the United States has attached, when the map of definite location of the road was filed, are reserved from the operation of the grant; as to the right of way, that attaches as of the date of the act which provides for the finally adopted route. The filing of a map of the general route of the road is required by all of the acts except that of 1869; and that act designates the line and route of the road from Denver to Cheyenne with the precision of a survey; no map of that route was therefore required. Until the required map of general route is filed, or the road is built under the authority of Congress, the lands in aid of the construction, and over which the road is to be built, remain subject to disposal by the United States. *Kansas Pacific Co. v. Dunmeyer*, 113 U. S. 629-637, 638, 5 Sup. Ct. 566, 28 L. Ed. 1122; *United States v. Northern Pacific Ry. Co.*, 152 U. S. 284-298, 14 Sup. Ct. 598, 38 L. Ed. 443.

United States v. Union Pacific Ry. Co., 148 U. S. 562, 13 Sup. Ct. 724, 37 L. Ed. 560, relied upon by appellant, involved only the question of the rights of the defendant companies, as against the United States, to lands southwest of Denver, west of the Kansas road, and southwest of the road of the Denver Company at that place, some 200,000 acres in the outer angle formed by the connection of the two roads at Denver; the contention of the government being that the road of the Kansas Company ended at Denver and that of the Denver Company began at that place, and that the two roads had no connection with each other within the meaning of the act of 1869. The Acts of 1862, 1864, and 1866, required a continuous line of road from the Missouri river to the Pacific Ocean, and it was held that it was not intended by the act of 1869 to break the continuity of such line, and that the lands in controversy, therefore, passed to the two companies. No other question was involved. The case was determined upon a demurrer and plea to the bill which alleged facts substantially different from those shown by the proofs in this case. The opinion plainly indicates, however, that the rights of the Kansas Company date only from the act of 1866. For the same reason the rights of the Denver Company would date only from the act of 1869. But the respective dates when the right of each company attached were not important in that case; the important question being, Were the companies, as against the United States, entitled to these particular lands? The fact that the rights of the Denver Company would attach only as of the date of the act of 1869 would not have the effect of breaking the

continuity of the line from the Missouri river to the Pacific Ocean, required by the prior acts of Congress.

Missouri, Kansas & Texas Railway Company v. Kansas Pacific Co., 97 U. S. 491, 24 L. Ed. 1095, involved the rights of the two companies to lands in the state of Kansas west of Ft. Riley. The lands were withdrawn from sale July 26, 1866, by the Secretary of the Interior for the benefit of the Kansas Company, under its map of July 11, 1866, filed pursuant to the act of July 3d, of that year, designating the route of its road from Ft. Riley to the western boundary of Kansas. The claim of the Missouri, Kansas & Texas Company to the lands was under the act of Congress of July 26, 1866, and inferior, therefore, to the rights of the Kansas Company. The rights of settlers upon the lands, if any, or of others than the two railroad companies, parties to that suit, were not involved and of course are not affected by the decision.

United States v. Kansas Pacific Company, 99 U. S. 455, 25 L. Ed. 289, involved the right of the United States to a lien upon the road west of the 100th meridian of longitude for 5 per cent. of the net earnings of the company upon that portion of its road. The lien was denied. What is said in the opinion in this and the preceding case should be limited, under familiar rules, to the questions involved.

I am, therefore, of the opinion that appellant's right of way over the lands in question attached only as of the date of the act of March 3, 1869; and, as to the lands in sections 32, 5, and 8, its rights are inferior to those of all of the defendants, except as to the 100 feet, and the 200 feet in blocks 42 and 59, as decreed by the Circuit Court.

No part of section 17 had been sold, and there were no pre-emption or other claims of record against any part thereof at the date of the passage of the act of 1869. That section with other lands was selected by the Denver Company in October, 1874, as inuring to it under that act, and a patent issued to it therefor, April 24, 1875. That company, therefore, acquired full title to this land. It was acquired, however, by the Union Colony in 1870, with other lands under the conveyance, from John Evans as trustee of the Denver Company under its deed of trust of August, 1869, made pursuant to the act of March 3d, of that year, and was included by the Union Colony in its plat of the village of Greeley in 1870. As I understand the record the city of Greeley only is interested in that portion of the appellant's right of way over this section, and only for the use of its streets Nos. 20 to 23, inclusive, in the south part of the city where they cross the same. The right of the city to lay its streets *across* the right of way and use them as public streets cannot, I think, be prevented by the appellant. Northern Pacific Ry. Co. v. Townsend, 190 U. S. 267-272, 23 Sup. Ct. 671, 47 L. Ed. 1044. The decree should therefore be affirmed.

SANBORN, Circuit Judge, concurs in the opinion and conclusion that a strip 400 feet in width was granted in the lands in question by the act of July 2, 1864, and dissents from the opinion and conclusion that any of this strip has been lost by the grantee or its successors in interest by estoppel on the ground that these grantees could not by

indirection—that is, by estoppel—part with that public right and trust which they could not convey by deed or lose by the possession of others and the statute of limitations. *Northern Pacific R. Co. v. Smith*, 171 U. S. 260, 18 Sup. Ct. 794, 43 L. Ed. 157; *Northern Pacific R. Co. v. Townsend*, 190 U. S. 267, 271, 272, 23 Sup. Ct. 671, 47 L. Ed. 1044; *Northern Pacific R. Co. v. Ely*, 197 U. S. 1, 25 Sup. Ct. 302, 49 L. Ed. 639; *Kindred v. Union Pacific R. Co.*, 94 C. C. A. 112, 117, 168 Fed. 648, 653, 654.

RATHBONE, SARD & CO. v. CHAMPION STEEL RANGE CO.

(Circuit Court of Appeals, Sixth Circuit. July 11, 1911.)

No. 2,116.

1. TRADE-MARKS AND TRADE-NAMES (§ 70*)—"UNFAIR COMPETITION"—WHAT CONSTITUTES.

The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another, and the copying by one manufacturer of stoves of an unpatented design of a stove made by another, only a few of which had been sold so that it was not known to the buying public, and no purchaser was deceived, the characteristic marks of the original designer being removed and those of the maker substituted, did not constitute unfair competition which would sustain a suit for an injunction.

[Ed. Note.—For other cases, see *Trade-Marks and Trade-Names*, Cent. Dig. § 81; Dec. Dig. § 70.*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 7174, 7824.]

2. TRADE-MARKS AND TRADE-NAMES (§ 69*)—UNFAIR COMPETITION—WHAT CONSTITUTES.

The fact that an article of defendant's manufacture is represented by unprincipled retailers as that of complainant does not render defendant liable for unfair competition, providing it did its legal duty in distinguishing its product from that of complainant.

[Ed. Note.—For other cases, see *Trade-Marks and Trade-Names*, Cent. Dig. § 80; Dec. Dig. § 69.*]

3. TRADE-MARKS AND TRADE-NAMES (§ 69*)—UNFAIR COMPETITION—WHAT CONSTITUTES.

Where the deception of purchasers is not the natural result of the imitation by defendant of goods made by complainant, and there is no intention to so deceive purchasers, a case of unfair competition is not made out.

[Ed. Note.—For other cases, see *Trade-Marks and Trade-Names*, Cent. Dig. § 80; Dec. Dig. § 69.*]

Unfair competition in use of trade-mark or trade-name, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

Suit in equity by Rathbone, Sard & Co. against the Champion Steel Range Company. Decree for defendant, and complainant appeals. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

C. J. Sawyer, M. B. Philipp, and J. J. Kennedy, for appellant.
D. C. Westenhaver and E. J. Hart, for appellee.

Before SEVERENS and KNAPPEN, Circuit Judges, and EVANS, District Judge.

KNAPPEN, Circuit Judge. [1] The appellant filed its bill of complaint against appellee, alleging unfair competition by the latter in the manufacture and sale of a certain type of natural-gas heater. The bill prayed for a permanent injunction against such manufacture and sale, and asked for certain special relief incidental to the general relief asked. Upon a final hearing on pleadings and proofs, the Circuit Court made a decree dismissing the bill, from which decree this appeal is taken.

The important facts are these:

Complainant is one of the largest and longest established manufacturers of stoves, ranges, and heaters (both coal burning and wood burning) in the United States. It has been in business since the year 1830. Its factories are now at Albany, N. Y., and Aurora, Ill. In the year 1835 it registered the "Acorn" as its trade-mark and has used the same ever since upon its product, unless in the case of a few cheap stoves. Its product enjoys an excellent popularity, being known to the public generally under the name of the "Acorn." About the year 1900, with the development of natural gas in the territory hereafter mentioned, several stove manufacturers began making natural-gas ranges and heaters. This natural gas territory included western New York, western Pennsylvania, Ohio, West Virginia, and parts of Indiana, Oklahoma, Kansas, Missouri, and possibly some other territory. In 1903 the complainant began making natural-gas ranges. It made no natural-gas heaters until 1905. At that time there were upon the market and in use substantially two types of natural-gas heaters of the better class, one having a rounding and the other a tubular drum. In 1904 there was put out by another manufacturer a heater known as the "Reliable." In 1905 complainant prepared designs for a natural-gas heater called the "Solar Acorn." The appearance of complainant's "Solar Acorn" differs, generally speaking, from that of the "Reliable" only in certain features of ornamentation, the shape, style, base, foot-rail, fire pot, reflector, drum, and top being substantially the same (except as hereafter stated), as well as the broad, general plan of ornamentation. Complainant made the ornamentation at the top of its "Solar Acorn" more elaborate than in the case of the "Reliable," apparently substituted a white for a black finishing rim above the drum, adopted a different design of ornamental pieces on the side of the drum, which were brought well forward, the ornamentation above the reflector being carried a little higher, and the foot rail and base ornamentation made somewhat more elaborate.

We do not intimate that complainant actually used the "Reliable" as a copy, or that it adopted features of ornamentation belonging peculiarly to that heater. The fact and extent of similarity are all that are material here. The "Solar Acorn," as exhibited in adver-

tising cut and as manufactured, had in all cases the device of the acorn upon the scroll work above the reflector and upon the corners of the base constituting the legs, and the words "Solar Acorn" prominently upon the foot rail, the name of the manufacturer being shown upon the back side of the stove. Complainant sells its product only to dealers, not directly reaching the ultimate purchaser and user. The territory covered by its sales is divided by the Ohio river into the eastern and the western territory, respectively, headquarters for the former being at Albany and for the latter at Aurora. The method and extent of its advertising of the heater in question, and of its attempts to bring the same to the attention of the public prior to the defendant's coming into the market, are these: In September, 1905, it issued from 2,000 to 2,500 leaflets which it distributed in approximately equal amounts through the Albany and Aurora headquarters, these leaflets being sent to dealers only, except as a very few were given to traveling salesmen, who did not call upon the user or consumer, but only upon the dealer. The latter distributed the leaflets only by handing them out to customers calling at the store, or by leaving them upon the counter accessible to customers. In February, 1906, 1,500 circulars were issued, and before April 1st of that year 2,000 catalogues. These circulars and catalogues seem to have been distributed in substantially the same way as the leaflets. In each of these three classes of literature the Solar Acorn was shown and advertised. Complainant has never advertised this heater in the newspapers, trade journals, or magazines. In December, 1905, complainant shipped 12 of these heaters to dealers in Ohio, and in the following January two more. As a general rule but one stove was sent to each dealer, the same being apparently intended to be used as a sample. From February 1, 1906, to August 1, 1906, three more deliveries were made to dealers in Ohio. In January, 1906, four were sent to dealers in Missouri and Kansas, no more being delivered previous to August of that year. In the Eastern territory deliveries were begun in November, 1905. It is not definitely shown, so far as appears by references in briefs of counsel, that more than two stoves were actually delivered to dealers in that territory in 1905. The testimony of the extent of sales to dealers during that year is not explicit, but we infer that at least 11 were so sold. Our attention is not called in briefs of counsel or in argument to any evidence of sales of complainant's heaters to actual users prior to defendant's adoption of its heater and the putting of the same upon the market.

The defendant is a general stove manufacturer at Cleveland, Ohio, having been engaged in business under its present name, either as a firm or as a corporation, since 1893. It has apparently a good business standing and does a large business, although we assume less extensive than complainant's. It has used the name "Champion" as its trade-mark continuously since that organization, except during the first few months. Soon after complainant began such manufacture and delivery to dealers of its "Solar Acorn," the defendant brought out a natural-gas heater called the "Champion." In so doing it copied complainant's cut, except that it removed the acorn device from the reflector and base of the stove and put the word "Cham-

pion" prominently upon the foot rail, and placed its own name upon the back of the stove in the same location where complainant puts its name upon its stove. Its patterns were prepared directly by the use of parts of one of complainant's "Solar Acorns," the changes referred to as made in the cut being also made in the patterns and in the stove as manufactured, except that as actually put out the letter "C" appeared conspicuously upon the reflector in place of complainant's acorn. Defendant has invariably manufactured the heater in the dress stated, excepted that in the case of heaters manufactured for three special dealers, who desired distinctive names, the words "Iron City," "Crown," or "Comfort," were placed upon the foot rails of the respective stoves, in each case, however, the letter "C" being prominently shown in the scrollwork of the reflector, complainant's trade-mark and trade-name being likewise absent, and defendant's name being upon the back of the stove in the usual place therefor. The defendant completed its heater and put the same upon the market in February, 1906, publicly exhibiting the same at the Ohio Hardware Dealers' Convention at Canton, Ohio, the latter part of that month. It got out for that convention 20,000 descriptive circulars (five times as many as complainant had issued up to that time) advertising its heaters, part of which circulars were distributed at the convention, the remainder being sent out through the mail to other dealers and salesmen. Complainant had no exhibit of natural-gas heaters at the Canton convention, but had a representative thereat. Defendant exhibited this stove at the Ohio state and county fairs during the year 1906. "Right after the convention or at the convention" defendant's salesmen took orders for its heater, and immediately thereafter salesmen were sent out through the territory, deliveries being begun in July, 1906, the record showing that but a small proportion of the deliveries in the natural-gas heater trade are made in any year between January and July. Following the Hardware Dealers' Convention in February, 1906, and throughout that year, new circulars and advertising matter to the number of many thousand copies were circulated by defendant, which has since carried on its advertising in trade papers, catalogues, circulars, and to some extent in local newspapers, its advertising having been much more extensive than that of complainant. The complainant's sales in Ohio increased in 1906, dropping off after that time. In Kansas and Missouri, sales increased during 1907 over 1906. In the eastern territory sales increased through 1907, dropping off after that year. The evidence indicates that this falling off of sales of complainant's heater is due in large part to defendant's active competition. This suit was begun in January, 1909.

The late Judge Tayler, who heard this case in the Circuit Court, in the course of his opinion dismissing the bill, said:

"It is perfectly apparent that these are the salient and influencing facts in this case: That late in 1905 the complainant brought out this 'Solar Acorn' stove in controversy, having previously advertised it by circulars sent to dealers. They sold a small number in the fall of that year. Some time in the winter of that year defendant took complainant's stove apart, and, except for the acorn and other marks which indicated the origin, absolutely

copied at least the external parts of the stove in every particular, so that, to look at it, it was an exact duplicate of the stove made and designed by complainant, with the descriptive exceptions referred to. At that time it is perfectly obvious that the 'Solar Acorn' gas heater had no reputation whatever. It had established no market. It was the expression of the idea of complainant as to the form which that type of gas stove should take. The defendant appropriated the design. Whatever may be said of the ethics of this act, the effect of this appropriation was not to deceive the public, for the public had no knowledge. It was not to affect the good will of the complainant, for the complainant had no good will established in respect to this stove. The defendant simply saw that somebody else had made something which it thought was good, and which was not protected by trade-mark or patent, and which the public had no general knowledge of and proceeded to make an article like it, taking off from it the characteristic designations which complainant used and putting on its own. Now, who could be deceived by any such operation as that? Certainly not the dealers, for they knew from whom they bought the stoves; certainly not the public, for the public did not know the stoves. In a word, the gist of the offense of unfair competition, to wit, the selling of the imitating thing as the imitated thing, does not exist in this case at all."

Judge Tayler was also of opinion that complainant's right of action was barred by laches, in failing for nearly three years to take action, while defendant was actively building up its own trade.

We do not find it necessary to pass upon the question of complainant's alleged laches, for in view of the lack of public reputation and popularity of complainant's heater, and even of any substantial knowledge, on the part of the using and purchasing public, of its existence, we agree with Judge Tayler that the copying by defendant of complainant's design of ornamentation did not deceive the public, by enabling the defendant to palm off its heater as that made by complainant. The latter has no patent upon either the method of construction or operation of the heater, nor upon its design with respect to ornamentation or otherwise. This action is not for infringement of trade-mark, for no trade-mark is infringed. Nor is it for pirating a trade-name, for complainant's trade-name is not used. This action is simply and solely for alleged unfair competition in the use of the special features of ornamental dress to which attention has been called.

The rule is well settled that nothing less than conduct tending to pass off one man's merchandise or business as that of another will constitute unfair competition. In *Goodyear Co. v. Goodyear Rubber Co.*, 128 U. S. 598, 604, 9 Sup. Ct. 166, 168, 32 L. Ed. 535, Justice Field said:

"The case at bar cannot be sustained as one to restrain unfair trade. Relief in such cases is granted only where the defendant, by his marks, signs, labels, or in other ways, represents to the public that the goods sold by him are those manufactured or produced by the plaintiff, thus palming off his goods for those of a different manufacturer, to the injury of the plaintiff. *McLean v. Fleming*, 96 U. S. 245 [24 L. Ed. 828]; *Sawyer v. Horn* [C. C.] 4 *Hughes*, 239 [1 Fed. 24]; *Perry v. Trufitt*, 6 *Beav.* 66; *Croft v. Day*, 7 *Beav.* 84."

In *Howe Scale Co. v. Wykcoff, Seamans & Benedict*, 198 U. S. 118, 140, 25 Sup. Ct. 609, 614, 49 L. Ed. 972, Chief Justice Fuller said:

"The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another, and, if defendant so conducts its business as not to palm off its goods as those of complainant, the action fails."

In *American Washboard Co. v. Saginaw Mfg. Co.*, 103 Fed. 281, 43 C. C. A. 233, 50 L. R. A. 609, it was held by this court in an opinion by Judge (now Mr. Justice) Day that the fact even that the defendant deceives the public as to his goods by fraudulent means does not give a right of action unless it results in the sale of such goods as those of the complainant.

In *Newcomer & Lewis v. Scriven*, 168 Fed. 621, 94 C. C. A. 77, in which were involved alleged infringements of trade-marks and trade-name, as well as unfair competition, although it appeared that a certain advertisement was calculated to mislead a customer into believing that the product of defendant was that of complainant, this court, speaking through Judge (now Mr. Justice) Lurton, held that, as it was not shown "that any customer was misled into buying garments as made or sold by the Scriven Company which were made by others," no right of action in that regard existed.

The rule we have stated is recognized by numerous authorities, but those we have cited are sufficient for the purpose. So far as concerns the ornamental dress of the stove, it is clear that, as complainant had no patent on the design, it had no monopoly thereof, and that any one was free to copy it so long as he did not attempt thereby to palm off his goods as those of complainant, and took due care to guard against any deception of the public into buying in the belief that it is purchasing complainant's goods. *Fairbanks v. Jacobus*, 14 Blatchf. 337, Fed. Cas. No. 4,608; *Dover Stamping Co. v. Fellows*, 163 Mass. 191, 40 N. E. 105, 28 L. R. A. 448, 47 Am. St. Rep. 448; *Flagg Man'g Co. v. Holloway*, 178 Mass. 83, 59 N. E. 667; *Heide v. Wallace & Co.* (3d Circuit) 135 Fed. 346, 68 C. C. A. 16; *Saxlehner v. Wagner*, 216 U. S. 375, 30 Sup. Ct. 298, 54 L. Ed. 525. And it results from this principle that the adoption by one manufacturer of the characteristic features of another's product, common to articles of that class, does not of itself amount to unfair competition. *Globe-Wernicke Co. v. Macey Co.* (6th Circuit) 119 Fed. 696, 56 C. C. A. 304; *Warren Co. v. American Co.* (7th Circuit) 141 Fed. 513, 72 C. C. A. 571; *Computing Scale Co. v. Standard, etc., Scale Co.* (6th Circuit) 118 Fed. 965, 971, 55 C. C. A. 439.

Complainant insists, however, that the unnecessary imitation by one manufacturer of the nonfunctional parts of the product of a competitor, to the extent that the two articles are substantially identical in appearance to a casual observer, and retail purchasers are thus likely to mistake one for the other, is chargeable with unfair competition, although each feature taken separately may have been open to appropriation, as announced in certain authorities, including three cases decided by the United States Circuit Court of Appeals for the Second Circuit. *Enterprise Mfg. Co. v. Landers*, 131 Fed. 240, 65 C. C. A. 587; *Yale, etc., Mfg. Co. v. Alder*, 154 Fed. 37, 83 C. C. A. 149; *Rushmore v. Manhattan, etc., Works*, 163 Fed. 939,

90 C. C. A. 299, 19 L. R. A. (N. S.) 269. We are not called upon to determine the correctness of the rule thus stated as applied to appropriate facts. We content ourselves with saying that in our opinion it can have no application to the facts of this case, for the reason that, upon the record before us, taking into account the lack of public knowledge and reputation of complainant's heater in question, the absence of complainant's trade-mark and trade-name, and the fact, as shown, we think, by the preponderance of the proof, that purchasers more often identify stoves by their name or the name of the manufacturer, or both, than by appearance merely; that all of complainant's natural-gas heaters, including even its cheap products, have the acorn device prominently upon the front and are all advertised in catalogues under the name of "Acorn," in connection with the comparatively minor variations in the general appearance of the stove, including the style of ornamentation, from that of stoves theretofore upon the market, the retail purchaser exercising reasonable care could not well have been deceived into the belief that in buying defendant's heater he was purchasing complainant's stove.

It is further urged that in trade-mark cases the right to protection does not depend upon any particular period of usage, but that, once adopted in good faith and used, the right thereto will prevail against any subsequent user, although no public reputation or notoriety has been acquired; that the right of protection against infringement of trade-marks and unfair competition respectively rest upon the same basis; and that, therefore, the rule in trade-mark cases, as stated, controls this case.

But, whether or not the rule in trade-mark cases is as stated (a question we are not now required to consider), the case before us is not a trade-mark or a trade-name case, but one of alleged unfair competition, predicated upon the simulating of the dress of a competitor's product. And in such case it is clear that identification in the mind of the purchaser of such distinctive dress, as belonging to the complaining manufacturer, is necessary, and that such identification cannot well exist in the absence of knowledge or reputation of such characteristic dress.

In this connection it is urged that complainant's good will and reputation connected with its general line of goods attached to the heater in question immediately upon its being placed upon the market. But if we have correctly reached the conclusion that complainant's heater had acquired no appreciable public knowledge or reputation, and the dress of the heater was not identified in the public mind as the complainant's product, the suggestion loses point.

[2] There is some evidence tending to show an actual deception of customers on the part of dealers by representing defendant's heater as that of complainant. It also appears that on the inside of some of the castings of defendant's heater, due to the use of parts of complainant's heater as patterns, the letters "A" and "Sol. A" are found, and that this fact would enable a dishonest dealer to misrepresent defendant's heater as a "Solar Acorn." This last consideration does not impress us as important, and there is no evidence of actual deception thereby. So far as concerns actual misrepresen-

tation by dealers of the identity of heaters, not only is the proof thereof not highly convincing, but defendant is not responsible for the fact that tricky retailers represent its manufacture as that of complainant, knowing better, provided defendant has done its legal duty in distinguishing its own product from that of complainant. *Royal Baking Powder Co. v. Royal*, 122 Fed. 345, 58 C. C. A. 499; *Hall's Safe Co. v. Herring, etc., Co.*, 146 Fed. 43, 76 C. C. A. 495, 14 L. R. A. (N. S.) 1182.

We have no doubt that sales of complainant's heater have been materially lessened through defendant's competition. The effectiveness of this competition, in our judgment, has resulted from the activity with which defendant has pushed its heater, the publicity and extent of defendant's exhibitions and advertising, the advantage which the defendant has, especially in the large and valuable district of Ohio, in being a local manufacturer; and to complainant's advance of prices for 1907, before which time the prices of the two competing heaters were substantially the same. This competition was legitimate.

[3] Our conclusion, then, in substance, is that complainant has failed to establish a case of unfair competition, for lack of proof that defendant has palmed off its goods upon the public as the goods of complainant. In our opinion, defendant's intent, as shown by the record, in copying complainant's cut and patterns, was not to derive a benefit from complainant's name and reputation, but to avail itself of a design which, by imitating it, defendant has confessed is attractive and desirable. Defendant's intent is, of course, not material where the necessary result of the act is to commit legal wrong. But, where neither such natural result nor such actual intent exists, unfair competition is not made out. *Royal Baking Powder Co. v. Royal*, 122 Fed. 345, 58 C. C. A. 499; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 549, 551, 11 Sup. Ct. 396, 34 L. Ed. 997; *Globe-Wernicke Co. v. Fred Macey Co.*, 119 Fed. 703-704, 56 C. C. A. 304.

We do not think that the fact that defendant entered the extreme western territory after complainant's goods had been introduced there justifies a differentiating of that particular territory from the remaining portions of it or from the territory as a whole.

For the reasons stated, the decree of the Circuit Court should be affirmed.

THE NORTHMAN.

TEXAS CO. v. J. M. GUFFEY PETROLEUM CO.

(Circuit Court of Appeals, Second Circuit. May 8, 1911.

Nos. 224, 225.

SHIPPING (§ 54*)—STEAMSHIP BREAKING FROM WHARF—NEGLIGENCE OF CHARTERER.

Libelant was owner of the tank steamer *Winifred*, 300 feet long, and charterer of the *Northman*, 250 feet long, owned by respondent and cross-libelant. Her charter required the *Northman* to dock wherever

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 189 F.—3

directed by libellant, and, arriving at Philadelphia loaded, she was directed to tie up outside of the Winifred, lying in the Schuylkill river, which she did, making fast to the Winifred and running one line from her stern to the wharf, which was all she could do, owing to the greater length of the Winifred. There was a freshet in the river at the time, but nothing unusual at the season, and the Winifred's lines gave way, allowing both vessels to drift down stream, where they grounded, remaining fastened together. *Held*, that the fault was solely that of libellant, which was also lessee of the dock, for not making the Winifred secure, as might readily have been done, and that it was liable for the damage to the Northman.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 219-221; Dec. Dig. § 54.*]

Appeals from the District Court of the United States for the Southern District of New York.

Suit in admiralty by the J. M. Guffey Petroleum Company against the steamship Northman, The Texas Company, claimant, and cross-suit by the Texas Company against the Petroleum Company. Decree for respondent, dismissing libel, in the first suit, and for libellant in the sum of \$7,964.40 in the second, and the J. M. Guffey Petroleum Company appeals. Affirmed.

Burlingham, Montgomery & Beecher (Charles C. Burlingham and Chauncey I. Clark, of counsel), for appellants.

Wallace, Butler & Brown (James K. Symmers, of counsel), for respondent.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The Guffey Petroleum Company at the time in controversy was the owner of the steamship Winifred and the charterer of the steamship Northman. The former was 300 and the latter 250 feet long. Both were tank steamers. The charter party provided that the Northman should load and discharge at a place, at a dock or alongside lighters, reachable on her arrival, to be indicated by the Guffey Company, where she could always lie safely afloat.

On March 14, 1907, the Northman arrived at Philadelphia from Port Arthur, Tex., with a cargo of oil, and was directed by the Guffey Company to proceed to Gibson's Point wharf on the Schuylkill river and make fast outside of the Winifred, which was lying moored at that point. The Winifred had discharged her cargo and was to pass out on the following morning. As the Northman was loaded and the Winifred was light, the latter was much higher in the water than the former, making it practically impossible to pass a line to the bulkhead except at the stern, which was substantially parallel with the stern of the Winifred. The Northman had out a stern line to the shore, but no bow line. Both vessels were headed up-stream. A freshet was prevailing at the time and between nine and ten o'clock the Winifred's lines gave way and both drifted down stream and grounded half a mile below, causing the damage complained of. That the Northman was securely fastened to the Winifred is demonstrated

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by the fact that the two vessels remained together even after they grounded.

The District Judge found that the Guffey Company, as owner of the Winifred and lessee of the wharf, was liable, either as wharfinger or vessel owner, for not providing suitable mooring posts or for failing to put out sufficient lines from the Winifred to the wharf.

There was, as stated, a freshet prevailing at the time, but there was nothing abnormal about this condition, which was of yearly occurrence and was to be expected during the month of March. There was no vis major, no unusual and unexpected disturbance of the elements; nothing, in fact, that could not have been guarded against by human skill and caution. As the breaking away was not the result of inevitable accident, it must be attributed to the fault either of the Northman, the Winifred or the wharfinger. The principal charge against the Northman is that she had not sufficient lines to the wharf. As before stated, it was impossible to use any lines other than from the bow and stern, and as she had out a stern line, it is only necessary to inquire whether she could have put out a bow line. Post No. 1 was the only one to which a bow line could have been fastened. The District Judge finds:

"That the stem of the Northman was so far behind the stem of the Winifred that a line could not be passed from the Northman forward to any of the posts on the dock."

We think this conclusion is amply justified by the testimony. It is said that the Northman might have run bow lines to trees in a neighboring park, but the suggestion is highly chimerical, and the precaution one which the Northman was under no obligation to take, especially as the Guffey Company, with full knowledge of the situation, did not suggest taking any extraordinary precautions.

Again, it is argued that the Northman should have dropped her anchor straight down from her bow into the river. How such a maneuver could have prevented the vessels from breaking away from the dock it is difficult to perceive; especially so in view of the fact that when they broke away each dropped her anchor and neither held in the soft mud at the bottom of the river. The District Judge says of these contentions, "they seem to me entirely untenable and mere after-thoughts." We are unable to find negligence on the part of the Northman; she was under the control of the Guffey Company and was in duty bound to go to the dock designated by that company. She could not have refused to go to the Gibson Point wharf because the Winifred was lying there for the reason that it was at the express request of her owners that she should be "breasted out" from the dock. A refusal to go there would have been wholly unjustifiable and in direct conflict with the terms of the charter-party. If there were any hidden defects or abnormal dangers to be guarded against, it was the duty of the charterer's agents in charge of the dock so to inform the Northman. Having moored to the Winifred in the usual way and, apparently, in the only practicable way, and receiving no protest and no suggestion that any additional precaution should be taken, we think the Northman was justified in assuming that the Winifred was satisfied

with the situation and that she was moored sufficiently fast to hold both vessels. By a process of exclusion we have thus reached the point where the accident cannot be said to be inevitable or due to the negligence of the Northman. The only alternative is that it was due to fault of the Winifred in being insufficiently moored to the dock or to the fault of the Guffey Company in providing insufficient posts. That one of these posts was pulled over by the strain, permitting the line to slip off, is not disputed. There is a conflict in the testimony as to where this post was located. No. 1 at the upper corner of the wharf was the one on which the greatest strain was placed and there is testimony that this post was made of wood and gave way, permitting the lines to slip over the top. There is also testimony that No. 6 was the only post bent over by the strain, but the direct testimony that it was No. 1 is strengthened by the presumption that this post, which held the bow lines sustained the great weight of the strain and would naturally be the first to be bent over. A finding that it was post No. 1 cannot be set aside as against the weight of evidence. It is not important to determine whether it was made of iron or wood, as in either case, if the post gave way, it was incapable of sustaining the weight liable to be placed thereon. It may here be noted also that the same result would have followed if the Northman had had a bow line out to this post.

To recapitulate: The Northman was under the control of the Guffey Company. It was her duty to go to the dock at Gibson's Point and tie up outside the Winifred, the charter required it and she had no legal excuse for disregarding the direction. The Guffey Company was in full control of this dock and knew, or should have known, whether its lines and posts were sufficient to stand the strain under the conditions then existing in the river. The agents of the Guffey Company saw the Northman arrive and the manner in which she made fast. They knew that she had no line to the shore except at the stern. They knew that she had no bow line out and that the Winifred's bow extended so far beyond the Northman that it was doubtful if a line could be placed on post No. 1. All this was known and yet there was not a word of complaint or warning from the vessel or the dock that the Northman's methods were improper. No doubt was expressed as to the Winifred's lines being sufficient to carry the added strain of the Northman.

In such circumstances, no blame can be attributed to the Northman and it must be found that the Guffey Company was at fault for improperly mooring the Winifred, or for failing to provide mooring posts sufficient to withstand the strain made necessary by the direction to the Northman to tie up outside the Winifred.

The decrees are affirmed with interest and costs.

In re HAMMERSTEIN.

(Circuit Court of Appeals, Second Circuit. May 8, 1911.)

No. 256.

1. BANKRUPTCY (§ 413*)—DISCHARGE—EFFECT OF ABANDONMENT OF OPPOSITION BY CREDITORS.

Where the discharge of a bankrupt was opposed by creditors on the ground that he defrauded them, the fact that they have abandoned their opposition is entitled to consideration by the court.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 413.*]

2. BANKRUPTCY (§ 408*)—DISCHARGE—GROUNDS FOR REFUSAL—"CONCEALMENT."

In order to establish a fraudulent "concealment" by a bankrupt of property belonging to his estate from his trustee, which will deprive him of his right to a discharge under Bankr. Act July 1, 1898, c. 541, §§ 14b (1), 29b (1), 30 Stat. 550, 554 (U. S. Comp. St. 1901, pp. 3427, 3433), it must appear that the property in fact belonged to him at the time of the bankruptcy. The fact that it had previously been fraudulently transferred, if the transfer was actual, and not colorable, and placed it beyond the reach of the bankrupt, is not made by the act a ground for refusing a discharge.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 408.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1377-1384.]

Appeal from the District Court of the United States for the Southern District of New York.

In the matter of Malvina Hammerstein, bankrupt. From an order denying a discharge, the bankrupt appeals. Reversed.

Malvina Hammerstein filed a voluntary petition in bankruptcy October 24, 1901, and was adjudged a bankrupt the next day, October 25, 1901. On January 22, 1902, she filed a petition praying that a discharge in bankruptcy be granted her. By an order made January 23, 1902, a hearing on said petition was fixed for February 3, 1902. Specifications of objection to a discharge were filed by two of her creditors. The issues on said specifications were then referred to the referee in bankruptcy, as special commissioner, to ascertain and report the facts. On January 19, 1903, he filed a report stating that in his opinion a discharge should be denied and an order was entered on the 20th day of November, 1909, confirming this report and denying a discharge. From this order the bankrupt appeals.

Thomas & Oppenheimer and Frederick L. C. Keating, for the bankrupt.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge (after stating the facts as above). [1] No one appears for the opposing creditors upon this appeal, from which it may be inferred either that they have become convinced that the discharge should be granted or that they have now no interest in opposing it. The creditors' withdrawal from the case should have no weight if the court be clearly convinced that the bankrupt has committed the alleged frauds. If, however, there be doubt as to her guilt, the fact that those most interested have ceased to oppose the discharge may properly be considered. A discharge is granted to an honest

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

bankrupt in order that he may reinstate himself in the business world; it is refused to a dishonest bankrupt as a punishment for his fraud and to prevent its continuance in the future. In a sense the question has passed beyond the creditors and is one of public policy, but when the charge is that the bankrupt has defrauded his creditors the fact that they have ceased to assert their charge cannot be wholly ignored by the court. The controversy must be considered under the law as originally passed, for the reason that all the acts complained of took place prior to the amendments of February 5, 1903.

[2] Section 14b of the act provides that the judge shall discharge the bankrupt "unless he has (1) committed an offense punishable by imprisonment as herein provided." Section 29b of the act provides that:

"A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently (1) concealed while a bankrupt, or after his discharge, from his trustee any property belonging to his estate in bankruptcy."

Several specifications were assigned which were found in favor of the bankrupt, others were not passed on by the special commissioner and still others were abandoned. Those which were found against the bankrupt and which are now in controversy are as follows:

"First.—That the bankrupt, knowingly and fraudulently concealed, etc., from her trustee property belonging to her estate. * * * (b) Her furniture, enumerated in a bill of sale made by bankrupt to said Raphael, now in her possession, subject to no lien. (c) \$31,638.25 cash, amount of a judgment recovered by James Allison against the New York Life Insurance Company for the value of the interior furnishing of the Victoria Theater, which property has been conveyed by the bankrupt to one Amanda Lissner, by whom it was conveyed to said Allison, the said transfers being colorable only and the said sum still being part of the bankrupt's estate."

The question, then, is whether the bankrupt in October, 1901, after her petition was filed, committed the offense, punishable by imprisonment, of having knowingly and fraudulently concealed from her trustee property belonging to her estate?

The commissioner prefaces a carefully prepared review of the facts bearing upon the two specifications sustained by him with the following statement:

"The testimony as to these transactions is voluminous, involved and more or less conflicting, but upon careful perusal seems to me to establish substantially the following facts."

He also says regarding the principal transaction of which fraud is predicated:

"It is possible that these transactions may have been in good faith and that other parties, namely the Hammerstein Amusement Company and Allison may have taken the opportunity to benefit themselves at the expense of the bankrupt."

In both of these statements the commissioner is correct. The evidence, undoubtedly, is conflicting and it is possible to draw therefrom a conclusion that the bankrupt has not committed the offense charged. It will serve no useful purpose to discuss the testimony in detail.

The difficulties which led up to the bankruptcy of the appellant grew out of the desperate financial condition in which her husband, Oscar Hammerstein, was involved, during the time in question. Resort was had to every expedient to secure money to satisfy his creditors and save the valuable property on Broadway which was mortgaged for \$900,000—foreclosure of the mortgage being threatened. Under the stress of these difficulties many acts were done which are open to severe criticism and transfers were made which were probably fraudulent as to creditors. That the bankrupt was the tacit instrument by which many of these questionable transfers were made cannot be denied. That she had a clear understanding of the transactions, acting as she did by the request and procurement of her husband, is doubtful.

It must be remembered that this is not a proceeding to set aside a fraudulent conveyance. It may be assumed that all of the transfers were fraudulent as to creditors and it would not, under the bankruptcy law of 1898, prevent a discharge. The foundation of the charge is concealment of the bankrupt's property. If the bankrupt has conveyed it, no matter how fraudulently, so that he has lost all right, title and interest therein, it is not a concealment under the provision of the act referred to. If the bankrupt has parted with all dominion over the property, if the title is gone out of him and is beyond recall, it is not his property, and therefore is not "property belonging to his estate in bankruptcy."

We are of the opinion, as to the great bulk of the property in question, that it is by no means clear that Mrs. Hammerstein ever owned it, but if she did the title was not in her at the date of the bankruptcy and could not be resumed by her. The authorities bearing upon this question will be found in *Re Dauchy* (D. C.) 122 Fed. 688. In affirming the opinion of the District Judge this court said:

"The principal accusation of fraud is based upon the conveyance by the bankrupt of the Nantucket property to her father and by him to her son over two years prior to the adjudication in bankruptcy. At the time the petition was filed and the schedules verified, the legal title to this property was not in the bankrupt and had not been for two years and seven months. The transfer to her son, conceding it to be fraudulent as to then existing creditors, has not been made by the act a sufficient ground for refusing a discharge. About this there is no disagreement. In order to establish a fraudulent concealment it must appear that the property concealed belongs to the bankrupt's estate. It must be shown that the transfer was merely a temporary expedient to place the property beyond the reach of the trustee, the title to be resumed by the bankrupt as soon as prudence will permit. In other words, it must be proved that a secret trust exists in her favor and that her son is under agreement, expressed or implied, to reconvey the property to her when the danger of attack by the creditors has passed." In *re Dauchy*, 130 Fed. 532, 65 C. C. A. 78.

We think the order should be reversed, and a discharge should be granted.

THE DOROTHY.

THE WYOMISSING.

(Circuit Court of Appeals, Second Circuit. May 8, 1911.)

Nos. 246, 247.

COLLISION (§ 71*)—GROUNDED STEAMSHIP—NEGLIGENT OPERATION OF PROPPELLER.

A steamer, grounded in Newtown creek, Long Island, and obstructing navigation by other vessels, started her propeller in an endeavor to free herself at high tide, and kept it in operation for 15 minutes, and until the suction drew libellant's scow, which was a part of a tow and lying at some little distance, so close that she was struck and sunk by the propeller. The master and lookout of the steamship were in such positions that they could see the scow and observe her movements. *Held*, that the steamship was in fault for not sooner stopping her propeller, as it was her duty to do; that the tug, having the scow and 15 other barges in tow, and which was engaged in distributing the same, was not in fault, as the scow was safe until the steamer started her propeller, and the tug had the right to assume that she would not recklessly subject the nearby vessels to such danger.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 71.*]

Appeals from the District Court of the United States for the Southern District of New York.

Suit in admiralty for collision by Michael Tracy and John Tracy, as owners of the scow William Carney, against the steamer Dorothy, the A. H. Bull Steamship Company, claimant, and the steam tug Wyomissing, the Philadelphia & Reading Railway, claimant. Decree against both vessels, and claimants appeal. Reversed, with directions to decree against the Dorothy alone.

Libel by the owner of the Dorothy against the Wyomissing, and decree against the latter for part damages, from which the claimant of the Wyomissing appeals. Reversed.

The first of the above-entitled actions was brought by Michael and John Tracy, owners of the scow William Carney, against the steamer Dorothy and the steam tug Wyomissing, to recover damages sustained by the said scow on October 5, 1909, while lying in Newtown creek. It is alleged that through the negligence of the steamer and tug the Carney was permitted to drift upon the revolving propeller of the steamer, which cut a large hole in her side, causing her to sink, with her cargo of coal. The District Court entered a decree, based upon an opinion filed March 12, 1910, in favor of the scow and against the steamer and tug for \$1,701.75.

On March 21, 1910, after the above decision had been filed, the Bull Steamship Company, owner of the Dorothy, filed a libel against the Wyomissing to recover damages for the injury to her propeller by reason of its contact with the Carney. The Dorothy insisted that the collision occurred through the fault of the tug in not keeping the Carney out of danger. The District Court entered a decree November 8, 1910, against the Wyomissing for \$422.08, being one-third of the damages suffered by the Dorothy.

The Wyomissing has appealed from the first decree, and both she and the Dorothy have appealed from the second decree.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

MacFarland, Taylor & Costello (Willard U. Taylor, of counsel), for the Dorothy.

Armstrong & Brown (Pierre M. Brown, of counsel), for the Wyomissing.

Before LACOMBE, COXE and WARD, Circuit Judges.

COXE, Circuit Judge. On October 5, 1909, the steamship Dorothy was lying aground in Newtown creek and was endeavoring, at high tide, by means of her propeller and a hawser to the shore, to get herself free. The Dorothy is a large steamship about 315 feet in length. She was headed upstream and was lying with her bow between 300 and 400 feet from the dock on the Brooklyn, or southerly, side of the creek, her stern reaching almost to the East River.

The Wyomissing, with a tow of 16 loaded barges, reached the mouth of the creek intending to tie up at Bergen's Dock and there distribute her East River boats. The tow was made up in four tiers, the injured boat—the Carney—tailing behind the fourth tier. Accompanying the tow, as helper, was the tug Pencoyd. When the head tier of the tow had reached the bulkhead, the Carney, at the end of the tow, had been swung by the flood tide in the river diagonally across the creek and towards the starboard side of the Dorothy. Up to this time we understand the proof to be that the Dorothy's propeller had not been in motion. At 11 o'clock the Dorothy started her propeller at a time when the Carney had been carried by the tide to about amidships of the Dorothy. She was then about 100 feet from the Dorothy's starboard side and was in no danger from the propeller. Fifteen minutes after it started to revolve the Carney was, by means of the suction thus produced in the comparatively shallow waters of the creek, drawn against the revolving blades and received injuries from which she sank shortly thereafter.

The steamer was found at fault because of the negligence of a lookout at her stern in failing to give warning of the drifting of the Carney towards the propeller. The tug was inculpated because she failed to give the Dorothy warning of the proximity of the Carney at the time her engines were started; also in failing to give assistance to the Carney. We concur in the finding against the Dorothy, but are unable to find negligence on the part of the Wyomissing.

The Dorothy was aground in a part of the harbor where vessels alone and with tows were constantly going in pursuit of their ordinary vocations. She was 315 feet in length and with the line out to the Brooklyn shore, which she refused to remove, she was seriously obstructing navigation. It cannot be pretended that the Wyomissing and the other tugs having business in the creek were called upon to suspend operations and lie out in the East River until the Dorothy was floated. The tug was entirely justified in proceeding to the lumber dock for the purpose of sorting out and distributing the barges in her custody. That she did this prudently and with a due regard for all the dangers which were reasonably to be apprehended, we are convinced. She was not called upon to assume that the Dorothy would start her propeller when the barges were in dangerous proximity and

keep it in motion until one of them was struck and sunk. The master of the tug was attending to his business and at the time of the collision had a barge alongside and could not have reached the Carney in time to have prevented the accident. The situation was, or should have been, as apparent to the steamer as to the tug and the latter was justified in assuming that the former would not recklessly subject the barges to danger.

The witnesses called for the Dorothy were an oiler, who was stationed at the stern "to watch the propeller and see that nothing came up to her," and two engineers, who were in the engine room and saw nothing of what was transpiring. The captain, who, according to the oiler, was on the bridge, was not called. The negligence of the Dorothy is so plain and so clearly accounts for the accident that it is not necessary to speculate as to other causes.

For 15 minutes, at least, her propeller was revolving and the suction produced was gradually drawing the Carney nearer and nearer to the danger. All this was apparent to the oiler, who was on watch and also to the man on the bridge, and yet nothing was done to prevent the disaster. If this situation were insufficient to induce those in charge of the Dorothy to stop her engines, it is not easy to perceive what means could have been employed to produce that result. The testimony shows that there was general commotion among the barges, signals were given and warnings were shouted to the steamer. Even though it be conceded that these were given when the Carney was in extremis, it does not detract from the proposition that the steamer knew of the danger and that signals, even if given sooner, would have added nothing to that knowledge. If she had stopped her propeller for a few minutes, until the barges had been safely moored or towed away, there would have been no collision. That it was her duty to stop her propeller we have no doubt. The duty was so obvious that the Wyomissing was justified in believing that it would be performed and she cannot be held at fault for assuming that the Dorothy would act as common sense and ordinary prudence dictated.

It follows that the decrees should be reversed and the causes remanded to the District Court with instructions to enter a decree in the first of the above entitled actions against the Dorothy with costs and to dismiss the libel in the second of the above entitled actions with costs to the Wyomissing.

The Wyomissing should recover her costs in this court.

THE PALLANZA.

(Circuit Court of Appeals, Second Circuit. May 24, 1911.)

No. 279.

1. COLLISION (§ 85*)—ACTION FOR DAMAGES—CONTRIBUTORY FAULT—BURDEN AND MEASURE OF PROOF.

Where the faults of a steamer were sufficient to account for a collision with a schooner in a dense fog, before the schooner is also condemned the court should be satisfied that her fault contributed to the accident.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 85.*]

2. COLLISION (§ 83*)—STEAMER AND SCHOONER IN FOG—CONTRIBUTORY FAULT.

That the mate of a schooner, who was acting as lookout and sounding her fog horn in a dense fog, was burdened with too many duties, is not sufficient to charge the schooner with contributory fault for a collision with a steamer, brought about by the clear fault of the steamer, where all of his work was done and properly done.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 83.*]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty by J. Allen Hudson, master and chief owner of the schooner Emma Knowlton, against the steamer Pallanza; the Hamburg-American Line, claimant. From a decree awarding him half damages for collision, libellant appeals. Reversed.

Harrington, Bigham & Englar (D. Roger Englar, of counsel), for appellant.

Burlingham, Montgomery & Beecher (James Forrester and Chauncey I. Clark, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The District Judge condemned the steamer for proceeding at too great a rate of speed in an unusually thick fog and for not reversing in time to prevent the collision. We concur in these conclusions. The schooner was held in fault because the mate, who was blowing the fog-horn and acting as lookout, "had an unnecessary amount of labor put upon him while the schooner was going as fast as the wind would permit her through a dense fog. From this finding the conclusion flows that it was 'a fault to require the mate to do so much.'"

[1] The steamer was at fault, first, for proceeding at too great a rate of speed; second, for not stopping when she heard the indistinct blast from the schooner, and, third, for not reversing when she distinctly heard the three blasts on her starboard bow. These manifest faults sufficiently account for the collision, and before the schooner is condemned, the court should be satisfied that her fault contributed to the accident. The direct testimony is uncontradicted that her fog-horn was sounded at proper intervals by the mate, Borden, stationed at the forecastlehead. The assertion that the horn was not properly

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sounded is not only contrary to the testimony of the only witnesses who could see what was done on the schooner's deck, but is in conflict with the dictates of common sense and ordinary prudence. The proposition that a sailing vessel, practically helpless in a dense fog, would blow her horn at a place where the sails and deck load would prevent the sound from being heard, is too absurd for credence. The District Judge refused to make a finding to the effect that the fog-horn was sounded from amidships or behind the sails and expressed the opinion that such a finding could not be made on the evidence. He based his decision solely upon the proposition that Borden had too much to do. Having in mind the small amount of work which it is necessary to do on a sailing vessel after her sails are set and she is under way, we are unable to concur in this finding.

[2] But conceding it to be well founded, it is in our opinion of no importance what Borden had to do, whether much or little, so long as he was doing his duty faithfully at and before the time of the collision. The uncontradicted testimony shows that he was doing all that could be done at this time. If he blew the fog-horn from the bow at proper intervals it was as effectual as if he had been employed and paid for this service alone and did no other work. The fact, if it be so, that more work was required of him than one man should do is not material, so long as this work was done and properly done. That it was done is demonstrated, not only by the witnesses for the schooner, but also by the fact that the signals were heard on the steamer. The *Nacoochee*, 137 U. S. 330, 11 Sup. Ct. 122, 34 L. Ed. 687.

The decree is reversed with costs and the cause is remanded to the District Court with instructions to enter a decree for the libellant for the full amount of his damages and costs.

FLORENCE MFG. CO. v. DOWD et al.

(Circuit Court of Appeals, Second Circuit. May 8, 1911.)

No. 262.

TRADE-MARKS AND TRADE-NAMES (§ 99*)—SUIT FOR UNFAIR COMPETITION—REFERENCE.

Where a decree finding unfair competition by defendant and granting an injunction is entered by a Circuit Court in accordance with a mandate of the appellate court, complainant is entitled to a reference on the question of profits or damages, unless it clearly appears that proof of such profits or damages is impossible.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. § 99.*

Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Suit in equity by the Florence Manufacturing Company against John C. Dowd and James H. Dowd. Decree for complainant, and defendants appeal. Affirmed.

A decree of the Circuit Court for the Southern District of New York was entered May 13, 1910, in favor of the complainant for an accounting and an injunction. The case is also here on a motion by complainant to dismiss the appeal on the ground that it was not taken in time. The original decree entered herein dismissed the bill. 171 Fed. 122. An appeal was taken to this court, where the decree of the Circuit Court was reversed and the cause was remanded with instructions to enter a decree in favor of the complainant upon the cause of action charging unfair competition. 178 Fed. 73, 101 C. C. A. 565.

A. Bell Malcomson (Martin Conboy, of counsel), for appellants.
Macleod, Calver, Copeland & Dike, for appellee.

Before COXE, WARD, and NOYES, Circuit Judges.

COXE, Circuit Judge. The mandate directing that a decree be entered in accordance with the decision of this court is dated April 21, 1910. On May 13, 1910, a decree was entered in the Circuit Court without objection by the defendants although a copy of the decree with notice of settlement was served upon defendants' solicitor. After the settlement of the decree the defendants' solicitor agreed upon Mr. Shields as master to take the accounting and was present at the hearings before the master on May 25th, June 10th, July 13th and 14th. The defendants appeared, filed their account, and submitted themselves for examination. On September 17, 1910, a motion was made for resettlement of the decree, which was denied on October 5th thereafter. It was not until November 12, 1910, one day less than six months from the entry of the decree, that this appeal was taken.

An examination of the record has made it unnecessary for us to consider the motion to dismiss and we have concluded to dispose of the appeal on the merits. The instruction of this court to the Circuit Court, after the cause was remanded, was to enter a decree in conformity with our opinion. This meant, of course, the ordinary decree proper when a case of unfair competition has been established. The Circuit Court did not need to be informed of the details of such a decree. The decree entered, in its essential features, is correct. Some verbal changes might have been made with propriety and doubtless they would have been, if the attention of the court had been called to them; but there is nothing in the decree which justifies its reversal.

The acts of the defendants which warrant the finding of infringement are clearly stated in the decree, namely, selling

"tooth brushes, each of which they have placed in a box on which appears in conspicuous printed letters the word Sta-Kleen in imitation of the complainant's word Keeplean as charged in the bill of complaint."

The decree further states:

"That the defendants herein have so dressed their goods that they may be mistaken for the goods of the complainant and in so doing have intruded upon the exclusive rights of the complainant in the dress and appearance of the boxes or packages in which the complainant's goods are contained."

The accounting was ordered to ascertain the number of tooth brushes so sold which infringe the rights of the defendant as aforesaid. The injunction enjoins the defendants from doing any of the acts in the future which are declared to be infringements of the complainant's rights.

This is not a case where this court or the Circuit Court can say in advance that the complainant will be unable to establish the amount of the gains and profits which the defendants have made by reason of the unfair methods employed by them in dressing up their brushes to resemble the complainant's brushes. Except in those cases where the court is convinced that such proof is impossible, an accounting should be ordered. It is true that the action for unfair competition is based upon fraud but this may be inferred from the circumstances. As was said by this court in the case of *Fairbank v. Windsor*, 124 Fed. 200, 61 C. C. A. 233:

"In many of these unfair competition cases the fraudulent intent is inferred from the facts, sometimes against the sworn protestations of the infringer, that he was trying to differentiate his package from those of the complainant, not to simulate them."

That the complainant's task seems difficult and the result an inadequate return for time and labor expended is not now important. The complainant is entitled to its hearing before the master; if it fails in its proof the Circuit Court will deal with the situation as to costs and expenses when it enters the final decree.

We refrain from discussing many of the questions mooted on the briefs as to what may or may not be done upon the accounting for the reason that the facts are not sufficiently before us. It is to be assumed that the accounting will proceed in an orderly manner before the master and that the proof will be confined to the issues referred to him.

Should the report be in favor of the complainant any errors will be corrected by the Circuit Court or by this court. In other words, the cause should proceed in the usual orderly manner and the final decree will settle the ultimate rights of the parties.

The decree is affirmed.

In re T. A. McINTYRE & CO.

(Circuit Court of Appeals, Second Circuit. June 6, 1911.)

No. 270.

BANKRUPTCY (§ 155*)—PLEGDED COLLATERALS—OWNERSHIP.

Petitioner, having borrowed money from bankrupts, deposited two certain railroad bonds and other securities as collateral. The bankrupts pledged the bonds with other collaterals to a bank for loans, without petitioner's knowledge or consent. On the day bankruptcy intervened, petitioner tendered the bankrupts the amount he owed them and demanded a return of his securities, but the tender was refused; and on the appointment of receivers he made a similar tender and demand. He later demanded the bonds from the bank, and directed it not to sell them.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The bankrupts' debt to the bank having been liquidated by a sale of other securities, the bonds were delivered to the receivers, and out of the proceeds of other collateral the entire balance of petitioner's debt was satisfied. *Held*, that petitioner was entitled to a return of the bonds from the receivers.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 155.*]

Petition to Revise Order of the District Court of the United States for the Southern District of New York.

In the matter of bankruptcy proceedings of T. A. McIntyre & Co. On petition to revise an order directing that certain bonds in the possession of a receiver be sold, and the proceeds in excess of \$1,454.93 be turned over to petitioner, Vincent Loeser. Reversed and remanded, with instructions.

P. Chauncey Anderson (Ellery O. Anderson, of counsel), for petitioner.

Irving L. Ernst and D. Raymond Cobb, for respondent.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. On September 4, 1907, Loeser borrowed \$25,000 from the bankrupt, depositing with it as collateral certain securities, among which there were one \$1,000 bond, New York, Chicago & St. Louis No. 6,122, and one \$1,000 bond, Wheeling, Lake Erie & Western No. 2,988. By April 24, 1908, Loeser had reduced his indebtedness to about \$20,000, and the value of his securities was then and has at all times since been several thousand dollars in excess of the amount due. The two bonds were worth about \$2,000.

On April 7, 1908, the firm of McIntyre & Co., which was conducting a general brokerage business in the city of New York, borrowed \$35,000 from the Corn Exchange Bank, depositing as collateral a large number of securities, which included Loeser's two bonds. This was done without the assent or knowledge of Loeser. The firm failed on April 24, 1908, and a voluntary petition in bankruptcy was filed. On the day of the bankruptcy Loeser tendered to McIntyre & Co. payment of the amount owed by him to said firm and demanded return of the securities held as collateral; but the tender was refused and the demand not complied with. Upon the appointment of receivers Loeser made a similar tender and demand upon them, and was informed that they did not have his securities in their possession and could not return them. On April 29, 1908, Loeser demanded his two bonds from the Corn Exchange Bank and directed it not to sell them. The bank liquidated its loan to McIntyre & Co. out of part of the securities held by it, not selling Loeser's two bonds, nor two other bonds which were identified as the property of two other persons. All these unsold bonds were turned over to receivers. Out of the proceeds of the other bonds, which Loeser deposited as collateral with McIntyre & Co. the entire balance due on his loan from them has been liquidated, and the bankrupt's estate is indebted to him for money received on their sale in the amount of several thousand dollars. It has been stipulated:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"That after the loan made by the Corn Exchange Bank to T. A. McIntyre & Co. has been fully discharged and after the claims of all claimants in the reclamation proceedings to the surplus funds in the Corn Exchange Bank, with the exception of Vincent Loeser, have been paid, in accordance with the directions of the special master's report, the amount of the surplus fund remaining in the possession of the Corn Exchange Bank, which is directed by the report of the special master, and the order of confirmation thereof, to be turned over to the bankrupt's estate, is the sum of \$8,854.44, together with the claimant's two bonds, as follows: \$1,000 New York, Chicago & St. Louis 4% bond No. 6,122; \$1,000 Wheeling, Lake Erie & Western first 5% bond No. 2,988."

Upon this state of facts the disposition of these two bonds is governed by our former decision in these proceedings on the petition of William F. Pippey. 181 Fed. 955, 104 C. C. A. 419. They should be returned to the petitioner Loeser.

The order is reversed, and cause remanded, with instructions to enter an order in conformity with the views expressed in this opinion.

L. G. McKNIGHT & SON CO. v. CRAMER FURNITURE CO.

(Circuit Court of Appeals, First Circuit. August 8, 1911.)

No. 931.

COURTS (§ 314*)—JURISDICTION OF FEDERAL COURTS—CITIZENSHIP OF PARTIES.

A federal court is without jurisdiction on the ground of diversity of citizenship of an action by a corporation of another state against a corporation of a third state, which has no place of business in the state of suit, and on service on an officer of defendant who was not in the state on business of his corporation.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 860; Dec. Dig. § 314.*]

Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.]

In Error to the Circuit Court of the United States for the District of Massachusetts.

Action at law by the L. G. McKnight & Son Company against the Cramer Furniture Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Harvey H. Pratt and Owen A. Hoban, for plaintiff in error.

George Holden Tinkham, for defendant in error.

Before ALDRICH, BROWN, and DODGE, District Judges.

PER CURIAM. We are of the opinion that the Circuit Court was right in dismissing the plaintiff's action at law, for want of jurisdiction, upon motion of the defendant.

The plaintiff in error, plaintiff below, the L. G. McKnight & Son Company, is a corporation of the state of Maine, having its usual place of business in Massachusetts. The defendant is a corporation of the state of North Carolina, having its usual place of business in that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

state, and having no place of business in the state of Massachusetts. The action was begun in the district of Massachusetts by service of summons upon its vice president, also a director, who was not in Massachusetts on business of the defendant corporation. The question of jurisdiction upon such facts as are above set forth, and upon such additional facts as are contained in the bill of exceptions, is so well settled to the contrary of the contention of the plaintiff in error that we need only refer to the following authorities: *Shaw v. Quincy Mining Co.*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768; *Keasbey v. Mattison Co.*, 160 U. S. 221-229, 16 Sup. Ct. 273, 40 L. Ed. 402; *Ladew v. Tennessee Copper Co. (C. C.)* 179 Fed. 245, s. c. 218 U. S. 357, 31 Sup. Ct. 81, 54 L. Ed. 1069; *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437, 30 Sup. Ct. 125, 54 L. Ed. 272; *Hoyt v. Ogden Portland Cement Co. (C. C.)* 185 Fed. 889-898, et seq.

The judgment of the Circuit Court is affirmed, and the defendant in error recovers costs in this court.

NATIONAL WIRE BOUND BOX CO. et al. v. HEALY.

(Circuit Court of Appeals, Seventh Circuit. January 10, 1911.)

No. 1,717.

1. EVIDENCE (§ 442*)—PAROL EVIDENCE AFFECTING WRITING—MATTERS NOT INCLUDED IN WRITING.

Where a written contract was made in pursuance of a prior verbal contract between the parties broader in its scope, and as a means of carrying out a portion only of such verbal contract, the rule that a verbal agreement is conclusively presumed to be merged in a subsequent written contract does not apply, and the verbal agreement may be shown in a suit to determine the respective rights of the parties.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874-1899; Dec. Dig. § 442.*]

2. TRUSTS (§§ 30½, 287*)—CONSTRUCTIVE TRUSTS—CONTRACTS CREATING FIDUCIARY RELATIONS—ENFORCEMENT OF RIGHTS IN EQUITY.

Complainant, who owned certain basic patents for machines for making wire bound packing boxes, entered into a general verbal agreement with defendants, which contemplated the exclusive promotion of the patents by defendants throughout the United States by means of the formation of corporations to manufacture under licenses to be granted by complainant; the royalties therefrom to be divided between the parties. Pursuant to said agreement, a written contract was executed giving defendants the exclusive right to organize corporations to be so licensed in certain territory; the understanding being that when it was covered other territory should be added. Defendants organized a corporation and established a factory to aid in demonstrating the business. The machines of complainant's patents were not altogether successful in operation, and it was further verbally agreed that any improvements made thereon by defendants should be patented and the patents assigned to complainant that they might be covered by the licenses to be given by him. Disagreements arose which stopped further operations under the written contract. Defendants in the meantime had made certain inventions relating to the art, some of which had been patented and others not, and, on their refusal to assign the same to complainant, he brought suit to compel such assignment. *Held*, that the contracts created a fidu-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 189 F.—4

clary relation between the parties, and that defendants held the patents and inventions in trust, but that such trust was not in favor of complainant personally, but for the benefit of the common enterprise; that, such enterprise having been abandoned, a court of equity would deal with the matter as with a dissolved partnership, requiring defendants who had promoted certain corporations under their patents to account to complainant on the basis of their contract and to assign the patents for the benefit of the common enterprise or of the parties as tenants in common.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. §§ 30½, 287.*]

Appeal from the Circuit Court of the United States for the District of Indiana.

Suit in equity by William P. Healy against the National Wire Bound Box Company, Samuel M. Robinson, Richard G. Inwood, and Perry C. Lavenberg. Decree for complainant, and defendants appeal. Reversed.

The decree appealed from orders appellants, within one month of the date of the entry thereof, to execute to appellee, his heirs and assigns, a written assignment of the invention known as "means for making box blanks," serial number 230,249, and the invention known as "a combined carriage and 'former' for wire bound blank machines," serial number 228,443; appellee, his heirs and assigns, being given control of such applications for letters patent in place of the appellants.

The decree further orders appellants to execute to appellee, written assignments of the following letters patent:

"1. Patent number 799,854, granted by the United States, on the invention of 'Improvements in Wire Bound Boxes,' later surrendered to the United States, and for which re-issued letters patent No. 12,725 was granted November 26, 1907 to the appellant National Wire Bound Box Company.

"2. Patent number 806,411, granted December 5, 1905, by the United States to the appellant National Wire Bound Box Company on said invention of the 'Box Blank Machine with Traveling Staplers.'

"3. Patent number 907,586, applied for December 4, 1905, granted to said National Wire Bound Box Company December 22, 1908. This patent covers said invention: 'Improvements in Wire Bound Boxes' except that the cleats are rabbeted instead of being step-mitered.

"4. British patent number 16,138 granted by the United Kingdom of Great Britain and Ireland on August 8, 1905, to Alfred Julius Boulton and by him assigned on April 19, 1906, to said National Wire Bound Box Company of South Bend, Indiana, U. S. A., on said invention 'Improvements in Wire Bound Boxes.'

"5. British patent number 16,139 granted by the United Kingdom of Great Britain and Ireland on August 8, 1905, to Alfred Julius Boulton, and by him assigned on April 19, 1906, to said National Wire Bound Box Company, on said invention, 'Box Blank Machines with Traveling Staplers.'

"6. French patent number 356,753 applied for and granted August 8, 1905, by the French Republic to said National Wire Bound Box Company on said invention 'Box Blank Machine with Traveling Staplers.'

"7. Austrian patent number 28,366 applied for August 8, 1905, and granted by the Empire of Austria to said National Wire Bound Box Company on said invention 'Box Blank Machine with Traveling Staplers.'

"8. Austrian patent number 30,972, applied for August 8, 1905, and granted by the Empire of Austria to said National Wire Bound Box Company, on said invention 'Combined Carriage and "Former."'

"9. German patent number 183,216 applied for August 9, 1905, and granted by the German Empire to said National Wire Bound Box Company, on said invention 'Box Blank Machine with Traveling Staplers.'

"10. German patent number 184,840, applied for June 9, 1906, and granted

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by the German Empire to said National Wire Bound Box Company, on said invention 'Improvements in Wire Bound Boxes.'"

The decree provides that, in case the assignments thus ordered are not made, the same shall be made through the Master in Chancery.

Further facts are stated in the opinion.

Russell Wiles, Floyd R. Mechem, Daniel P. Murphy, and Philip C. Dyrenforth, for appellants.

Dan. W. Simms, Clarence W. Nichols, George T. Buckingham, and Arthur F. Durand, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge, delivered the opinion. The decree appealed from is based upon the finding that the appellants Inwood, Lavenberg and Robinson were, at the date of the decree, and during all the time theretofore since the first day of June, 1904, jointly and severally trustees of appellee, and as such trustees, made each and all of the foregoing inventions for, and on behalf of, and for the sole use and benefit of appellee.

The testimony in the case is voluminous, covering 2617 printed pages. The findings of fact by the Master are also voluminous, covering 82 printed pages. The ultimate facts, determinative of whether the decree should stand or not, or what should be its modifications, can be more compactly stated.

The patents and applications involved in this suit relate to machines employed in the manufacture of wire bound packing boxes. Through corporations, the stock of which were owned by him, appellee was, at the time of his transactions with appellants, the owner of the broad basic patents covering this character of machine, together with the improvements that, up to that time, had been made thereon. This gave him full control, supposedly at least, of the art of manufacturing wire bound packing boxes by machinery. The patents and applications involved in this suit are mere improvements upon, and extensions of, this art.

The relations of the parties began in March 1904; in furtherance of which, in April 1904, the South Bend Healy Box Company was organized, of which appellants Robinson and Inwood (Lavenberg was subsequently included) were the sole stockholders and directors, and to whom was granted a license for certain territory therein named, lying around South Bend—the understanding being, that if this Company was successfully launched, Robinson, Inwood and Lavenberg were to have the further right to promote appellee's patents exclusively throughout the United States.

Up to this time, appellee had expended \$62,000 of his own money, and ten years of time and effort, in introducing and launching his wire bound packing box enterprise commercially. The machines actually used for the making of boxes, at this time, were those known as the Rosback machines, and a later machine known as the Flora machine. The Flora machine, at this time, consisted in plans and working drawings made by the inventor. To the appellants Robinson, Inwood and Lavenberg, appellee exhibited these Rosback machines, and the plans

and working drawings of the Flora machine—the purpose, obviously, being to put appellants into possession of the knowledge of the art. The Rosback machines did not prove satisfactory. Rosback himself, the inventor, was employed for six weeks to make them operate, and with him worked Inwood and Lavenberg. Rosback then gave up the attempt and left the plant—appellants and appellee looking to the Flora patent to produce a machine that would be satisfactory. Appellants claim that the Flora machine also proved unsatisfactory, because it was found to be too expensive.

Up to this time, June 1, 1904, the general understanding had been, as stated, that Robinson, Inwood and Lavenberg were to have the exclusive promotion of the organization of corporations, under appellee's patents, throughout the United States. No formal contract to that end, however, was drawn. June 1, 1904 a formal contract was drawn, covering nine cities and the country adjacent thereto, within which Robinson and Inwood (Lavenberg subsequently becoming a party thereto) secured the exclusive right to organize box manufacturing and selling companies under appellee's patents. Subsequently other cities were added to these, and some territory exchanged for other territory. But at no time was the contract made to cover the United States. This contract, and the ones following it, granted to appellants the exclusive right to promote the organization of corporations within the territory named, for the purpose of manufacturing wire bound packing boxes by the patented machine of appellee, and selling the same according to the terms of a license and agreements, to be granted by appellee to each company so formed in each of such cities. Minimum license fees were fixed, as also minimum cash bonuses and a stock bonus of ten per cent., the bonuses to be divided one-third to appellee and two-thirds to appellants. Six months was fixed as the time within which these corporations should be organized and purchase their first set of machines, for failure of which the agreement was to forthwith cease and become void. This is known as the option agreement. The Master finds, however, that concurrently with this agreement "a general verbal understanding was reached * * * that the complainant (appellee) would give the defendants (appellants) promotion contracts of the general purport of the South Bend, Nine Cities and Cleveland contracts herein referred to, which should cover the United States, excluding the territory of Chicago, for which the complainant (appellee) had already given a promotion contract to a third person." Obviously, the restricted contract drawn was with a view of ultimately extending it to the whole of the United States, with the exception named, in case appellee's experience with appellants, in the specific territory named, turned out to be satisfactory.

The Master also finds that there was a general verbal understanding that Robinson, Inwood and Lavenberg would assign to appellee "any and all inventions made by them, relative to the wire bound box industry, and * * * would make and sign any papers necessary to enable the complainant (appellee) to get patents, and that there would be no charge or compensation for the complainant (appellee) to pay

them, and complainant (appellee) agreed to take out patents on such inventions so assigned him"—this understanding between the parties, that the ownership and control of all the patents relative to the wire bound box art should be in appellee, being a means to enable appellants to promote their contracts of promotion.

Pursuant to the relationship thus established, appellants entered upon the work of promotion, Robinson being chiefly engaged in looking up people with money who were desirous of investing, and Inwood and Lavenberg in fitting up the factory and getting ready to manufacture samples of the boxes to exhibit to prospective investors. As far as the record shows, however, no corporations were organized to the point either of distributing stock or cash bonuses, or of entering upon the actual manufacture or sale of the boxes; and the parties coming to a distinct misunderstanding in September 1904, further promotion seems to have been abandoned. It was during this period, June 1, 1904 to about September 13th, 1904, that appellants invented the machines covered by the decree—the purpose of the inventions, confessedly, being to remove the defects in the Rosback and Flora machines that appellants' experience with them disclosed.

Does this relationship warrant the decree entered, or any decree in favor of appellee? The decree is not based upon what is known in equity jurisprudence as specific performance, both because "such decree would not be consonant with the form and prayer of the bill of complaint; and because the evidence is not sufficient to warrant a decree for specific performance." (Master's finding.) The decree is based upon alleged rights "created by, and arising out of, fiduciary relations." Such was the ground upon which the Master put his recommendation of the decree; and, in the absence of an opinion, we assume that such is also the ground upon which the Court put the decree. Do the facts stated constitute a fiduciary relation between appellants and appellee, such as to prevent appellants from claiming these inventions as their own? Are appellants, upon this statement of facts, bound in equity to convey to appellee, at his instance, the inventions thus made, either absolutely, or upon equitable terms looking to the restoration of the statu quo?

In *Davis v. Hamlin*, 108 Ill. 39, 48 Am. Rep. 541, it was held that the agent of a lessee of a theatre building, who, by reason of his relation as such agent, learning that the lease was valuable and that the lessee, his principal, intended to have it renewed, went past the lessee and obtained a lease for himself, was a trustee for his principal in respect to such lease; and upon reimbursing the agent against his losses and liabilities, the principal could take over the lease, or let the agent keep the lease, as he (the principal) saw fit, exercising this option within a reasonable time. The same doctrine extends to other cases where agents, by reason of their relation as such, ascertained that the principal intended to make valuable purchases, and sought, without the knowledge of the principal, to obtain the benefit of the purchases to themselves. *Gower v. Andrew*, 59 Cal. 119, 43 Am. Rep. 242; *Grumley v. Webb*, 44 Mo. 444, 100 Am. Dec. 304; *Ringo v. Binns*, 10 Pet. 269; ¹*Trice v. Comstock*, 121 Fed. 620, 57 C. C. A. 646, 61 L. R.

¹ 9 L. Ed. 420.

A. 176; and *Jones v. Dexter*, 130 Mass. 380, 39 Am. Rep. 459 (a partnership case).

All these cases rest upon this reasoning, that the agent's knowledge, upon the possession of which he obtained the advantage, was gotten in consequence of, and as a part of, his relationship to his principal; that what he did, therefore, was in violation of his duty to his principal; and that what the Court should do, as nearly as possible, is to leave the agent, in the transaction named, precisely where he would have been left had he acted for the principal as he ought to have done, less any expense to which the principal has been subjected; and put the principal precisely where he would have been put had he, through the agent, obtained for himself what the agent had diverted to himself; in other words, that the transaction may come out as nearly in accordance with the way it would have come out, had there been no violation of duty, as the circumstances permit.

Can these principles be applied to the case under consideration? It is not essential, as we view it, that the parties should bear to each other the technical relation of principal and agent; neither need it be found that they were in the relation of employer and employé, or of partners. Technically their relation may have been that of principals, dealing with each other somewhat as partners deal with each other. The question is, whatever the relationship, do the equitable principles, governing the cases already decided, apply to this relationship; for equity, in seeking justice between man and man, not obtainable at law, does not stop precisely where the cases already decided have stopped. The chancellor has now, as had the chancellor in the past, the power and duty to apply old principles to new cases involving new relationships.

The case has been argued as if the entire relationship arose under the Option or Nine Cities contract, and the agreement of the parties respecting the inventions thereafter to be made. But the Option, or Nine Cities contract, was not the sole basis out of which the relationship grows. As found by the Master, and as already stated, there was a general verbal understanding that the relationship eventually should extend to the whole of the United States. Evidently, the purpose of the transaction between appellants and appellee was to unify, throughout the United States, the business of making this kind of box. To this end, the ownership and control of patents for this kind of box were to be unified; and corporations were to be organized, to which a common character of license should be granted; and to this end, all the inventions in that line, future as well as past, were to be kept together. Back of this Nine Cities contract was the broader matter in contemplation—a relationship that, when fully ripened, would unify the whole of this industry throughout the whole of the United States. The Nine Cities contract, and the additions thereto, were only the *modus vivendi* through which this broader relationship was to be eventually worked out. Only by grasping, in this way, the whole scope of the undertaking, can either the nature of the relationship, or the mutual obligations of the parties thereunder, be fully understood.

Upon the assumption that the fiduciary character of the relationship

grows out of the fact that appellee and appellants were principal and agents, counsel for appellants urge, that in every case in which the agent has been held as trustee, the "something" acquired by him must have been something that the principal himself might have acquired, had he acted in person; and inasmuch as future inventions are not something that the principal himself could have acquired—are something that, but for the inventors' creative faculty, would not have existed at all—they are not within the possible subject-matter of this doctrine of trusteeship through fiduciary relationship. This, though not the language, is the substance of the argument. We do not think it conclusive. Some one has said that "in every generality is an untruth." In this one, it seems to us, there is an untruth, which we do not know how to bring out better than to go outside of the field of inventions for an illustration. Take as such illustration the engagement, between two or more persons, to unify and control tracts of land in which there are natural gas deposits, in order that the gas may be utilized in manufacturing, and in the heating and lighting of cities. Unification here is an economic necessity. The law has come to recognize it as such. Gas deposits in reserve, sufficient for a long period of time, are just as essential as gas deposits already opened. The financing of expensive lines, and large distributing systems, require that, not only should there be a supply of gas for today and for this year, but for a sufficient length of time ahead to justify the investment. And besides unification, solidification of the holdings is essential; for adjacent lands, in the hands of others, may be used to draw off these very deposits that are intended to be kept in reserve. Indeed, no business enterprise of this kind is secure unless both unification and solidification have gone to the point, not only of having a sufficient reserve, but of being secure against the diversion of that reserve to others.

Is not the unification of ownership of inventions, relating to a given art, founded commercially upon the same considerations? A given lawful enterprise, to be successful, often depends upon its power to obtain the benefit of every improvement introduced. Protection for the future requires that inventions already controlled be not undermined and diverted by other inventions along the same line. An invention is not something that, but for the particular inventor or inventors, would not have been. Inventions come along as the discovery of gas deposits come along—the contribution of some particular person to the world's knowledge—but if not by that person, then, in the course of time, and usually in a very short time, by some one else. And where, in the development of business enterprise, it is necessary that there should be a look forward, as well as a look just around them, inventions in the future can be made the subject-matter of a fiduciary relationship, just as much so as the future discoveries of deposits of natural gas. Indeed, the grant by the government of a monopoly in these inventions, would, in most cases, be valueless unless they could be thus connected up, legally and equitably, future as well as in the present, with other like grants of monopoly looking to the promotion of some single practical business enterprise.

Now, suppose that in pursuance of a common purpose, entered upon

by a certain number of given persons, to get together the lands containing gas deposits deemed sufficient for the enterprise in hand, one of these parties, during the term of such relationship, and as a part of it, obtains knowledge of gas deposits within the territory contemplated by the enterprise, and thereupon obtains title for himself thereto, refusing to put them into the common enterprise. May not the others, upon showing what the scope of the enterprise was, and that such party was in it with them, deriving mutually a benefit therefrom, hold him as trustee to the arrangement? We think so, provided it is shown that the party got into the enterprise and obtained these advantages as part of, and in consequence of, his relationship to the others. To him, as to the agent in *Davis v. Hamlin*, the equitable principle applies that not to fulfill his obligations would be a violation of his duty to others, and to require him to fulfill his obligations, is one of the rights that others may draw upon him. If equity cannot act here, as in the familiar cases of principal and agent, it is because equity has no power to reach out and grow as conditions advance.

Commercially and industrially, the same principles apply to future inventions, included, by the understanding of the parties, in a present relationship, like the one between these parties; for the exploration of the laws of nature and mechanics, for something that will aid a specific commercial or business end, practically and commercially is not different from explorations for mineral or gas deposits to a like commercial end. Neither has any value until it is obtained. Both create a value that did not exist before they were obtained. One is the reclamation from the earth of something beneficial to commerce and industry; the other is the reclamation from the laws of mechanics or nature of something beneficial to commerce and industry. To both, once their boundaries are ascertained, the law gives the quality and protection of legal title. Both, equally, can be bought and sold and otherwise enter into business and commerce. Why should equity, dealing with them in the light of these commercial ends, run any distinction between them upon lines purely psychological; for it must be remembered that it is with inventions, as a part of commerce and industry, that we are dealing, not with inventions as a part of historical science; and it is by putting inventions, and the patents that embody them, into this, their true commercial setting, that courts can best carry out the purpose of our constitution and laws in protecting them, and, in the long run too, the best interests of the inventors themselves.

We are not overlooking the cases cited by appellants, *Pressed Steel Car Co. v. Hansen*, 137 Fed. 403, 71 C. C. A. 207, 2 L. R. A. (N. S.) 1172; *American Circular Loom Co. v. Wilson*, 198 Mass. 182, 84 N. E. 133, 126 Am. St. Rep. 409; *Dalzell v. Dueber Watch Case Co.*, 149 U. S. 315, 13 Sup. Ct. 886, 37 L. Ed. 749; *Deane v. Hodge*, 35 Minn. 146, 27 N. W. 917, 59 Am. Rep. 321; *Belcher v. Whittemore*, 134 Mass. 330; *Burr v. De La Vergne*, 102 N. Y. 415, 7 N. E. 366; *Hapgood v. Hewitt*, 119 U. S. 226, 7 Sup. Ct. 193, 30 L. Ed. 369; *Solomons v. United States*, 137 U. S. 342, 11 Sup. Ct. 88, 34 L. Ed. 667; nor this rule drawn from them:

"The rule may be stated in a few words. No matter what the contract of service may be—whether for ordinary employment or for specific inventive

work—the master cannot have title to an invention of a servant, in the absence of an express contract to assign it to him, although made in the course of the service and at the master's expense. Stray statements which seem to point to the master's right of ownership are to be found in some opinions, but these decisions cannot stand as authorities against the main body of cases from which the above rule is gathered."

From this rule we are not dissenting. Before any case can be said to be made out, requiring appellants to assign their inventions, it must be shown that consciously, and knowing the effect of what they were doing, they expressly agreed to make the assignment. Persons are not to be deprived of their inventions merely because to retain them, under the circumstances, may appear unconscionable. The circumstances must include a contemplated assignment as their conscious act and deed. But such conscious act and deed need not have taken the form of a contract that, standing alone, is specifically enforceable. Such conscious act and deed is sufficiently shown, it seems to us, when it is made to appear that consciously, and knowing the effect of what they were doing, they became parties to a lawful undertaking that, to carry out the undertaking as an entirety, expressly involved, on their part, such an assignment. In other words, title will not be taken, by the courts, from the inventor, and given to another, upon a state of facts that does not involve proof that the inventor, consciously and knowing the effect of what he was doing, contemplated that the title should go to the other; the rule being to protect the inventor against everything except his conscious agreement. But it was not intended that he should thereby be circumscribed in what he consciously wished to do with his future inventions. The rule was to save him from advantage being taken of him by others, not to cut him off from opportunity to deal openly and fairly with others; and in the case before us, if these inventions are to be decreed to be assigned, it is upon the fact shown that appellants, consciously and knowing what was the effect of what they were doing, agreed that they should go into the common enterprise, contributing their future inventions to that enterprise.

[1] The question has been raised whether, in the light of the existing written contracts entered into between appellee and appellants, the conversations constituting the "general verbal agreement" are admissible at all. We think they are. The written agreements were not intended to merge and embody the understanding between the parties on the subject of the ownership of future inventions, but only to define the rights of the parties with respect to the particular city or territory for which a license was then to be granted. As already stated, the general understanding and agreement between the parties was one thing; it fixed their relations to each other. The particular written agreements was another and a different thing; they were only the *modus vivendi* of carrying out the general understanding as business conditions and opportunity developed. There is no ground, therefore, for applying the rule of law that verbal conversations are merged in a subsequent written agreement; for these subsequent written agreements were not accepted or acted upon by the parties as a written embodiment of the verbal agreement.

[2] There existed, then, between these parties, as we view it, a relationship that made them, appellee as well as appellants, agents to a common enterprise—agents by agreement—the principal being the common enterprise itself; a relationship that, faithfully carried out by appellants, required that they put in the name of appellee, but for the common enterprise, whatever they might invent in that line; and that, faithfully carried out by appellee, required that he extend (the appellants fulfilling their obligations) the scope of the common enterprise to include the whole of the United States—the specific option contracts being the mode employed. In what respect has this relationship failed? That appellants stand in a trustee relationship with respect to these inventions, to this common enterprise, we think is clear. That appellee stands, in relation to this common enterprise, as a trustee also, we think is clear. This clothes the court with power to enter a decree of some kind. It is the form of the decree that remains to be determined.

To determine what the form shall be, we must first inquire why it is that appellants did not perform their duty, as such trustees, in the assignment of the patents? And why is it that the enterprise has not been extended to cover the United States? For upon the answer to these questions, the form of decree depends.

September 13, 1904, the day that Inwood refused to assign the inventions to appellee, the condition of affairs, as found by the Master, was as follows:

The Rosback and Flora machines had been discarded by consent all around. The Brown machine, the step-miter machine, and the end stapling machine (some of the inventions in dispute) were in successful operation, making lapped boxes in the factory of the South Bend Healy Box Company, and were being exclusively promoted for appellee by Robinson, Inwood and Lavenberg, under their several contracts of promotion.

Everything was harmonious between appellee and appellants in reference to the promotion of the enterprise; almost daily conferences were held between them, and there were, substantially, no disputes or differences. Appellants were being aided by appellee by his advice and counsel. Appellee was hurrying up the building of the machines at the St. Joseph Iron Works, paying out of his own money for the building of them. Robinson, Inwood and Lavenberg were busy in the promotion of their several contracts.

At this time, appellee had promised another contract of promotion to Robinson, Inwood and Lavenberg for the Pacific slope and Mexico, and they were negotiating a contract to promote the city of New York; and further negotiations were on relative to the organization of the Cleveland Box Company. It was also expected that the Rood Lumber Company, of Columbus, Ohio, would take licenses, paying \$10,000 cash and \$25,000 stock bonuses, of which Robinson, Inwood and Lavenberg were to receive one-half, as their compensation for promoting Cleveland and Columbus.

Then something happened. Inwood refused, upon request, to assign to appellee the inventions of the adjustable "former" and step-

miter machines, and two days later, appellants having caused representatives of the Cleveland and Columbus prospective licensees to visit South Bend, for the purpose of inspecting the box machines in operation, and of seeing and consulting appellee as the owner of the patents, appellee refused to meet or consult with them, upon the ground that, inasmuch as Inwood and Lavenberg were refusing to assign the inventions, he (appellee) could not truthfully state and represent that he owned and controlled all the inventions relating to the enterprise. Here began the break. But to avoid this, appellee was requested, as an alternative, to meet and have the consultation respecting the promotion, remaining silent, for the time being, on the refusal of Inwood to make the assignment. This appellee refused to do, informing Robinson that he would meet the aforesaid representatives if Robinson insisted, but would inform them of Inwood's action in withholding from him the inventions. Robinson did not accede to this, whereupon Williams and Rood (the representatives of the prospective licensees aforesaid) were informed that appellee was too ill to be seen, and Williams and Rood went away from South Bend without meeting him.

From that time until the 3rd of October, the parties remained in negotiation; appellee threatening to write to Williams and Rood (who, in the meantime, had written to appellee asking for certain modifications in the proposed license) a letter that would have ended the negotiations, and appellants insisted that no such letter should be written. It appears also, from a letter of appellee, that during this negotiation he offered an option of the whole United States (this must have been in controversy), which was refused on the ground that appellee ought to fight the infringers in the Courts and not appellants. In this letter, written to appellant Robinson, appellee says:

"You tried to saddle that heavy expense on me. You and Inwood now claim that you were really ready to accept the option just as I drew it, but that I withdrew it sooner than you expected. In this I believe that you are telling the truth, but it shows that you played a game and got left and have been trying to retrieve your bad generalship ever since. You have stood on your legal rights, which you have a right to do. You and Inwood have both told me (and others) that what I demand (the inventions), is not in the license. I will also stand on my legal rights. You will get what the law will give you, and no more, as to options and licenses."

This was the end of their active connection. Soon thereafter the National Wire Bound Box Company was organized, to whom was transferred the inventions in dispute. No further companies were organized and no further territory offered. The Nine Cities contract, and other contracts, lapsed by their own terms. War between the parties succeeded peace. How it was conducted need not be elaborated, for it throws little light upon how the parties had come to the parting of the ways.

We cannot find that appellee, in thus breaking with appellants, was in the wrong. As viewed now, after these full discussions in the courts, he may have been technically in the right in demanding that the inventions be first assigned to him. But we can find nothing in the record showing that he stood upon his right as a trustee for the com-

mon enterprise, to cover, eventually, the United States—demanding the assignment to him as such. Appellants, very properly, may have been apprehensive that, to make such an absolute assignment of patents without further safe-guards, would have put them, and their common enterprise, wholly in appellee's hands.

Nor were appellants wholly in the wrong. They seemed to have had the promotion of some of the contemplated corporations well in hand, and to have been ready to go on with the common enterprise, reserving for future discussion the question of assigning the patents to appellee. They did not know then what the law on the subject is now declared to be; and it is altogether possible that future conferences might have so safe-guarded their interests in the common enterprise that the patents would have been assigned. On the whole, this branch of the case appeals to us as analogous to those many cases where partners fall out, neither being wholly to blame. And the attitude of a court of equity ought, perhaps, to be analogous to the attitude of a court of equity toward a partnership thus dissolved.

In the winding up of partnerships, courts of equity are not governed too much by the question of which partner technically is right, and which partner technically is wrong—seeking rather, in the distribution of the partnership assets, that each partner should get his rightful interest therein. Is this a case (practically the winding up of a common enterprise) where great stress should be laid on the technical right and technical wrong of the parties? Partners cannot be kept together by a decree in equity; neither can this enterprise be kept together, according to the original understanding, contrary to the will of these parties. To give these inventions absolutely to the appellee, on the basis of the Nine Cities or Option contracts, would be to ignore the larger understanding behind those contracts; to leave the inventions with the appellants, would be to ignore the rights that the appellee has fairly obtained in them. The exact statu quo cannot be restored; four years time and much bad feeling have intervened. What, nearest to a restoration of the statu quo, can a court of equity do?

The fairest and most equitable thing, as it seems to us, is to deal with this common enterprise as we would with a dissolved partnership, giving to each of the separating parties, as nearly as possible, his interest in the assets that have grown out of the common enterprise. Those assets, so far as we know, are the royalties contracted for by appellants, the interest that appellants have obtained in the corporations promoted by them under their inventions, contrary to their duty to the common enterprise, and the inventions themselves. Possibly there is something more. To a large extent, the parties have already agreed upon the measure of each party's interest in these assets. The best way may be to adopt that agreement as the measure of each party's interest; which would require appellants to account to appellee for what would have been his proportion in all the corporations promoted by appellants, the same as if the original understanding had been carried out; and his proportion of the royalties; as also an assignment to appellee of the inventions involved, either as trustee for the common enterprise, or as a tenant in common to the extent of his right

therein as one of the parties to the common enterprise; this decree not to affect the patents owned or under the control of appellee prior to the common enterprise, because, although they were to have been utilized in that enterprise, they are in no sense a product of the enterprise. Whatever is a product of the enterprise, wherever now held, is, of course, to be included in the accounting.

The decree of the Circuit Court is reversed, with instructions to enter a decree in accordance with this opinion; the costs of this appeal to be divided.

SEAMAN, Circuit Judge (concurring). I concur in the conclusion of the foregoing opinion that the appellee is entitled to relief through a decree as therein directed, but rest concurrence on the express contract of the appellants (in evidence) to assign and place, for benefit in their joint enterprise, such inventions as were made by either in the course of promotion. Under the line of authorities cited in the opinion, I believe no other relation of the parties (fiduciary or contractual) in their undertaking can sanction such relief, nor furnish support therefor, beyond the undoubted weight of the evidence thereunder in corroboration of the testimony that inventions made were to be assigned. In reference to the proof of express contract, I am not impressed with doubt of the sufficiency of the appellee's testimony, if accepted as the true version, to constitute an enforceable contract, as it becomes well defined under the evidence. Its credibility is supported, both by the circumstantial evidence and by the finding of the master; but I have hesitated over its acceptance on the question of admissibility—whether it may not tend to vary the written contracts in suit. On re-examination of the evidence, however, I am satisfied that the several license agreements referred to were portions only of their general agreement for the enterprise, and were neither understood nor intended to embrace their various mutual undertakings, resting on other evidence in the case. Thus the testimony became admissible and supports the decree as directed.

W. W. SLY MFG. CO. v. RUSSELL & CO.

(Circuit Court of Appeals, Sixth Circuit. July 12, 1911.)

No. 2,098.

1. PATENTS (§ 168*)—CONSTRUCTION—LIMITATION BY PROCEEDINGS IN PATENT OFFICE.

Where an applicant for a patent acquiesces in the rejection of the claims presented, and amends the same or substitutes others to meet the objections of the Patent Office, he must be deemed to have surrendered and disclaimed what he has thus conceded, and is bound by the limitation so imposed; and in such case it is immaterial whether the Patent Office was right or wrong in rejecting the original claims.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 243½, 244; Dec. Dig. § 168.*]

Conclusiveness and effect of decisions of Patent Office in proceedings on applications, see note to Novelty Glass Mfg. Co. v. Brookfield, 95 C. C. A. 530.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. PATENTS (§ 87*)—ABANDONMENT—PRESUMPTIONS.

But abandonment of invention through amendment of claims in the Patent Office is not to be presumed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 87.*]

3. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—IRON CINDER CRUSHER.

The Sly patent, No. 514,097, for a crusher intended for the recovery of iron from cupola cinder, was not anticipated and discloses invention. It is not limited to the crushing function, but includes also the separating feature, which is the principal object to be accomplished and in which it has proved successful, and is entitled to a reasonable breadth of equivalents. As so construed, *held* infringed.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

Suit in equity by the W. W. Sly Manufacturing Company against Russell & Co. Decree for defendant, and complainant appeals. Reversed.

John B. Hull and Robert H. Parkinson, for appellant.

Howard G. Cook, for appellee.

Before KNAPPEN, Circuit Judge, and McCALL and SATER, District Judges.

KNAPPEN, Circuit Judge. This suit was brought by the complainant, who is the appellant, for the alleged infringement of United States patent No. 514,097, to Sly, dated February 6, 1894. Claim 1 of the patent, which is the only claim in controversy, reads as follows:

"1. In a rotary crusher, a cylinder *A* chambered heads *C C* in said cylinder, hollow trunnions *C1 C1* on said heads, supporting the cylinder in bearings *C2 C2* of the supporting frame; the rolling troughed crusher *D*, loosely placed in said cylinder; and means for rotating the cylinder, combined and operating substantially as and for the purpose set forth."

The complainant contends that the device, as patented, includes, as a constituent element, a separator feature. The defendant insists that the patent is limited to a crushing device; that, as so limited, it is anticipated by the prior art. The Circuit Court took this view, and dismissed the bill. Infringement is also denied.

1. The contention that the patent is limited to the crushing feature is based largely upon what occurred in the Patent Office in connection with the application for and allowance of the claim. The specification states that the invention "relates to machines for crushing ore, cinders, etc., and consists in the new construction and combination substantially as hereinafter described and pointed out in the claims." In explanation of the drawings, after describing the cylinder with its frame and door in the side thereof, occurs the following:

"*C C* are chambered heads consisting of a castings having hollow trunnions *C1*, and are firmly riveted in the ends of the cylinder, and the cylinder is supported by these trunnions, in boxes *C2*, mounted on a suitable framework which supports the entire machine. The chambers in the heads are preferably made square. One of the heads has four radial partitions *C3*, which divides the chambers into four compartments, centrally communicating with one another, and with the hollow trunnion. This chamber is closed by an inner plate *C4* fastened by rivets, and it has openings *C5* leading

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

into the said compartments, over inclines *C6*. [Two of these inclines are so located in each of the four compartments of the chamber, that their inclined surfaces lead to the said openings *C5*, and are designed for conducting the pieces of iron that may get into the chambered head back into the cylinder, while the dirt and lighter particles float off with the water.] The opposite or right-hand head is not divided into compartments but is closed by a perforated lining plate enclosing the chamber. To the trunnion on this head is to be attached a hose or pipe for conveying water into the cylinder through the said perforations. This is the inlet head, and the other, the outlet head for the discharge of water and washing."

The letters referring to radial partitions obviously should be "C3" instead of "C5."

The bracketed clause was not in the original specifications. It was inserted later, as hereinafter stated.

After describing the construction and movement of the crushing device, as well as the mechanical means by which the cylinder is revolved, the specifications proceed:

"The operations of this machine are as follows:

"It is intended principally for crushing cinders from cupolas, and collecting the iron particles therefrom. The cinders are placed in the cylinder, and as the cylinder revolves the crusher rolls on the bottom and crushes the cinders under it. * * * Water is allowed to flow through the cylinder standing up about midway of the hollow trunnions. The direction of the inclines are in opposition to the revolutions of the cylinder, that is they are not intended to act as scoops for catching the broken cinders, but will admit the ingress of water and the dirt or lighter particles, and should any part of iron particles pass in, they, being of greater specific gravity, would fall into the lower compartment in the chamber head, and as the compartments come up on a horizontal line with the trunnions, the inclines and openings *C5* in that compartment are in a position to discharge the iron back into the cylinder. The iron sliding on the inclines out of the openings."

The omitted portions represented above by asterisks relate to the position and function of the crusher, and are not material to the immediately present inquiry.

The original claims were two in number, as follows:

"1. In a rotary crusher the combination with cylinder *A* of a door and fastening consisting of a frame *B*, frame *B* hinged to said frame *B* plate *B* and rod *d* arranged substantially in the manner and for the purpose set forth.

"2. In a rotary crusher and separator the combination of a cylinder having an opening in the side closed by a door and hinged frame; chambered heads fixed in the ends of the cylinder, having hollow trunnions on the centers of the heads, supported in bearings on the main frame; the chamber in one of the heads divided into compartments by radial partitions; holes in the lining plate over incline in the said compartment; the roller trough crusher contained in the cylinder; and means for revolving the cylinder, constructed to operate substantially in the manner and for the purpose set forth."

The communication of the examiner in charge of the application stated:

"The inclines *C6* * * * should be lettered and more clearly shown. The inlet and outlet orifices must be indicated by arrows."

After criticising the description in the specifications of the door frame and the door in the side of the cylinder (referred to in the first claim as originally drafted), the communication proceeded:

"The exact object to be accomplished must be clearly set forth. A model is required as a temporary exhibit. The head *C* is not properly shown in Fig. 2, the drawing not being uniformly finished. Rod *d* in claim 1 is evidently a mistake for *b*. So far as appears the 1st claim is essentially anticipated in 72,002, Drummond, Dec. 10, 1867, and 129,522, Bump & Ritchie, July 10, 1872. Ball and Drum. The 2nd claim is for an aggregation of devices in view of the same patents and 244,316, Sample, July 12, 1881; 395,140, Hill, Dec. 25, 1883—Ball & Drum; 267,529, Holcomb & Heine, Nov. 14, 1882, and 302,480, Gorton, July 22, 1884—Bran Dusters, Beaters. These patents show the several features mentioned to be old in the same functions and relations, but rejection on the merits is deferred."

The applicant thereupon amended the specifications by inserting therein the description of the inclines as contained in the clause in brackets in the earlier portion of this opinion; also by furnishing a substituted drawing showing a cross-section of the drawing of the longitudinal section of the machine, converting original claim 2 into claim 1 of the patent as issued, and adding a detailed drawing of the inside of the left-hand, or outlet chambered head. The application, as so amended, was immediately allowed, without further correspondence.

[1, 2] The rule is well settled that where an applicant for a patent acquiesces in the rejection of the claims presented, and amends the same or substitutes others to meet the objections of the Patent Office, he must be deemed to have surrendered and disclaimed what he thus conceded, and is bound by the limitation so imposed; and that in such case it is immaterial whether the Patent Office was right or wrong in rejecting the original claims. *Shepard v. Carrigan*, 116 U. S. 593, 597, 6 Sup. Ct. 493, 29 L. Ed. 723; *Roemer v. Peddie*, 132 U. S. 313, 317, 10 Sup. Ct. 98, 33 L. Ed. 382; *Morgan Envelope Co. v. Albany Paper Co.*, 152 U. S. 425, 429, 14 Sup. Ct. 627, 38 L. Ed. 500. This court has more than once enforced this rule. See *American Stove Co. v. Cleveland Foundry Co.*, 158 Fed. 978, 983, 86 C. C. A. 182; *Campbell v. American Shipbuilding Co.*, 179 Fed. 498, 103 C. C. A. 122; *Twentieth Century Heating Co. v. Taplin, Rice-Clerkin Co.*, 181 Fed. 96, 104 C. C. A. 156. The rule stated, however, rests upon the proposition that an applicant by submitting to the demands of the Patent Office, and thereby surrendering a claim or limiting its breadth, is deemed to have abandoned the feature so surrendered and to have dedicated it to the public, and thereby become estopped from asserting that the claim so allowed has the breadth of the rejected claim. It is the general rule that abandonment of an invention is not to be presumed, but must be clearly proven (*Ide v. Trorlicht, etc., Co.* [8th Circuit] 115 Fed. 137, 53 C. C. A. 341); and no reason is apparent why this rule does not apply to an alleged abandonment through amendment of claims in the Patent Office.

[3] The changes by which it is contended that applicant limited the claim in question to the crusher feature merely are, generally speaking, eliminating therefrom the words "and separator" following the word "crusher" in the reference to the device, and in omitting, in the redrafted claim, the words descriptive of the detailed construction of one of the chambered heads—"The chamber in one of the heads divided into compartments by radial partitions; holes in the lining

plate over incline in the said compartment." In our opinion the applicant did not thereby abandon the separating feature and limit his patent to the crushing element. The mere use of the word "crusher" in the amended claim is by no means conclusive of an intent to limit the protection of the patent to the crushing feature. The introductory phrase is not an element of the combination, and does not necessarily limit the claim. Ex parte Casler, 90 Off. Gaz. Pat. Off. 446. The object of the crushing was to accomplish a separation. It would have been in our judgment entirely proper to have styled the device either a crusher or a separator. Neither definition would have run counter to the custom prevailing in such cases. For example, the machine which hulls wheat and separates the hulls from the chaff is usually called a separator. The machine which performs the same function in the case of clover seed is usually called a huller. Both accomplish the two operations of hulling and segregating the hull from the kernel. That neither the examiner nor the applicant understood that the latter was abandoning the separating feature seems clear from these considerations: The examiner's communication required a more clear showing of the inclines in the outlet head, which the specifications show were designed only for the purpose of separating the cinders from the ore in conducting the iron back into the cylinder, "while the dirt and lighter particles float off with the water;" and in connection with the redrafted claims, not only was an amendment of the specifications allowed, containing a detailed description of the inclines in the outlet head, but an additional drawing was provided showing such detailed construction. Furthermore, in the redrafted claims, in connection with the elements accomplishing the crushing feature, there was expressly included the element of the chambered heads, which had no relation to a mere crushing machine. Still, further, the record shows that the idea of the inventor by the machine in question has always been to accomplish the actual segregation of the cinder from the ore and the removal of the former from the crushing cylinder, the crushing process being merely a means to an ultimate end. While the specifications state that the invention relates to machines for "crushing ore, cinders, etc.," the further statement is made that the machine "is intended principally for crushing cinders from cupolas and collecting the iron particles therefrom," and the record shows that such has been its principal, although not its sole, use. It has, however, always been used both as a crusher and separator. A construction resulting in the abandonment by the applicant of the very feature for which the invention was in large part designed should not be adopted unless such abandonment is clearly shown.

In view of these considerations, and taking into account the fact that rejection was not actually declared by the examiner, we think the applicant was not by that communication put to an election between abandoning the separating element or having his claim disallowed, and that he did not exercise such election. In reaching this conclusion we assume that the statement in the examiner's letter—"The exact object to be accomplished must be clearly set forth"—

did not relate to the chambered heads. We also assume that the applicant understood that the aggregation referred to by the examiner related to the inclusion in one claim of the elements thereof relating to the crushing feature and the separating feature respectively. It may well have been that the applicant recognized a degree of plausibility in the suggestion that the inclusion in the claim of the detailed construction of the cylinder heads constituting the separator feature with the detailed description of the crushing element constituted aggregation, and was willing to so restate his claim as to avoid that criticism. But in doing so he did not limit the scope of his claim. On the other hand, he broadened it. Instead of a claim as originally drafted, limited as respects the separating feature to chambered heads having the detailed construction stated therein, he presented and procured the allowance of a claim including as one of its elements the chambered heads of the general description and having the functions and method of operation described in the specifications.

2. We do not understand the defendant to contend that the claim in question, as redrafted, covers merely an aggregation of elements. To prevent misapprehension, however, we state that in our opinion it is not subject to such criticism. When the complete machine of the patent is used the crushing and separating elements do, in our opinion, co-operate to produce a new, final and unitary result, to wit, the complete separation of the cinder from the iron and the ejection of the former from the mill and the leaving of the latter therein. This constitutes invention. *National Cash Register Co. v. American Cash Register Co.*, 53 Fed. 367, 371, 3 C. C. A. 559; *Walker on Patents* (4th Ed.) § 33.

3. Were the claim in suit to be construed as covering merely a crushing device, we should agree with the Circuit Court that it was anticipated by the patent to Hill, No. 395,140. But, construed as we have construed it, as covering both the crushing and separating elements, we think it is not anticipated by any of the earlier patents cited. These citations are Chubb, No. 52,532; Scoville, No. 59,463; Bolthoff, No. 166,743; Rutherford, No. 224,357; Gates, No. 380,432; Hill, No. 395,140; Coward, No. 413,388; Sample, No. 244,316. Chambered heads having the functions of those in the patent in question are found in none of these patents. Neither of them is as close a reference as the Hill machine, to which we are about to refer.

4. Before and at the time the patent in suit was applied for, there was upon the market and in use a machine manufactured by the patentee Hill before referred to, for the recovery of metal from "brass foundry cinders, skimmings and ashes." This machine consisted, generally speaking, of a revolving cylinder, the material being crushed by a large cylindrical crusher having circumferential grooves or pockets. The finely crushed particles of the refuse material were removed from the cylinder by either a blast of air or by water entering through an inlet trunnion and discharging through an outlet trunnion. It entirely lacked the chambered heads of the patent in suit or anything approximating them. There were no plates, inclines, or partitions in the heads for the turning back of the heavier particles into the cylin-

der or for preventing the material from returning into the inlet. In fact, for the purpose of operating, the cylinder was filled only to within about two inches of the lower surface of the outlet; while the machine of the patent in suit, by reason of the construction of the chambered heads, may be filled above the lower surface of the outlet. In the catalogue describing Hill's crusher, the manufacturer, in discussing the relative desirability of air blast and water, says that:

"Most decidedly the dry method is the best and nicest. * * * An exhaust fan will draw away quite coarse material, at the same time losing no metal, if the suction pipe is properly adjusted at the outlet of the case. The same material, if wet, would need to be ground to powder in order to float out with the water."

It is obvious that the Hill machine does not anticipate the Sly patent.

5. The question of infringement remains. The machine used by the defendant (not manufactured by it) clearly infringes the complainant's patent unless it is differentiated therefrom by the form and function of the crushing agent. It is a rotary crusher. It has the cylinder, the chambered heads having the functions and operating substantially as those of complainant's patent, the hollow trunnions of the heads supported as in complainant's device, a crushing agent loosely placed in the cylinder, and means for rotating the same. The specification of complainant's patent refers to the crushing agent as—

"a rolling crusher, consisting of disks joined by wings rotating from an axis, and forming angular troughs. This crusher is placed loosely in the cylinder, and rolls in the lower side thereof as the cylinder is revolved."

And in the description of the operation of the machine it is said that:

"As the cylinder revolves the crusher rolls on the bottom and crushes the cinders under it, at the same time a large portion of cinders are carried over in the troughs in the upper side of the crusher, and are dumped in front of it. They also serve to give additional weight to the crusher."

In the claim under consideration this crushing agent is spoken of as "the rolling troughed crusher D, loosely placed in said cylinder." The defendant's crushing agent, instead of being troughed by means of wings radiating from the axis, is hexagonal and solid, and of much smaller diameter than complainant's troughed crusher, although, being solid, it is apparently as heavy. The important question is whether or not defendant's crushing agent is the substantial equivalent of the crushing agent of complainant's patent. The answer to this question depends upon the range of equivalents to be accorded the patent, with respect to those elements; and this question of breadth of equivalents again depends upon the extent of the advance which the inventor has made in the art.

As stated by Judge Severens in *Penfield v. Chambers*, 92 Fed. at page 638, 34 C. C. A. at page 587:

"The rule applicable to the determination of equivalency depends upon the importance and the breadth of the original invention, and does not depend upon the question whether it was the first in the field relating to that subject, but upon the degree of advancement which the invention has made in newness of discovery and utility; for there may be as much merit in bringing on a large illumination from a feeble start, as in the conception of the first beclouded idea which may have originated the course of study and discovery

along that line. The rule is not a hard and fast one, but measures equivalents by looking to see what has been accomplished before, and finding whether the combination, read broadly, had been anticipated, or whether, having reference to what had already been shown, the claim must be limited to the precise construction in order to save it as being new; for the constant rule is to give to the inventor the benefit of all that he has invented. If he has improved only a little, he has only a correspondingly narrow standing ground. If he has improved much and widely, the area of the field in which he is to be protected is enlarged to the limits of what his invention has made his own."

In *Bundy Mfg. Co. v. Detroit Time Register Co.*, 94 Fed. at page 540, 36 C. C. A. at page 391, Judge (now Mr. Justice) Lurton said:

"To be entitled to the benefit of the doctrine of equivalents, it is not essential that the patent shall be for a pioneer invention in the broad sense of that term. If his invention is one which has marked a decided step in the art, and has proven of value to the public, he will be entitled to the benefit of the rule of equivalents, though not in so liberal a degree as if his invention was of a primary character."

In *McSherry Mfg. Co. v. Dowagiac Mfg. Co.*, 101 Fed. 716, 41 C. C. A. 627, this court, likewise speaking through Judge Lurton, held that the patentee, although not a pioneer inventor, but an improver only, is entitled to a reasonable range of equivalents, measured by the advance he has made over older machines, and is not limited to the specific form claimed and described unless he has expressly so limited himself, or unless such limitation is necessary in order to save his patent from anticipation. See, also, *Winans v. Denmead*, 15 How. 330, 14 L. Ed. 717; *Metallic Extraction Co. v. Brown* (8th Circuit) 104 Fed. 345, 43 C. C. A. 568; *Vrooman v. Penhollow* (6th Circuit) 179 Fed. 296, 307, 102 C. C. A. 495. In the latter case Judge Severens thus stated the rule:

"We do not doubt that where the thing described in a claim has been declared by the inventor to be the only one, or has treated it as the only one appropriate to represent his invention, or the character of the associated elements is such as necessarily to require that particular form, in all such cases the patentee will be bound by his description. But where there are no such considerations, and there is simply and only a description of one form of a thing which would perform the same office in other forms, the court will apply the general rule above stated and accord him his monopoly in all equivalent forms. In such a case the general rule prevails, and there is no ground for treating the case as exceptional."

Sly's invention marks in our opinion a long step in the art to which it applies, and is entitled to a reasonable breadth of equivalents. No invention in the prior art was adapted with any substantial effectiveness to the treatment of iron cupola cinder.

The so-called "stave-mill," which was specially designed for cleaning castings, and which, before the invention of the Sly machine, was used by foundry men, in connection with their business, for the treatment of iron cinder, was slow in operation and lost from 18 to 35 per cent. of the iron. The Sly machine is rapid in operation, recovers nearly all the iron, and appears not only to have been successfully used by foundry men in connection with their own business, but to have been bought and used with commercial success by others

than foundry men for the purpose of the recovery of metal from refuse of brass foundries and old iron cinder heaps bought for the purpose.

The chambered heads in the use to which they are put in Sly's device are new and effective. The Hill machine, which has not the chambered heads, would, as shown by tests made for the purposes of this suit, separate iron cinder; and Hill was ready to testify, as the result of those tests, that in his opinion his machines are well adapted to recover iron from foundry cinder in sufficient quantities to make their use for the purpose commercially profitable. But the cinder had to be broken up into comparatively small pieces, the mill worked slowly, and the record, taken together, leaves it at least doubtful whether iron cinder could not be worked as profitably by hand as by the Hill machine. Hill himself, in answer to the question whether he had sold his mill of the type shown in his patent for the purpose of recovering iron shot and particles from iron foundry cinder, answered:

"Yes. Concern in Wilmington, Del., bought a little mill to experiment on material they were throwing away, that had some metal in; that is, scrap that they get from their furnaces and were throwing away. This concern bought a mill from me on approval, but found that it was not practical for their purpose, and returned it. This iron was oxidized scale. I went there and attempted to make a success, but found that he didn't recover enough out of the material he had to make it pay. Another party attempted to make fettling for puddling furnaces with one of my mills, but could not make it answer the purpose. My machines are especially designed for *recovering brass particles from brass foundry cinders, skimmings and ashes.*" (Italics are ours).

The stipulation as to his testimony in connection with the tests above referred to included the fact that in 1892 or 1893 he made a test on iron foundry cupola cinder for a prospective customer, but that the party for whom the test was made did not purchase the mill. We understand the Hill mill has never been put into actual business use as an iron recoverer.

The Sly device has proved highly successful and commercially profitable. While sales of the machine were at first slow, they amounted to \$40,000 for the year immediately prior to the coming upon the market of the machine of which defendant's is a sample. We are convinced that it is the first successful and satisfactory recoverer of iron from cupola cinder, for which it was specially designed, and for which purpose, as we understand the record, the alleged infringing machine is used by defendant. Moreover, while the Hill machine was specially designed as a brass recoverer, and seems to have been commercially successful therein (having been not only used by brass foundry men, but sold to several parties for the purpose of recovering brass from brass cinder, as a separate business), complainant's machine seems to have proved more effective than the Hill machine even as a brass recoverer, it appearing that a refuse dump resulting from the operation of a Hill mill upon brass cinder was profitably worked by a Sly mill.

In view of this situation, we do not think the patentee should be

held limited to the precise form of his crushing agent as described in the patent, in the absence of words of express limitation thereto. We do not construe the language of the specifications and claim as expressly so limiting it.

It is urged, however, that defendant's hexagonal crusher does not perform the functions of the rolling troughed crusher of the patent, and so cannot be considered the equivalent thereof. It is, of course, true that for one thing to be the equivalent of another it must perform the function of that other, and the function must be performed in substantially the same way by the alleged equivalent as by the thing of which it is alleged to be the equivalent. But it is not necessary that this function be performed in identically the same way, or to the same extent. As applied to this case, the defendant's hexagonal crusher, theoretically at least, does not perform, to the same extent as Sly's troughed crusher, the function of carrying the crushed material to the upper side of the crusher and dumping the same before it. It appears, however, that in the practical operation of the Sly crusher very little material is carried up and dumped in front of the crusher through the action of the troughs therein—as only the finer material would be so carried up—and it is apparent that the faces of the defendant's hexagonal crusher (which in defendant's machine are each about $4\frac{1}{2}$ inches wide) do—and especially when brought into relation with the sides of the cylinder—perform, to an appreciable extent, the same function of carrying forward the crushed material and again dumping it in front of the revolving crusher, which could not be the case with a cylindrical crushing agent. Both the troughed crusher of the patent and defendant's hexagonal crusher are loosely placed in the cylinder, and both turn or roll therein in substantially the same way. Both have a striking action upon the material.

In view of the advance made by Sly in the invention of the combination in question, the fact that the form of crusher adopted by him was not necessary to the obtaining of the patent, but, on the contrary, was old in the art; that the crushing was but one element in and one step toward the result to be accomplished; and in view of the extent to which, in practical operation, the defendant's crusher performs the functions of that element of the patent, we are constrained to hold the complainant's patent infringed by the defendant's machine.

The decree of the Circuit Court is accordingly reversed, with directions to enter the usual decree for an accounting. As the patent has expired, there is no occasion for injunction.

SIMPLEX RAILWAY APPLIANCE CO. v. PRESSED STEEL CAR CO.

(Circuit Court of Appeals, Second Circuit. May 8, 1911.)

No. 254.

1. PATENTS (§ 151*)—DISCLAIMER—SUIT FOR INFRINGEMENT.

A disclaimer of an unnecessary and inadvertent statement in the specification of a patent may be entered in a suit for its infringement, where its effect is not to broaden the claim in issue, but to limit it to the actual

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

invention, strictly within the terms of the claim, and as described and shown, and to save the claim from possible ambiguity.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 151.*]

2. PATENTS (§ 328*)—VALIDITY AND INVENTION—CAR TRUCK BOLSTER.

The Bauer patent, No. 593,410, for a car truck bolster, claim 6, was not anticipated and discloses invention; also held infringed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Suit in equity by the Simplex Railway Appliance Company against the Pressed Steel Car Company. Decree for complainant, and defendant appeals. Affirmed.

The decree of the Circuit Court held valid and infringed claim 6 of letters patent No. 593,410, granted November 9, 1897, to Carl E. Bauer for improvements in bolsters. The opinion of the Circuit Court is reported in 177 Fed. 426.

Clarence P. Byrnes and Alfred W. Kiddle, for appellant.

C. C. Linthicum and J. Edgar Bull, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The patentee, Carl E. Bauer, states in his specification that his object is to improve upon and remedy the defects of the form of bolster shown in patent No. 565,481, issued to W. H. Marshall, August 11, 1896. The defect in the Marshall bolster is alleged to be that, when subjected to an excessive load, it is liable to give way by splitting the web of the compression member just at the side edges of the plate tension member and by a downward bending of the web at that point. These difficulties the patentee remedies, in part, by introducing a strengthening piece at each end of the bolster. The Bauer bolster is so formed that the length of the truss is less in proportion to its depth and the ends are so arranged as to cause the lines of force to meet at a point more nearly in a line with the point of support, thus securing strength, durability and a saving in the cost of construction. In order to bring the meeting point of the lines of force nearer to the center of the bolster, the patentee bends the compression member so that it meets the tension member at a point approximately over the place of support instead of at the extreme end of the compression member, as in prior structures. At or near the meeting place the two members are riveted to prevent them from pulling apart. The specification contains a statement that, though the best results are obtained by keeping the tension member straight, if the construction be varied by bending the tension member and keeping the compression member straight it will still be within the spirit of the invention.

[1] The Circuit Court, however, permitted a disclaimer to that part of the specification, so that the patent is now limited to a bolster having a straight tension member and a compression member with its end bent at a point approximately over the place of support. That the court was entirely justified in permitting a disclaimer is, we think,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

clearly established by the authorities. The effect of the disclaimer was not to broaden the claim, but to limit it to the construction, described and shown, of a straight tension member and a bent compression member. Until this disclaimer was allowed it was possible to contend for a construction of claim 6 broad enough to include a structure described in the language disclaimed, viz., a straight compression member and a bent tension member. That this was a proper case for a disclaimer and that the language disclaimed is no longer a part of the specification, are propositions which are sustained by the following authorities: *Dunbar v. Meyers*, 94 U. S. 187, 24 L. Ed. 34, and cases cited in *Accumulator Co. v. Julien Co.* (C. C.) 38 Fed. 117, 133-136.

In *Carnegie Co. v. Cambria Co.*, 185 U. S. 403, at page 436, 22 Sup. Ct. 698, at page 711, 46 L. Ed. 968, the court say:

"Had the purpose of the disclaimer been to reform or alter the description of the invention, or convert the claim from one thing into something else, it might have been objectionable, as patents can only be amended for mistakes of this kind by a re-issue. But the disclaimer in this case appears to have been made to obviate an ambiguity in the specification, and with no idea of obtaining the benefit of a re-issue. If the clauses had the effect of broadening the patent the disclaimer removes the objection. If they did not, the disclaimer could do no harm, and cannot be made the subject of criticism."

The sole effect of the present disclaimer is to limit the sixth claim to a structure embodying Bauer's actual invention and strictly within its terms. The statement eliminated by the disclaimer was unnecessary and was not advisedly inserted, but there is nothing of which to predicate a fraudulent intent. The statement is gone and to that extent the atmosphere is cleared.

[2] The sixth claim, which alone is involved, is as follows:

"6. In a bolster, the combination with the middle support, of a compression member, and a tension member, the said compression member being bent upward near its ends in a line with said tension member, and the tension member being straight at its ends to the end of the compression member, substantially as described."

The claim is for the combination of the following elements in a bolster: First, a middle support; second, a compression member bent upward near its ends in line with the tension member; third, a tension member being straight at its ends to the end of the compression member.

The novel feature of this combination and the one which has won for it unquestioned success in the railway world is the straight tension member connected, approximately, just over the place of support to the compression member, which is bent up to receive it. This construction permits a straight-away longitudinal pull from end to end of the tension member. The problem thus solved seems to us, with the bolster before us, to be a simple one, but the earlier patents and the numerous structures of the prior art demonstrate the proposition that no one prior to Bauer had discovered this particular construction. The necessity for it was clearly understood. Master mechanics, mechanical engineers and persons skilled in the art, in various parts of

the country, were endeavoring to remedy the defects which were well known and generally deplored, but with partial success only; the bolsters still lacked strength and durability at the ends. Bauer solved the problem; his simple changes have produced strength where formerly there was weakness and stability where there was infirmity. No better proof of this is needed than the tenacity with which the defendant has insisted upon using the patented structure. Practically all of the bolsters of the prior art, which the defendant insists have the advantages of the Bauer structure, were open to its use and yet it persists in using the patented bolster.

It would have avoided all controversy and prevented an expensive litigation if, for instance, the defendant had used the construction shown by Meatyard, Robertson and Carlton, Marshall or Lindstrom. It did not do so and was willing to risk the expense and penalties of an infringement suit to secure the right to use the Bauer bolster.

In construing the claim in controversy, we must remember that it is to be interpreted in the light of the description and drawings having regard to the difficulties to be overcome and the end to be attained. The main essential of a truck bolster is great strength, combined with simplicity of construction. It is necessary that the tension member shall have no bends or kinks, for the line of pull being straight, the tendency is to straighten out the kinks, loosen the rivets and thus destroy the usefulness of the bolster. Bauer avoids this by bending up the end of the compression member, at a point where it is intersected by the load line, so that it is parallel with the tension member from this point to its end, the rivets being inserted in this end section. When strain is applied, there is no tendency to pull the tension member down and away from the compression member. The line of pull is direct from end to end.

The Robertson and Carlton patent, No. 497,728, was introduced at a rehearing in the Circuit Court, and for this reason, perhaps, more attention has been given to it in this court than any other reference. It is for a railway car brake-beam and it requires little expert knowledge to perceive that it would be ineffectual if used as a truck bolster. But the patent does not disclose or suggest the Bauer construction. The description says:

"The strain on this improved brake-beam will be equally distributed throughout its parts. By forming the end boxes integral with the main member of the beam, the construction is greatly simplified and cheapened. Moreover, the pressure of the nuts on the ends of the truss-rod is directly against the end surfaces of the main member, which insures strength and stability."

The tension member is straight to its end, but the compression member is not bent up to receive it in the sense of the Bauer patent, and it is not riveted to the compression member. The truss-rod has round end portions with screw-threaded extremities which are inserted into boxes at the ends of the beam provided with sockets having tubular outer ends which project from the rear outer corner of the boxes and have end surfaces against which nuts on the threaded extremities of the truss-rod are screwed. In other words, the efficiency of the structure depends upon the parts being held in working order by the screw

thread and nut which were used to key up the structure when it worked loose.

Meatyard shows, in a side frame, a straight compression member and a bent-down tension member, the object being to prevent the side beams of car trucks from sagging and the consequent twisting of the axle box.

Barber and Terry show both members bent near their ends and proceeding in parallel lines from the point where they are bent to their ends.

Montz, McCarty and Henderson show a straight tension member and a bent compression member, the two being parallel from the bend to their ends.

These are the best references presented by the defendant and none of them discloses the distinguishing feature of the patent in suit. Marshall and Lindstrom came nearer than the others to solving the problem, but failed to reach the needed perfection. Bauer came into the art to remedy the defects in Marshall's bolster and he succeeded in doing so by the changes heretofore pointed out.

We do not deem it necessary to discuss the defense of noninfringement. It is argued that:

"In defendant's bolster the compression member is not a *rolled* channel nor of the same width from end to end. It is a *pressed steel shape* which is wider at the center than at the ends, and tapers gradually from its central portion toward the ends. The flanges are deeper at the ends and taper toward the middle. These features give a stronger and better truss, since the compression member being wider at the center is better adapted to resist lateral bending stresses, while the flanges being deeper at the ends, give greater resistance to shear, which tendency increases towards the ends of this member. This design could not be obtained by a *rolled* channel member, such as used in the Marshall bolster and in the Bauer form, but is easily and cheaply made in *pressed* steel."

These differences are all immaterial and do not in any way touch the essential elements of the invention as covered by the sixth claim.

Judge Hazel has accurately described the defects in the Marshall bolster which Bauer remedied and the relation of Lindstrom to the invention. As we agree with him as to the respective contributions of these men to the art, we need not enter into a prolonged discussion of the evidence.

The decree is affirmed with costs.

MALLEABLE IRON RANGE CO. v. BECKWITH.

(Circuit Court of Appeals, Seventh Circuit. April 18, 1911.)

No. 1,695.

1. PATENTS (§ 167*)—CONSTRUCTION OF TERMS—"CONVEX" SURFACE.

The word "convex," used in a claim of a patent as applied to a surface, is to be given its generally accepted meaning, as indicating a surface of a more or less spherical form, rather than cylindrical.

[Ed. Note.—For other cases, see Patents; Cent. Dig. § 243; Dec. Dig. § 167.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. PATENTS (§ 328*)—VALIDITY—INFRINGEMENT—RESERVOIR FOR STOVES.

The Beckwith patent, No. 787,425, for a reservoir for stoves and ranges, claim 11, is not void for indefiniteness, nor for anticipation, but discloses patentable invention, the combination shown being one of great utility and success; also *held* infringed.

Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin.

Suit in equity by Arthur K. Beckwith against the Malleable Iron Range Company. Decree for complainant, and defendant appeals. Affirmed.

See, also, 174 Fed. (C. C.) 1001.

This appeal is from an interlocutory decree in favor of the appellee, Beckwith, upon his patent, No. 787,425, adjudging validity of the patent and infringement thereof by the appellant defendant, with injunctive relief.

The Beckwith patent was granted April 18, 1905, under an application filed September 11, 1903, for "improvements in stoves," and contains 11 claims; but claim 11 is alone involved in the charge of infringement, reading as follows:

"11. In a stove or range, the combination of the convex rigid back plate, a sheet-metal reservoir, and means for clamping said reservoir against the convex surface of said plate, for the purpose specified."

"In the specifications are the following recitals and references involved in the issues:

"The objects of this invention are: First, to provide an improved reservoir by which water may be quickly heated; second, to provide an improved reservoir for stoves or ranges by which a maximum amount of the waste heat may be utilized; third, to provide an improved reservoir for stoves or ranges in which the heating of the water is under control. * * *

"A structure embodying the features of my invention is clearly illustrated in the accompanying drawings, forming a part of this specification, in which—

"Figure 1 is a detail vertical sectional view through a structure embodying the features of my invention, taken on a line corresponding to line 1 1 of Fig. 2. Fig. 2 is a detail horizontal sectional view taken on line 2 2 of Fig. 1. Fig. 3 is an enlarged detail view taken on line 3 3 of Fig. 2. Fig. 4 is a detail sectional view showing the manner of supporting the reservoir on the range, taken on line 4 4 of Fig. 3.

"In the drawings the sectional views are taken looking in the direction of the little arrows at the ends of the section lines, and similar letters of reference refer to similar parts throughout the several views.

"Referring to the lettered parts of the drawings, A represents the rear portion of my improved stove or range, and A' the oven thereof. These parts are illustrated in conventional form.

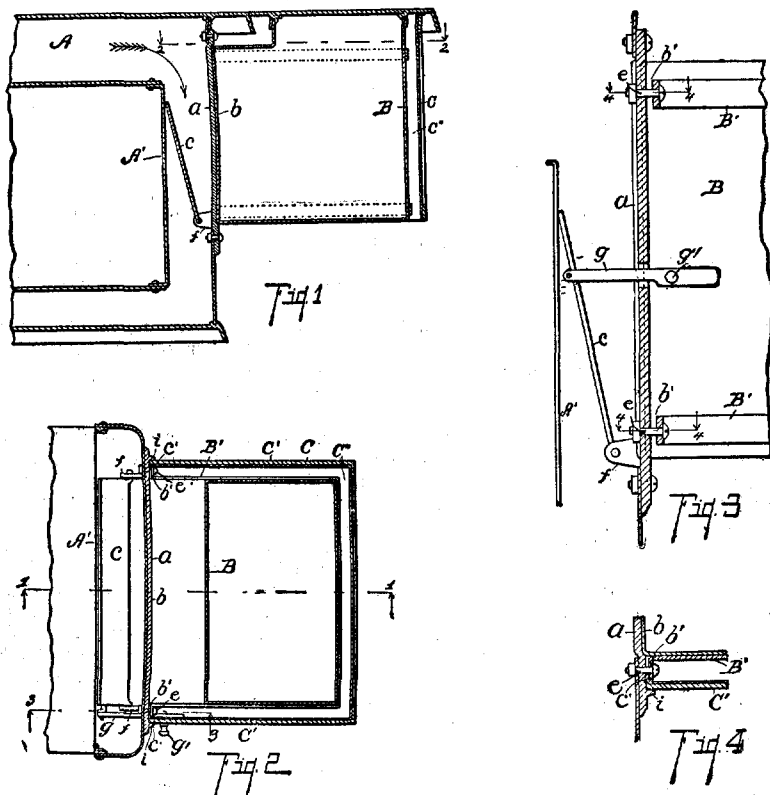
"I provide a back plate *a*, which is convex on its outer face or curves outwardly. (See Figs. 1 and 2.) The back plate *a* is cast or formed of rigid material.

"The reservoir B is formed of sheet metal, preferably copper, and its inner side *b* is clamped against the convex face of the back plate *a* by the supporting-straps B'. The clamping of the side of the reservoir against the convex plate *a* holds the side of the reservoir in close contact therewith over its entire surface and places the same under tension, so that the tendency to buckle or the possibility of its buckling, and thereby forming air-chambers between the side of the reservoir and the plate, is overcome. The inner end of the supporting-straps B' of the reservoir are bent outwardly and perforated to receive the bolts *c*, which are arranged through the back plate *a*. The straps are of such length that tension can be applied thereto by the bolts.

"The reservoir B is surrounded by a casing C, forming an air-chamber C' between it and the side walls of the reservoir. The casing C is embraced

by the frame-like end plate *C'*, supported on the plate *a*. Outwardly-projecting flanges *i* on the back plate *a* engage the end plates *C'*. The inner edges of the metal casing *C* are turned inwardly to form flanges *c'*. These flanges *c'* are engaged by the lugs *b'* on the straps *B'*, so that the parts are securely supported."

The drawings are as follows:



A. L. Morsell and C. C. Linthicum, for appellant.

Harry C. Howard and Fred. L. Chappell, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The Beckwith patent, No. 787,425, involved in this appeal, is for "improvements in stoves," and the decree of the Circuit Court, in favor of the complainant below, is challenged upon two general grounds: (1) Invalidity of the claim in suit, for want of patentable invention, for indefiniteness, for anticipation by prior patents, and for prior use; and (2) for noninfringement of the clamping means shown in the patent. The claim reads:

"11. In a stove or range, the combination of the convex rigid back plate, a sheet-metal reservoir, and means for clamping said reservoir against the convex surface of said plate, for the purpose specified."

It is plainly a broad claim of invention in the combination of elements thus stated, and the controversy over the issues has produced voluminous testimony and alike voluminous briefs submitted by counsel for the hearing. In reference to the briefs (extended in several hundred pages of letterpress upon each side), it may well be remarked that both the original and (so-called) reply briefs are wanting in the conciseness of presentation intended by the rules and needful to save undue burden in the labors of the reviewing court. Succinct propositions of ultimate fact, as well as of law, should be stated, with reference to supporting testimony of record, rather than extended quotations therefrom.

Irrespective of the question of priority, the testimony is undisputed that the device of the patent, as defined in the foregoing claim 11, was the outcome of constant effort on the part of manufacturers to improve the means for heating water, in a reservoir attachment to the stove or range. The objects of invention, as stated in the specification, were:

"First, to provide an improved reservoir by which water may be quickly heated; second, * * * by which a maximum amount of waste heat may be utilized; third, * * * in which the heating of the water is under control."

Upon the general inquiry of prior art, to ascertain whether invention was involved in the simple device of the patentee, the opinion filed by the trial judge aptly deduces from the testimony, as follows:

"The history of the prior art teaches that for many years there had been a growing demand for a right-hand reservoir; that is, one located away from the fire box, and so adjusted as not to interfere with the heating of the oven, and so attached to the range that the water in the reservoir would heat quickly. Naturally stove makers were anxious to meet this demand. The old form of cast iron reservoirs was discarded, and sheet metal substituted therefor. The main difficulty in the employment of the sheet metal was its tendency to warp or buckle under the influence of heat, and leave an air space between the reservoir and the range, which seriously interfered with the transmission of heat to the water. The early back plates were flat. Experience showed that they warped out of shape during the process of annealing. Bumps and hollows appeared, which created numerous air pockets. This necessitated the use of the bulging bar to correct these imperfections. To meet complaints that water did not heat quickly, experiments were tried by leaving out the back plate entirely and allowing the products of combustion to come into direct contact with the sides of the reservoir. This produced rapid and intense heat, but was found destructive to the sheet metal. To remedy this difficulty a baffle plate was attached to the reservoir. Later rigid back plates were again introduced. In most of these ranges the weight of the water in the reservoir was relied upon to secure close contact with the range; but after all such efforts the right-hand reservoir remained unsatisfactory for one reason or another. Among other experimenters was the defendant company. About the time the complainant's range came on the market, defendant was engaged in conducting certain experiments on sheet metal reservoirs at the hardware store of one Rassman at Beaver Dam, Wis. While these experiments were going on, Rassman, who was also the sales agent of the Beckwith range at Beaver Dam, had occasion to visit Dowagiac, Mich., and there saw one of the Beckwith ranges, built under the patent in suit. Rassman came back and told defendant that Beckwith had solved the problem of the right-hand reservoir. Thereupon one of the new Beckwith ranges was obtained, and at the store of Rassman defendant's officers and experts made a thorough examination of the same,

and extended to Beckwith the compliment of adopting and appropriating all the elements of his device. Thereupon the defendant in its catalogue gave prominence to the convex rigid back plate as a new and prominent feature."

We concur, therefore, in the opinion, there expressed, that:

"Complainant's device maintains a closer contact over a larger area of the side of the reservoir, and therefore heats the water more quickly, than any of the earlier ranges."

And in the following conclusion thereof in favor of patentable invention under the general issue:

"I am persuaded that the combination of the patent involves inventive thought. The device is so simple, and other experimenters had come so near reaching the same consummation, that it is perhaps natural to conclude, after the fact, that nothing but mechanical skill was necessary to reach the success obtained by the inventor. In *Webster Loom Co. v. Higgins*, 105 U. S. 580, 591 [26 L. Ed. 1177], the attention of the Supreme Court was directed to a state of facts quite similar to those here present. The court say: 'This argument would be sound if the combination claimed by Webster was an obvious one for attaining the advantages proposed; one which would occur to any mechanic skilled in the art. But it is plain from the evidence, and from the very fact that it was not sooner adopted and used, that it did not, for years, occur in this light to even the most skillful persons. It may have been under their very eyes; they may almost be said to have stumbled over it; but they certainly failed to see it, to estimate its value, and to bring it into notice. Who was the first to see it, to understand its value, to give it shape and form, to bring it into notice and urge its adoption, is a question to which we shall shortly give our attention. At this point we are constrained to say that we cannot yield our assent to the argument that the combination of the different parts or elements for attaining the object in view was so obvious as to merit no title to invention. Now that it has succeeded, it may seem very plain to any one that he could have done it as well. This is often the case with inventions of the greatest merit. It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result, never attained before, it is evidence of invention.' In this connection it is proper to consider the great commercial success of the complainant's device. The sale of the new style of range commenced in January, 1903. Prior to 1903 the complainant manufactured less than 1,500 ranges. During the year 1903 they sold 2,300 ranges. During the year 1907, they sold about 15,000 ranges. This increase in business necessitated the construction of many new buildings and a corresponding increase in facilities all along the line. This enormous increase in the business is attributed largely to the popularity of the right-hand reservoir of the patent in suit, which practically superseded the structure theretofore built by complainant. Under the authorities this circumstance might turn the scale on the question of invention in a doubtful case. *Smith v. Goodyear Co.*, 93 U. S. 486, 495 [23 L. Ed. 952]; *Magowan v. New York Belting Co.*, 141 U. S. 332, 344 [12 Sup. Ct. 71, 35 L. Ed. 781]."

[1] The objection raised, that claim 11 is indefinite or ambiguous in terms, rests on the mention of the element "the convex rigid back plate" and the contention that the term "convex" does not indicate that "spherical convexity" was intended for the back plate, and would thus include "cylindrically convex" plates or "convexity in one direction only," for which anticipations are alleged in the prior art. As well stated in the opinion of the trial judge, not only in the popular sense (as defined in the standard dictionaries there cited) is the term

"convex" understood to mean spherical convexity, and thus fixes "the true shape of the back plate," but the drawings of the patent "show spherical convexity," as defined by the experts in the case, including "Mr. Wilkinson, the defendant's expert." We believe such meaning to be conveyed by the claim and that the objection for ambiguity thereof is untenable.

[2] The only matters introduced as anticipations and prior public use requiring discussion appear in two branches of the testimony—one showing an expedient adopted by the appellant (in its works) prior to the patentee's conception, and the other a device of Mr. Keep (a rival manufacturer), exemplified in his patent, No. 765,140, with alleged prior use. Conceding the force of both of these lines as approximations, tending to improve the contact of back plate and reservoir, we believe neither satisfies the burden of proof rightly imposed to establish the defense of clear anticipation of the patentee's combination of means. Beckwith sought means for assuring that contact of the parts (for better utilization of the heat) in their co-operation, or assemblage in place as the several parts are brought from the works. Recognizing the flexibility and tendency of the sheet metal of the reservoir to buckle and cause imperfect contact, he departed from the prior form of flat contact plates (malleable or cast) and provided the convex plate of the patent, whereby the buckle in the reservoir was taken up, when the parts were clamped in place as directed. Thus contact was maintained as the result of such structure and combination, without need of repair. Its utility is well proven, and the test of the alleged anticipations must be whether one or the other plainly disclosed these means in like combination.

For the prior expedient in the works of the appellant, its employés testify, in substance: That as early as November, 1901, and during the year 1902, while its malleable iron contact plates were substantially flat as patterned and made, it was their frequent practice to hammer the plate when in place in the range, by use of a hammer and a "bulging bar" (as named by the witnesses), to contact with the reservoir, and that bulges resulted in the plate—described by one of the experts as "bumps and hollows," as shown in three of the exhibit ranges—whereby better contact was obtained for heating efficiency. These witnesses concur in their version that convexity was intended and caused by this hammering, wherever contact of the parts was wanting, while the witness Terrell (called by the appellee), who was superintendent of the appellant's works during such operations, expressly denies that such was the purpose or substantial effect, and states that the plates were so hammered, when needful, to correct irregularities which occur in the casting from the annealing process. One of the appellant's witnesses (Grant) confirms the last-mentioned view of the purpose—"to hammer out the rough places on them." Testimony of this character, to prove anticipation, must be weighed with care, and we are not convinced that this awkward method of hammering was adopted to give convexity to the malleable iron plate, nor with recognition or understanding on the part of the appellant, or either of these operators in its works, that such form would maintain con-

tact with and under the normal conditions of the reservoir wall, as disclosed by the patentee. In so far as bulge or "protuberance" is mentioned or appears in the three exhibit ranges of appellant's make, we concur in the opinion of the trial judge that they were accidental productions; that their occurrence "attracted no attention and was considered a matter of no significance until Beckwith made" convexity "an important element in his combination." Otherwise, no explanation appears for such use of hammer and bar, after the parts were in place, for more than a year, when convex form could be far better provided before attachment; and, furthermore, the evidence shows that no plates were manufactured by the appellant, in convex form, until February, 1903, when it was ascertained that Beckwith was so making them successfully. We believe the testimony, therefore, to be insufficient to forestall the Beckwith conception.

The appellant, however, further relies upon anticipation under the testimony of Mr. Keep, superintendent of the Michigan Stove Company (a rival manufacturer), and two patents issued to him—(1) No. 715,666, December 9, 1902, on application of September 23, 1901, for "hot water reservoir for stoves"; and (2) No. 765,140, July 12, 1904, on application of October 26, 1903, for "detachable reservoir for ranges." It is conceded in the brief for appellant that No. 715,666 "does not disclose any form of contact plate," and is inapplicable, except by way of explaining Mr. Keep's testimony that a plate was "embodied in addition to the features shown in the patent." In No. 765,140 appears incidental reference to "a convex portion of the end of the range which forms the outer wall of one of the flues"—obviously not spherically convex in form or function—and not mentioned in the claims, nor shown in contact with the reservoir. Thus the contention that Keep employed his form of convex plate for like function with that of Beckwith rests alone on his assertions of practice in his works prior to the Beckwith improvement. Examination of his testimony furnishes no support for such contention, as we believe. As stated in the opinion below, in reference thereto:

"He never grasped the coacting principle which was the soul of the Beckwith invention, namely, to stretch the sheet metal over a convex protuberance, and thus establish such tension that the sheet metal could not spring away or warp under the influence of the heat; means being furnished for increasing the tension from time to time, so as to make the closest contact absolute and permanent by means of this constant stretching."

Keep's structure, as described both in his patents and testimony, was not adapted to make contact of back plate and reservoir within the Beckwith conception, and he expressly disclaims such purpose, stating that he avoided its tendency "to strain the front of the reservoir in contact," relying upon the weight of water in the reservoir, instead of tension and clamping means, to maintain contact.

We are of opinion, therefore, that the validity of the patent claims in suit is rightly upheld by the decree, and that infringement thereof by the appellant's structure in evidence is well established, with its clamping means identical in function, although varied in form.

The decree accordingly of the Circuit Court is affirmed.

GILBERT MFG. CO. v. POST & LESTER CO.

(Circuit Court, D. Connecticut. March 13, 1911.)

No. 1,340.

1. PATENTS (§ 310*)—SUIT FOR INFRINGEMENT—DEMURRER TO BILL.

A demurrer to a bill for infringement on the ground that the patent is invalid on its face is proper in cases of manifest invalidity, as saving labor, time, and expense, but should not be urged unless competent counsel representing defendant are absolutely sure of their ground.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 507-540; Dec. Dig. § 310.*]

2. PATENTS (§ 328*)—INVENTION—SPARE TIRE HOLDER.

The Bowers patent, No. 872,892, for a spare tire holder for automobiles, is not so manifestly void on its face for lack of invention as to warrant its being so declared on demurrer.

In Equity. Suit by the Gilbert Manufacturing Company against the Post & Lester Company. On demurrer to bill. Overruled.

Arthur L. Shipman and Heath Sutherland, for demurrant.
Cyrus N. Anderson, for complainant.

PLATT, District Judge. [1] Under the decisions it is clear that the method herein used for assailing a patent, which is deemed manifestly invalid on its face, is proper and meritorious, because if it succeeds, the litigants are saved time, labor, and expense. It should not be urged, unless competent counsel in charge of the defendant's interests are absolutely sure of their ground. In the case at bar I am confident that the capable counsel for the demurrant filed the demurrer in the best of faith, and their action meets with my approval. The granting of the patent carries with it, of course, the presumption of validity, and it must be a plain case indeed, which will warrant the court in differing, on the face of the thing, with the trained experts at the Patent Office. A speaking example of such temerity is before my eyes at this moment. In *Stillwell v. McPherson* (C. C.) 172 Fed. 151, a District Judge, whom I personally esteem and respect, had before him an attack by demurrer upon the validity of the Watson patent, No. 559,642, for a culvert constructed of corrugated sheet-metal pipe in sections, bolted or otherwise fastened together. This was to be used as a substitute for the well-known tile culverts, because it could be laid on an uneven bed with less danger of breaking; could be joined together without cement; and could be safely transported in longer sections. The judge says that ideas are not patentable, which, of course, is true. He follows with a statement that the ideas presented by the patented culvert had, within his knowledge and that of the average person, been commonly understood for years. He points to stovepipes as an example of inserting a contracted end into a flared end, and says, as to the liability to breakage, that every one knows that corrugated pipe is stronger than plain pipe, and that metal pipe of course will not break as easily as tile pipe. On the face of it that did look like a simple case.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The Court of Appeals, however, for the Second Circuit, 183 Fed. 586, just reported in No. 5 of the Advance Sheets, by a decision filed last November and within my knowledge from about that time, reversed the decision of the District Judge, because in their opinion the question of patentability was doubtful enough, so that such a summary method of disposing of the patent was unwarranted.

Two other judges, of acknowledged wisdom, had also, at circuit, refused to dismiss upon demurrers bills counting upon the Watson patent. That is a demonstration of the futility of taking chances.

[2] The patent in suit has only one claim, viz.:

"The herein described spare tire holder comprising a straight shank, two fingers projecting from one side thereof at substantially right angles thereto, a strap engaged with said fingers, a socket in which the inner end of the shank is longitudinally and rotatably adjustable, and means for securing said shank in the socket, substantially as described."

The elements set forth therein when applied to the concrete form patented co-operate to effect the result sought by the inventor, viz., the supporting of a spare tire in a convenient manner and position upon an automobile. The claim therefore recites a living, pulsating entity, and cannot be construed as an aggregation.

Regarding invention, my mind works on the plan suggested by Judge Blodgett in *Eclipse Mfg. Co. v. Adkins* (C. C.) 36 Fed. 554-557, when he said that he would not feel justified in holding a patent void on common knowledge, unless he could cite instances of common use, which would, when presented, at once strike persons of usual intelligence as a complete answer to the claim of the patent.

I do not think that the oarlock of a rowing machine or racing shell, or the device for supporting eaves troughs on houses, would measure up to the standard which was there set by a very capable judge, and which I am willing to adopt.

It is not unlikely that at final hearing such facts may be brought forward in support of the presence of inventive thought in the patented device that it will become my duty to agree with the Patent Office in that respect.

Let the demurrer be overruled and issue joined in the usual way.

CENTRAL TRUST CO. OF NEW YORK v. WHEELING & L. E. R. CO.

(Circuit Court, N. D. Ohio, E. D. May 11, 1911.)

No. 7,603.

1. RECEIVERS (§ 174*)—SUITS AGAINST RECEIVERS—AUTHORITY TO SUE.

Prior to Act Cong. March 3, 1887, c. 373, § 3, 24 Stat. 554, as amended by Act Aug. 13, 1888, c. 866, § 3, 25 Stat. 436 (U. S. Comp. St. 1901, p. 582), authorizing suits in certain cases against receivers appointed by federal courts without first obtaining leave of the court appointing them, a receiver appointed by a federal court could not be sued in a state for any purpose without the consent of the appointing authority.

[Ed. Note.—For other cases, see *Receivers*, Dec. Dig. § 174.*

Actions by or against receivers of federal courts, see note to *J. I. Case Plow Works v. Finks*, 26 C. C. A. 49.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. RECEIVERS (§ 181*)—ACTION AGAINST RECEIVER—LEAVE OF COURT—GARNISHMENT.

Act Cong. March 3, 1887, c. 373, § 3, 24 Stat. 554, as amended by Act Aug. 13, 1888, c. 866, § 3, 25 Stat. 436 (U. S. Comp. St. 1901, p. 582), provides that a receiver appointed by a federal court may be sued in respect to any transaction of his in carrying on the business connected with the property of which he is receiver without previous leave of the appointing authority. *Held* that, where a receiver was appointed to operate a railroad, he was only subject to suit without leave under such section concerning matters having their origin in his operation of the railroad, and the act did not authorize the garnishment of funds in his hands alleged to belong to a debtor in the receiver's employ, especially where at the time the garnishment was instituted the amount due the debtor had not been adjudicated and ordered paid so that the receiver could be regarded as holding it merely as the debtor's agent or custodian.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 181.*]

3. RECEIVERS (§ 181*)—ATTACHMENT.

Receivers appointed by a court of chancery are not subject to attachment in an action at law, since, in the absence of statutory authority, a court of chancery will not permit interference with its operations by proceedings at law.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 181.*]

4. RECEIVERS (§ 181*)—GARNISHMENT—VALIDITY.

Where a receiver, appointed by a federal court to operate a railroad, was garnished in an action at law in a state court, such garnishment being a nullity, the receiver incurred no responsibility by ignoring the service and all other subsequent proceedings based thereon.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 181.*]

5. COURTS (§ 501*)—FEDERAL COURTS—JURISDICTION—CONTEMPT.

Where, after the appointment of a receiver to operate a railroad by a federal court, garnishment proceedings were illegally instituted against him without leave in a state court, the court appointing the receiver had jurisdiction to order the dismissal of the garnishment and all proceedings based thereon and to enforce such order by contempt proceedings.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 501.*]

In Equity. Suit by the Central Trust Company of New York, as trustee, against the Wheeling & Lake Erie Railroad Company. Application by B. A. Worthington, as receiver, to restrain Dr. J. C. Dignan and Fritz Rudin, his attorney, from continuing proceedings in a suit in the state courts to subject certain earnings alleged to belong to their judgment debtor, Frank Scott, to the payment of such judgment, and to punish the said Dr. J. C. Dignan and Fritz Rudin for contempt. Granted.

Squire, Sanders & Dempsey, for receiver.
Fritz Rudin, for respondents.

KILLITS, District Judge. On the 12th of December, 1910, Dr. J. C. Dignan brought an action in a justice court of Lorain county against one Frank Scott, to recover the sum of \$18 for professional services; the respondent Fritz Rudin being his counsel.

The bill of particulars sets up the allegation that Scott was in the employ of, and had money in the possession of, B. A. Worthington, receiver of the Wheeling & Lake Erie Railroad Company, and an ef-

fort was made to garnish the receiver, who was appointed by this court in this action, with power to operate the railroad.

The receiver made no response as garnishee, but wholly ignored the proceeding. Thereafter Dr. Dignan, with the respondent Rudin as attorney, brought an action before a justice of the peace of said county against Worthington, receiver, on account of the latter's alleged statutory liability as garnishee in failing and refusing to respond to the order to pay in the money supposed to be due Scott. Service of summons in this action was had upon the receiver, who ignored the same, and on the 11th of January, 1911, a judgment against the receiver by default was taken.

Upon the 30th of the same month, proceedings in aid of execution upon the last-named judgment were begun, and an attempt was made to bring in the ticket and freight agent of the receiver at Wellington to respond to the execution, which proceedings were ignored by the receiver.

On the 14th of February, 1911, what the respondents denominate a garnishee liability suit was begun against the ticket agent on account of his failure and refusal to answer the notice in the proceedings in aid of execution.

At this juncture an application was made to this court for a rule on Dignan and his attorney, Rudin, to show cause why they "should not be required to dismiss said action against the ticket agent and cease prosecuting the enterprise in which they are engaged or be held in contempt of this court." An order as prayed for was issued, and the respondents are before the court.

[1] Prior to the act of March 3, 1887, amended by the act of August 13, 1888, a receiver appointed by this court could not be sued in the state court for any purpose without the consent of this court.

[2] The act in question provides (section 3) that:

"A receiver may be sued *in respect of any transaction of his in carrying on the business* connected with such property without previous leave of court by which such receiver was appointed."

And the difficulty which the respondents Dignan and Rudin have gotten into is born of a misconstruction of that statute. They err in assuming that, when they attempted to make the receiver a garnishee in their original action against Scott, they were suing the receiver.

It is fundamental that a receiver is not subject to attachment or garnishment as to funds in his possession without leave of court.

"The receiver's possession being the possession of the court from which he derives his appointment, he is not subject to the process of attachment or garnishment as to funds in his hands or subject to his control, and such process will be regarded as a nullity when directed against him." High on Receivers, § 151.

In *Davis v. Gray*, 16 Wall. 203, 218, 21 L. Ed. 447, the Supreme Court said:

"Money or property in his hands is in custodia legis. He has only such power and authority as are given him by the court, and must not exceed the prescribed limits. The court will not * * * permit his possession to be disturbed by force. * * * In such cases the court will vindicate its authority, and, if need be, will punish the offender by fine and imprisonment

for contempt. * * * Where property in the hands of a receiver is claimed by another, the right may be tried by proper issues at law, by a reference to a master, or otherwise, as the court in its discretion may see fit to direct."

We have been referred by respondents to the case of *Boylan v. Hines*, 62 W. Va. 486, 59 S. E. 503, 13 L. R. A. (N. S.) 757, 125 Am. St. Rep. 983, and especially to the annotation to this case found in 13 L. R. A. (N. S.) 757. We quote this paragraph from the notes as stating what may be assumed to be the established law:

"In the absence of express statutory authority therefor, it is settled law that, in general, funds in custodia legis are not subject to either attachment or garnishment. It is asserted by many courts and text-writers, however, that, after the person who is entitled to a fund has been ascertained, together with the amount to which he is entitled, and an order has been made for payment, the custodian then becomes the agent of such party, and may thereafter be garnished, or the fund in his custody attached."

In this case the situation in which respondents find themselves must be referred to the time when they attempted to garnish the receiver in their action against Scott.

The Circuit Court for the District of Kentucky, in *Central Trust Company v. East Tennessee, V. & G. R. Co.*, 59 Fed. 523, very clearly limits the application of the act of 1887, amended 1888, to actions against the receiver which grow out of acts and transactions in respect to carrying on the operations of the railroad. On page 528 of the opinion the court say:

"The act does not affect suits not having their origin in the operation of the railroad by the receiver. * * * Garnishment proceedings are not suits against the receiver for any act or transaction of his, and such claims must be prosecuted in the manner heretofore settled by order in this cause. Such claims filed with the commissioner appointed to hear them can be thus more speedily and economically determined than by the institution of regular suits."

This opinion has been followed by the Circuit Court of Appeals of this circuit in *Comer v. Felton*, 61 Fed. 731.

[3] Receivers are appointed by a court in chancery, and an action in attachment is a proceeding at law. It is easy to understand why, in the absence of statutory authority, a court in chancery will not permit its operations to be interfered with by proceedings at law.

[4] It seems very clear to the court that the respondents had no right to drag the receiver, an officer of this court, into the suit they had against Scott, by the ancillary process of garnishment, and the receiver was well within his rights and incurred no responsibility whatever when he ignored the service. The garnishment was a mere nullity, and, in consequence, all subsequent proceedings by the respondents were nullities, so far as they attempted to affect the receivership.

Referring again to the quotation from the annotation in 13 L. R. A. (N. S.) 758, it is not improbable that respondents have failed to notice the distinction between the situation here and that which would, in some jurisdictions, support an exception to the general rule that a receiver cannot be garnished. There was no adjudication, at the time an attempt was made to garnish the receiver, of an amount due from him to Scott. As to any claim that Scott may have had

upon him, the receiver had had no day in court. Consequently, the situation had not arisen to which may be applied even the exception referred to.

The decision, as we are using it, of the case in 59 Fed., is not, as respondents suggest, mere obiter, but the facts of that case necessarily involve the limitation which the court made of the operation of the act of 1887-88. If it may seem that the point is not in that case, we follow the language of that opinion and so construe and limit the act with direct application to this case.

This is not a case wherein the authorities touching the right of this court to enjoin, offered by respondents, apply.

[5] On the authority of *Davis v. Gray*, supra, the respondents are subject to the court's control by proceedings for contempt, and it is clearly within the jurisdiction of the court to place an alternative order upon them.

The order of the court, therefore, is that each of the respondents be, and they hereby are, declared to be in contempt of this court, and that they purge themselves thereof by forthwith dismissing the pending proceedings before Justice Binehower, of the township of Wellington, Lorain county, Ohio, and pay the costs of the several proceedings, so far as costs may have therein been attempted to be taxed against the receiver or O. B. Williams, ticket and freight agent of the receiver at Wellington, Ohio, and pay the costs of this proceeding; failing which, such further order will be made herein as the circumstances may require.

INTERNATIONAL TEXT-BOOK CO. v. LEADER PRINTING CO.

SAME v. HEISLER.

(Circuit Court, N. D. Ohio, W. D. November 5, 1910.)

Nos. 2,040, 2,041.

1. LIBEL AND SLANDER (§ 82*)—NEWSPAPER ARTICLE—APPLICATION TO PLAINTIFF.

Defendants wrote and published a newspaper article attacking correspondence schools of education, headed with the word "graft," and charging that the contracts required by concerns engaged in such business were one-sided, harsh affairs, which no business man would care to sign, and that the victims were unfortunately boys and young men in the most straightened circumstances, who were forced because of hardships of the contract to break it, and then in their inexperience were quite readily frightened by a petty lawyer who could be hired for such work. The article contained instances of such defaults, etc., and concluded with the question as to the legality of the use of the mails to coerce an inexperienced victim with the threat to sue under such a contract to get his money for a value never received. *Held* that, since the article referred to a class and not to a particular individual or concern, a petition, charging that the article was libelous as to plaintiff, must allege that it was intended to apply to plaintiff and was so understood in the community where it was published.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 187-197; Dec. Dig. § 82.*]

2. LIBEL AND SLANDER (§ 9*)—BUSINESS LIBEL—WORDS LIBELOUS PER SE—SPECIAL DAMAGES.

Where a libel contains an imputation on an individual or corporation in respect to its business, it is libelous per se and sufficient to sustain an action without allegation or proof of special damages.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 80-90; Dec. Dig. § 9.*]

3. LIBEL AND SLANDER (§ 123*)—WORDS LIBELOUS PER SE—"GRAFT."

Where an alleged libelous article attacking correspondence schools of education was headed with the word "graft" and attacked the contracts and mode of doing business by such schools as unjust, harsh, etc., whether the term "graft" was used in its most reflective sense as involving wrongdoing and illegality, or in its nonobjectionable sense as a "soft snap," was for the jury.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 123.*]

4. LIBEL AND SLANDER (§ 21*)—NEWSPAPER PUBLICATION—CLASS OF INDIVIDUALS.

Under Rev. St. Ohio 1908, § 5093, providing that, in an action for libel or slander, it shall be sufficient to state generally that the defamatory matter was published or spoken of the plaintiff, where an alleged libelous article was an attack on a class of persons and corporations engaged in correspondence school education, the fact that it did not expressly refer to plaintiff, a member of that class, did not render it the less libelous where it was intentionally directed at plaintiff and was so commonly understood in the community.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 103; Dec. Dig. § 21.*]

At Law. Actions by the International Text-Book Company against the Leader Printing Company and against Charles B. Heisler. On demurrer to petitions. Overruled.

David C. Harrington and C. O. Richey, for plaintiff.
Hoskins & Smith, for defendants.

KILLITS, District Judge. These cases count upon the same publication; one being against the publisher of the newspaper containing the alleged libel, and the other being against the assumed author of the article.

The matter is before the court upon a demurrer to the second amended petition, the grounds of the demurrer being that the second amended petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant, and, secondly, that this action was not brought within the time limited for the commencement of such actions as fixed by the statutes of the state of Ohio.

A demurrer for these same reasons was interposed to the first amended petition and overruled as to the second ground and sustained as to the first ground. The situation has not changed with regard to the second ground since the action of the court upon the first amended petition; wherefore, the demurrer will be overruled as to the second ground.

The first ground, as stated, is comprehensive enough to raise the question whether the article published in the "St. Mary's Leader," and alleged to have been written by the defendant Heisler, in the case of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the plaintiff against him, was libelous per se, and, if so, whether the second amended petition sufficiently connects the libel with the plaintiff company. The demurrer to the amended petition was sustained on this ground, the judge then sitting noting on the back of the demurrer an opinion that the article upon which the libel is predicated did not seem to be libelous.

[1] Comparing the amended petition with the second amended petition now before us, this court is of the opinion that, as the article was pleaded in the first amended petition, it was not libelous at the suit of the plaintiff, for want of an allegation therein (which has been supplied in the second amended petition) alleging that the reflections in the article, which were therein apparently directed at a class rather than an individual member of the class, were intended to apply to the plaintiff and were so understood in the community in which the article was published. The plaintiff now alleges this fact very clearly, and, as the pleading now stands, the court is of opinion that the demurrer on the first ground should be overruled also.

The article is headed with the word "GRAFT" in large type, followed by a question mark; contains reflections upon the character of the contract for instruction by correspondence which is being advertised and exploited in the community, depicting the contract as a one-sided and harsh affair which "no sane business man would care to sign," states that its victims are "unfortunately our best boys and young men in the most straightened circumstances," who are forced, because of the hardships of the contract, to break it, and then "in their inexperience are quite readily frightened by a petty lawyer who can be hired for such work."

The article contains instances of the default of young men upon this contract and of the harsh efforts of the other party thereto, the correspondence school, to enforce its terms, and, in general, belittles the character of the service performed under the contract for which a large charge is made, and concludes with the question:

"Is it a legal use of the mails to coerce an inexperienced victim with the threat to sue under such a contract for the purpose of getting his money for a value never received?"

In the body of the article is quoted what is alleged to be an actual letter sent by "a little lawyer * * * located at Lima," threatening the commencement of legal action against the recipient to enforce the payment of the entire balance due upon the contract, and the question is asked whether "every line of this proposition does not spell 'graft' in big letters," and the question is raised whether any person but an inexperienced youth or woman would sign such a contract as that put out by the institution under attack.

[2] No special damages are alleged, but the law seems to be well settled that, where a libel contains an imputation upon an individual or a corporation in respect to its business, the same becomes libelous per se, and in an action thereon it is not necessary to allege special damages. Among many cases on this subject we cite only *Ohio & Mississippi Ry. Co. v. Press Publishing Co.* (C. C.) 48 Fed. 206; *Victor Safe & Lock Co. v. Deright*, 147 Fed. 211, 77 C. C. A. 437; *Stern-*

berg Mfg. Co. v. Miller, etc., Mfg. Co., 170 Fed. 298, 95 C. C. A. 494. That the natural effect of this article, if it is understood in the community to apply to the contracts put out by the plaintiff, would be to prejudice the community against the plaintiff's method of doing business, and thereby cripple its opportunities to do business, seems very clear, and this is the test in this class of libels to determine whether the publication is libelous per se.

[3] Counsel for the plaintiff found in the use of the word "graft" alone actionable libel, and the innuendo pleaded was solely based on the use of that term. We are not willing to concede that it is libelous to use that term alone, for the word has several meanings in common use. Colloquially and politically we understand it to involve wrongdoing and illegality, but it has another use very common, so common as to be recognized by the latest edition of Webster's New International Dictionary, that does not involve the idea of wrongdoing at all, but which may be only defined by the terms of the language with which it is used, for a "graft" as thus used may be defined as a "soft snap." But as the court says in *McClure Co. v. Philipp*, 170 Fed. 910, 96 C. C. A. 86, the word "graft" may have a sinister meaning when taken in connection with other criticisms of the acts of the party attacked set forth in the article under consideration, and it is in connection with acts of the plaintiff which the writer of the article deems impositions upon susceptible and ignorant people that this term is used. At any rate, as the term is used in this article, it would be for the jury to say whether it was intended to be used in its most reflective sense.

[4] Counsel for the defendant, in urging the demurrer, was not disposed to take issue with the proposition that this article was generally libelous per se, but founded his argument mainly upon the proposition that, because the plaintiff was not directly referred to in the article, it was an attack upon the class of correspondence schools and, consequently, not actionable, citing *Watson v. Detroit Journal Co.*, 143 Mich. 430, 107 N. W. 81, 5 L. R. A. (N. S.) 480. The editor of the L. R. A., in annotating this case, while not at all attacking the principle that a libel cannot be predicated by one of a class upon a publication referring generally to concerns in business of that class, yet very justly, it seems to us, questions the application of that principle to the facts of the case itself, and very clearly, it seems to us, in the note to the case, shows how it may not be an authority for a case such as we have at bar. The note says:

"Upon principle * * * there is no reason why it should not * * * be for the jury to determine whether or not a publication which in its terms refers to a class or collection of individuals or to their business can be fairly construed to mean one or more particular individuals of the class referred to"—citing authorities.

As we have seen in the case before us, the present pleading distinctly avers that this article was intentionally directed at the plaintiff and was so commonly understood in the community.

Counsel are also referred to *Mauk v. Brundage*, 68 Ohio St. 89, 67 N. E. 152, 62 L. R. A. 477.

Section 5093 of the Revised Statutes of Ohio of 1908 (section 11,341, General Code) provides:

"In an action for a libel or slander it shall be sufficient to state generally that the defamatory matter was published or spoken of the plaintiff."

The second amended petition is, therefore, sufficient under the Ohio practice, which, of course, governs in this instance.

DA PRATO STATUARY CO. v. GIULIANI STATUARY CO.

(Circuit Court, D. Minnesota, Third Division. May 19, 1911.)

1. TRADE-MARKS AND TRADE-NAMES (§ 95*)—UNFAIR COMPETITION—TEMPORARY INJUNCTION.

A temporary injunction against the publication by defendant in its catalogue of pictures of statuary which it produces and sells for the decoration of churches and religious edifices which are exact copies of pictures in the catalogue of complainant, which is engaged in the same business, will not be granted on the ground of unfair competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 108; Dec. Dig. § 95.*]

Unfair competition in use of trade-mark or trade-name, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

2. COPYRIGHTS (§ 83*)—INFRINGEMENT—INJUNCTION—EVIDENCE.

In a suit to enjoin the publication by defendant in its catalogue of copies of cuts copyrighted by complainant, evidence held to show that the cuts in defendant's catalogue were copied from those copyrighted by complainant.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 74-76; Dec. Dig. § 83.*]

3. COPYRIGHTS (§ 83*)—INFRINGEMENT—INJUNCTION—EVIDENCE.

In a suit to enjoin the publication by defendant of cuts copyrighted by complainant, where it is proven that the defendant has copied one or more of the copyrighted cuts, a finding that the others as to which no explanation is made were also copied is supported by the evidence.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 74-76; Dec. Dig. § 83.*]

4. COPYRIGHTS (§ 9*)—SUBJECT OF COPYRIGHTS—CUTS.

Cuts of statuary and other articles for the decoration of churches and other religious edifices in the catalogue of a firm engaged in producing and selling such articles are proper subjects of copyright.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 7; Dec. Dig. § 9.*]

Matter subject to copyright, see note to *Cleland v. Thayer*, 58 C. C. A. 273.]

5. COPYRIGHTS (§ 5*)—SUBJECTS OF COPYRIGHTS—TRADE CATALOGUE.

A trade catalogue may be the subject of a copyright.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 3; Dec. Dig. § 5.*]

6. COPYRIGHTS (§ 38*)—EXTENT OF RIGHTS ACQUIRED.

Under Copyright Act March 4, 1909, c. 320, § 3, 35 Stat. 1076 (U. S. Comp. St. Supp. 1909, p. 1290), providing that the copyright shall protect all the copyrightable component parts of the work "copyrighted," where complainant copyrighted its catalogue of statuary and other articles for

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the decoration of churches and other religious edifices, it was entitled to the protection of the copyright law as to each cut contained therein.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 38.*]

7. COPYRIGHTS (§ 85*)—INJUNCTION—EXTENT OF INFRINGEMENT.

Where complainant's catalogue contained 2,813 cuts and of these 18 which were legally copyrighted were reproduced in defendant's catalogue which contained 393 cuts, this is sufficient to justify the granting of an injunction, but the injunction should be limited to the cuts that have been copied.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 78; Dec. Dig. § 85.*]

In Equity. Bill by the Da Prato Statuary Company against the Giuliani Statuary Company. On motion for temporary injunction. Granted.

This is a bill in equity brought by the complainant company of Chicago, a producer and seller of statuary and other articles for the decoration of churches and religious edifices. The bill alleges that complainant for the furtherance of its business, at great expense and labor, prepared and issued a trade catalogue containing pictures and cuts of its various statuary and articles; that said catalogue was duly copyrighted, and that since the issuance thereof the defendant company, which is engaged in the same business at St. Paul, Minn., prepared and issued a catalogue of its own, wherein, and without the permission of the complainant, it reproduced exact copies of many of the cuts contained in complainant's catalogue. The defendant avers that the statues shown in the cuts in complainant's catalogue are merely copies of statues which have been for years in existence in Europe; that they are not the subject of copyright; and, further, that complainant's catalogue itself is not a subject of copyright.

The evidence of complainant tended to show the following facts: That these statues can be produced only by the exercise of high artistic skill and care. For instance, a plaster of paris statue is received from Europe, and, as a general rule, the modeling is artistically good, but the decoration is inferior. Such statues are therefore dismembered, the decoration removed, new casts made and joined together, making a statue without decoration. The modeling and reassembling require a high degree of skill, care, and accuracy. The points of juncture have to be very carefully filled so as to conceal the same. The statues are then redecorated and colored, all of which involves the employment of skilled artists and persons thoroughly well trained in the art. Also the illustrations can only be produced by the employment of photographers skilled in the art of properly modulating and diffusing the light, so as to show the article as it appears in reality.

Edward C. Stringer, McNeil V. Seymour, and Edward S. Stringer (Frank F. Reed and Edward S. Rogers, of counsel), for petitioner.
John E. Stryker, for defendant.

WILLARD, District Judge (after stating the facts as above).
[1] The motion of the complainant for a temporary injunction, so far as it is based upon the claim of unfair competition, is denied. It is necessary, however, to consider whether such an injunction should be granted on the ground that the defendant has infringed the complainant's copyright.

[2] The complainant has offered evidence tending to show that 117 of the cuts contained in its catalogue have been copied in the defendant's catalogue; but no proof has been presented to show that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

any of these photographs so used by the defendant have been copyrighted by the complainant, except 18. The evidence shows that as to these 18 photographs or cuts the complainant has complied with the provisions of the law for the purpose of securing a copyright.

That cuts similar to these 18 cuts of the complainant appear in the defendant's catalogue is not disputed. Some attempt is made to explain the source from which the defendant derived its cuts. The affidavit of Giuliani and the affidavit of McCoy state that defendant's cut No. 372, which is like complainant's cut No. 2,739, was made from a photograph sent from Italy. Gaul, the president of the complainant, in his second affidavit states that this is impossible. An examination of the two cuts, in the light of what is said by Gaul in his affidavit, satisfies me beyond a doubt that the defendant's cut 372 was made, not from a photograph taken in Italy, but was made from a photograph of complainant's cut 2,739.

I am also satisfied that the same thing is true with reference to complainant's cut 2,737, copied by the defendant's cut 373, and complainant's cut 2,741 copied by defendant's cut 371. As to defendant's No. 371, it is to be observed that Giuliani says that it was taken from a photograph sent from Italy, while McCoy says it was copied from a photograph sent to the defendant by the Vermont Marble Company.

The defendant does not apparently deny that its cut No. 187 is a copy of the complainant's cut 913, but it says that cut 913, together with cut 2,737, had been previously published by the complainant in an uncopyrighted circular, or art review. This the complainant denies, and the defendant has not produced any such art review, which was not copyrighted.

The defendant further claims that complainant's cuts 346, 348, and 349 were published in a catalogue of Benziger Bros., of Cincinnati, without any reservation of copyright by the complainant. The defendant, however, produces no copy of that catalogue. This it should have done. *List Pub. Co. v. Keller* (C. C.) 30 Fed. 772.

As to the other cuts included in the 18 above mentioned, no explanation is offered by the defendant.

[3] It having been proven that the defendant has copied one or more cuts, a finding that the others as to which no explanation is made were also copied is easily supported by the evidence. *Chapman v. Ferry* (C. C.) 18 Fed. 539, 542; *Lawrence v. Dana*, 4 Cliff. 1, Fed. Cas. No. 8,136. It is therefore proven that the defendant has copied 18 of the cuts included in the complainant's copyrighted catalogue, which cuts had not before appeared in any uncopyrighted publication.

[4] The representations in the complainant's catalogue are proper subjects of copyright. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53, 4 Sup. Ct. 279, 28 L. Ed. 349; *Bleistein v. Donaldson Lithographing Co.*, 188 U. S. 239, 23 Sup. Ct. 298, 47 L. Ed. 460.

[5] A trade catalogue may be the subject of a copyright. *Maple v. Junior Army & Navy Stores*, Law Rep. 21, Chan. Div. 367 (1882).

In the case of *Lamb v. Grand Rapids School Furniture Co.* (C. C.) 39 Fed. 474 and which was a case of a trade catalogue, and was cited by the defendant, it did not appear that the defendant's cuts

were copied from the plaintiff's cuts, and the court assumed that defendant's cuts were made from photographs of its own stock.

In the case of *J. L. Mott Iron Works v. Clow*, 82 Fed. 316, 27 C. C. A. 250, it appeared that the particular illustration claimed to have been copied were those of a wash bowl, slop sink, bathtub, footbath, sponge holder, brush holder, and a robe hook. It was held that pictures of these objects were not proper subjects of copyright. But the objects there illustrated are very different from the objects illustrated in the catalogue in this case. All that was decided in the case of *Baker v. Selden*, 101 U. S. 99, 25 L. Ed. 841, cited by the defendant, was that a claim of exclusive property in a peculiar system of book-keeping could not, under the law of copyright, be maintained by the author of a treatise in which that system is exhibited and explained.

[6] The complainant having copyrighted its entire catalogue was entitled to the protection of the copyright law as to each cut contained therein; Copyright Act March 4, 1909, c. 320, § 3, 35 Stat. 1076 (U. S. Comp. St. Supp. 1909, p. 1290) *Dam v. Kirk La Shelle Co.*, 175 Fed. 902, 99 C. C. A. 392.

[7] The complainant's catalogue contained 2,813 cuts; of these 18 which were legally copyrighted were reproduced in defendant's catalogue which contained 393 cuts. Though the number thus reproduced is small, yet it is sufficient to justify the granting of an injunction. *Lawrence v. Dana*, 4 Cliff. 1, Fed. Cas. No. 8,136; *Campbell v. Scott*, 11 Simons, 30; *Leslie v. Young & Sons*, 6 Rep. 211, House of Lords (1894); *West Publishing Co. v. Lawyers Co-operative Publishing Co.*, 79 Fed. 756, 25 C. C. A. 648, 35 L. R. A. 400.

The injunction should, however, be limited to the 18 cuts that have been copied. List Pub. Co. v. Keller (C. C.) 30 Fed. 771; *Campbell v. Scott*, 11 Simons, 30; *Leslie v. Young & Sons*, 6 Rep. 211, House of Lords (1894).

Let an injunction issue, restraining the defendant, as prayed for in the bill, not as to its entire catalogue, but only as to the 18 cuts described on page 8 of the affidavit of Godfried J. Gaul sworn to on April 20, 1911. In the last line of the affidavit, however, the number of the defendant's cut should be "371" instead of "381." The complainant will furnish a bond in the sum of \$5,000.

IN RE BONER.

(District Court, N. D. Ohio, W. D. November 9, 1910.)

No. 1,516.

1. BANKRUPTCY (§ 228*)—PROCEEDINGS BY REFEREE—REVIEW OF FINDINGS OF FACT.

The court is not disposed to disturb findings of fact by the referee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 387; Dec. Dig. § 228.*]

Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. MECHANICS' LIENS (§ 156*)—NOTICE TO OWNER—VERBAL NOTICE—"NOTIFY."

Under Rev. St. Ohio, § 3185, providing that a person filing an affidavit or a mechanic's lien shall within 30 days thereafter notify the owner of the property, his agent, or attorney that he claimed such lien, verbal notice is sufficient. The word "notify" as generally used does not imply the use of writing; it meaning simply to convey information, knowledge, or notice in whatever way.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 187; Dec. Dig. § 156.*

For other definitions, see *Words and Phrases*, vol. 5, pp. 4845, 4846.]

In the matter of John T. Boner, bankrupt. Heard on petition by creditor to review an order of the referee. Petition dismissed.

L. F. Conway and W. P. Duffy, for petitioners.

Thomas Mulcahy, for bankrupt.

J. R. Linthicum and C. R. McComb, for trustee.

KILLITS, District Judge. This case is before the court upon a petition by a creditor to review the order of the referee ascertaining the priority of liens. The question as certified by the referee is as follows:

"The bankrupt was the owner of several parcels of real estate, among which was Inlot No. 194, in Napoleon, Ohio. Said real estate has all been sold by the trustee and a meeting was held to determine priorities among lienholders. Leonhart Bros., of Napoleon, are claiming the first lien upon said inlot No. 194, and C. W. Fisher, a subsequent lienor, contends that the lien of said Leonhart Bros. is null and void for the reason that the notice required by section 3185, R. S. of Ohio, was not given.

"The questions presented are: (1) Was there any notice of any kind? (2) If there was verbal notice, was that sufficient?"

The referee answered both of these questions in the affirmative, and sustained the lien of Leonhart Bros., which depended upon a verbal notice, if any.

[1] Whether or not verbal notice was given depends upon the consideration of conflicting testimony. The referee had the witnesses before him and was better able to judge of their respective credibilities than is the court on review, and we are not, for that reason, disposed to disturb his finding of fact; yet in the transcript it would appear that the more convincing evidence suggested that a verbal notice to the debtor was in fact given.

[2] We think, also, that the referee was right in determining that, under the statute in question, a verbal notice was sufficient. The statute, which is now section 8315, General Code, provides:

"Such person so filing the affidavit herein provided shall, within thirty days thereafter, notify the owner of the property, his agent or attorney, that he claims such lien, and, if he fail to do so, the lien so secured shall be null and void."

The word "notify," as generally used, does not imply the use of writing. It means simply to convey information, knowledge, or notice, in whatever way. Words of a statute are to be construed according to the ordinary usage and are to be given their ordinary and general significance, unless there is found in the statute itself or in the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

policy of its enactment some reason to modify or restrict their meanings. *Favorite v. Boohers*, 17 Ohio St. 548-554; *Matter of Hathaway*, 4 Ohio St. 385.

We see nothing in either the language or the policy of the section under consideration to require a limitation of the word "notify" to an act in writing. The filing of a mechanic's lien is constructive notice to all creditors or to parties thereafter furnishing materials to the debtor of the lien, and the law means also to secure knowledge to the debtor of the fact that his property is under a lien and casts the duty of imparting that information upon the lienholder. How that notice is given, whether in writing or verbally, provided also that it is timely and actual, seems immaterial, and not a question at all involved in the law's policy, which is that nothing more than an actual notice directly to the debtor from the lienholder should be given.

A similar use of this word in a like statute has been construed as we construe it in another state. *Vinton v. Builders' & Manufacturers' Association*, 109 Ind. 351, 9 N. E. 177.

We see no lack of harmony between this decision and the decision in *Moore v. Given*, 39 Ohio St. 661.

The petition to review is dismissed, at the costs of the petitioning creditor.

PARKE-DAVIS & CO. v. H. K. MULFORD CO. (two cases).

(Circuit Court, S. D. New York. April 28, 1911).¹

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—ADRENALIN.

The Takamine patent, No. 730,176, for a substance called "Adrenalin," extracted from the suprarenal glands of living animals, and containing the active principle of such glands practically free from inert constituents, and crystalline in its dry form, is valid, and, excepting claims 1 and 2, covers not only the dry powder but also its solution, but not its salts. Claims 1, 2, 6, 9, 11, 12, 13, 14, and 15 *held* infringed by the dry product of defendants, known as "Adrin," but not by defendant's solution, which is of a salt of Adrin.

2. PATENTS (§ 101*)—VALIDITY—MULTIPLICATION OF CLAIMS.

It is not objectionable for a patentee to first make as broad a claim as he can in good faith and follow it with narrower claims differentiated from each other to protect himself against possible anticipations of which he may not be aware.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 141; Dec. Dig. § 101.*]

3. PATENTS (§ 51*)—VALIDITY—UTILITY OF PRODUCT.

A substance extracted from animal tissue for medicinal use, which is new, practically and therapeutically may be patentable, although it differs from previous preparations only in its degree of purity from other portions of the tissue.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 66-74; Dec. Dig. § 51.*]

4. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—SOLUTION OF ADRENALIN.

The Takamine patent, No. 753,177, claims 1, 2, 5, and 6, for a substance consisting of the blood pressure raising principle of the suprarenal

¹For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

glands, or a salt of such product, in solution with a nonsuprarenal substance which renders the solution commercially stable, *held* not anticipated nor void for prior use, and also infringed. Claims 3 and 4 *held* void for anticipation.

In Equity. Two suits by Parke-Davis & Co. against the H. K. Mulford Company. Decree for complainant in each case.

This is a final hearing upon two bills in equity praying an injunction against the infringement of two patents. The subject patented in each case is an extract from the suprarenal glands of living animals, and the patent concerns only the product as extracted by the patentee. He also has taken out other patents for his process, which are not concerned here. The alleged infringements of the defendant consist of two products, one in the form of dry powder which constitutes the active chemical principle of the suprarenal glands, and the second a sodium chloride solution of the borate of that principle which is in commerce sold with a preservative such as acetone or chloretone. The complainant asserts that both the dry product and solution infringe the first patent, and that the solution infringes the second patent.

The following is the list of claims here in issue:

First patent:

"1. A substance possessing the herein-described physiological characteristics and reactions of the suprarenal glands in a stable and concentrated form, and practically free from inert and associated gland-tissue.

"2. A substance possessing the herein-described physiological characteristics and reactions of the suprarenal glands in a stable and concentrated form, practically free from inert and associated gland-tissue, and having a whitish color when in a dry or solid condition.

"3. A crystalline (sic) substance possessing the herein-described physiological characteristics and reactions of the suprarenal glands in a stable and concentrated form, and practically free from inert constituents.

"4. A substance possessing the herein-described physiological characteristics and reactions of the suprarenal glands in a stable and concentrated form, having a whitish color and a crystalline form when in a dry or solid condition, and melting at about 207 centigrade."

"6. A crystalline substance possessing the herein-described physiological characteristics and reactions of the suprarenal glands; said substance having the property of crystallizing in a variety of forms.

"7. A substance possessing the herein-described properties of the suprarenal glands having a whitish color, difficultly soluble in water at ordinary temperature, soluble in acids and forming salts therewith, soluble in alkalies, and melting at about 207 centigrade."

"9. A substance possessing the herein-described physiological characteristics and reactions of the suprarenal glands, practically free from inert and associated gland-tissue, and having an alkaline reaction."

"11. A substance possessing the herein-described physiological characteristics and reactions of the suprarenal glands, practically free from inert and associated gland-tissue, having an alkaline reaction and reducing properties.

"12. A substance possessing the herein-described physiological characteristics and reactions of the suprarenal glands, practically free from inert and associated gland-tissue, having an alkaline reaction, giving a green coloration in reaction with ferric salts, and a red coloration with iodine.

"13. A substance possessing the herein-described physiological characteristics and reactions of the suprarenal glands and which is not precipitated by the usual alkaloid test reagents.

"14. A substance possessing the herein-described properties of the suprarenal glands, practically free from inert and associated gland-tissue, having an alkaline reaction, giving a green coloration in reaction with ferric salts, and having reducing properties.

"15. The herein-described substance possessing hemostatic, astringent and blood pressure raising properties having a whitish color and a crystalline form, difficultly soluble in water at ordinary temperature, soluble in acids or

alkalies, possessing reducing properties, giving a green coloration in reaction with ferric salts and a red coloration in reaction with iodine.

"16. A solution possessing the herein-described physiological characteristics and reactions of the suprarenal glands in concentrated and stable condition, and from which solution is obtained the herein-described substance free from inert and deteriorating matter by simply neutralizing or removing the solvent."

Second patent:

"1. As an article of manufacture, a substance consisting of the blood pressure raising principle of the suprarenal glands chemically combined with a nonsuprarenal substance whereby the stability of a water solution of said blood pressure raising principle is maintained.

"2. As a new article of manufacture, a solution consisting of water and the blood pressure raising principle of the suprarenal glands chemically combined with a nonsuprarenal substance whereby the stability of the solution is maintained.

"3. As a new article of manufacture, a substance having the properties of the hemostatic astringent and blood pressure raising principle of the suprarenal glands substantially free from nonblood pressure raising constituents thereof, which is soluble in water and the water solution of which is practically inert to the oxygen of the air and gives a green coloration with ferric chloride and a red coloration with iodine.

"4. As a new article of manufacture, a compound of the crystallizable blood pressure raising constituent of the suprarenal glands substantially free from the noncrystallizable constituents thereof, which is soluble in water, and which when in water solution is practically inert to the oxygen of the air and gives a green coloration with ferric chloride and a red coloration with iodine.

"5. The substance consisting of a salt of the herein-described product of the suprarenal glands; said salt being easily soluble in water and possessing the physiological and therapeutic characteristics and reactions of said product in substantially stable and concentrated form.

"6. The substance consisting of a chemical compound of an inorganic acid and the herein-described product of the suprarenal glands; said compound having the physiological and therapeutic characteristics and reactions of said product in substantially stable and concentrated form."

Livingston Gifford, for complainant.

Charles Howson, for defendant.

HAND, District Judge (after stating the facts as above). [1] I will first take up the consideration of the mother patent, No. 730,176, and of the issue of infringement, which the complainant alleges to be double: First, the dry powder; and, second, a sodium chloride solution of the boric acid salt of the dry powder. The dry powder Adrin is produced by a somewhat different process from Takamine's "crude product," Adrenalin; but upon the divergence of those processes I do not mean to pass, for it does not seem to me necessary. The crucial step which Takamine discovered was that the base—it is true with some impurities—could be directly precipitated by an addition of ammonia, or strictly of caustic alkali and ammonium chloride, which together liberate the ammonia, which in turn effects the precipitation. This being a product patent, it is of no consequence whether the defendant's extraction in the first place by alcohol and trichloroacetic acid is the equivalent of an extraction by water and a subsequent addition of alcohol to precipitate albuminous substances. The purpose of both these steps is the same, and the following and crucial step is certainly the same. It may be possible that the preliminary steps result in eliminating different substances, and indeed that must be so as ap-

pears from the difference in the proportion of inorganic contamination in each; but the only question upon infringement is whether Adrin falls within any of the claims here in suit.

It certainly falls within claim 1 if it be free from inert and associated gland-tissue. No one supposes that these words mean that the actual cellular structure of the tissue remains, for the process involves its destruction, though, were this not so, the words might quite naturally have been so understood. That meaning being eliminated, what is the most natural meaning? I think it can only mean those organic chemical substances, regardless of the structure, out of which the gland-tissue is composed and of the same chemical composition in which they exist and make up the gland-tissues. To these may well be added those substances arising in the normal metabolism of the tissue of other organs or of the glands themselves, which, being carried in the blood, might remain in the glands at death. Such of these substances as have not the physiological activity of the "principle," now known, are the "inert and associated gland-tissue" mentioned in the claim. Nor can this mean a new chemical disintegration of the "gland-tissue" so described of which there is much in Adrenalin and over six times as much in Adrin. This substance, ammonium magnesium phosphate, is a new and inorganic substance arising from the regrouping of atoms which have, it is true, been a part of the gland-tissue, but which have been broken from the molecules which constituted their original form. Since the chemical distinction between "substances" depends, not upon the presence of the same atoms, but upon their definite structural association in known proportion into molecules, it is illegitimate to consider as "gland-tissue" those substances which, while they represent in part the same atoms, have by rearrangement and by addition of new atoms created new molecules. Moreover, the patent itself corroborates this view. The crude product was the patented substance, and it appears (page 2, lines 50-70) that the patentee understood perfectly well that without purification there would be inorganic matter in the crude product. Moreover, the amendment in the Patent Office of the words "inert constituents" to the words "inert and associated gland-tissue" clearly indicate the patentee's intention.

The question remains, however, whether Adrin is in fact free from organic tissue, and upon this there is some dispute. Sadtler found that under the biuret test Adrin showed a rose color. This indicated proteids, and for organic sulphur he used the nitro prusside sodium test. These tests in Chandler's opinion are so delicate that they will detect a mere trace, and Sadtler does not dispute that fact. The question may perhaps be best decided by considering first whether Adrin is substantially as free as Adrenalin from organic matter, and then considering whether Adrenalin itself is "practically free" within the meaning of the claims. One test much relied on by both experts is that of physiological activity. Adrin, having a much higher ash than Adrenalin, ought to show a correspondingly lower activity. In fact, it shows a more than correspondingly lower activity, thus indicating the presence of some other substance not inorganic, i. e., organic. It would seem that Adrin had therefore somewhat more organic contamination

than Adrenalin. However, in view of the very baffling results of the physiological experiments compared with the other tests, I am not disposed to press this quantitative comparison too far. Indeed, my own belief is that the matter has not been thoroughly cleared up in the testimony at all, and that considering the similarity of the processes, the use of each substance practically, and the approximation of result physiologically, the two are near enough to be an infringement one of the other. Indeed, the contrary is not sharply urged. However, the question remains whether Adrenalin is itself "practically free," and upon that issue the burden is on the defendant, unlike the issue of infringement, because it involves the question whether the claim covers the disclosure.

Sadtler upon this question calls attention to the results of his modifications of Von Furth's process, in which he showed much ingenuity. These so-called Von Furth intermediate products were three: Precipitate 5-A-3, Precipitate 1-B, "Crystalline Base." The first and third were negative in reaction to these biuret and other tests, and the second showed only a slight reaction. This indicated that all were free, or nearly free, from organic impurities; yet the amount of ash in each was very different. In 5-A-3 it was over 31 per cent., in 1-B it was about 7 per cent., and in "Crystalline Base" about 26 per cent. Now the physiological activity of 5-A-3 equalled that of crude Adrenalin, though the ash was more than seven times as great, while that of "Crystalline Base" was only one-eighth that of either. Similarly, 1-B had an activity equal to Adrenalin; the ash being also substantially the same. Both experts conceded that the sole physiologically active agent is the principle itself, and the result seems to be that the reason for the discrepancy between the activities must be the presence of organic substances not detected by Sadtler's tests. Against this there is Chandler's opinion that the conditions of crystallinity preclude the presence of organic matter, an opinion shared by Sadtler when dealing with Moore's Dialysate, and we have in the case of "Crystalline Base" purely negative test reactions. Why 5-A-3 shows an activity so disproportionate to the ash, I cannot say; it shows a similar disproportion to the Adrenalin purified, though less absolutely. I think that, to solve this apparent contradiction of evidence, one must have recourse, first, to the fact that the use of Adrenalin has been now sufficient to show that it is "practically free," and to the presumption from the patent itself that the disclosure answers the claims. Apparently the only difficulty ever arising from the intravenous use of Adrenalin was due to too strong solutions. These did cause destruction of tissue at the point of injection; but even they gave no evidence of contamination. I therefore hold that Adrin infringes claim 1.

Claim 2 is the same, with the addition of the words that the product is a "whitish" color. It appears that neither crude Adrin nor Adrenalin is, properly speaking, white. Each is a light yellow brownish color. Commercial Adrin is, however, near enough to a white to comply with the claim.

Claim 3 is like claim 1, except that the words "inert constituents" are substituted for "inert and associated gland-tissue." Now it un-

doubtedly appears in the specifications that the patentee did not suppose his crude product was wholly free from inert constituents, because he provided means of purification. However, the changes in the Patent Office clearly show that he must have meant something different by the phrase "gland-tissue" from what he meant by the phrase "inert constituents," and I do not think that any one can properly construe those words as not including ammonium magnesium phosphate. His own product did not contain a high percentage of ammonium magnesium phosphate—less than five per cent.—and it may well be that that is within the terms practically free; but the defendant's Adrenalin contains nearly seven times as much as that. I do not see how by any stretch of words that can be held to be free from inert constituents.

In claim 4 it is provided that the product shall melt at about 207 degrees centigrade. Now Adrin has not been shown to have melted even at 220 degrees and upwards. The difference proportionately is not great, and the patent is entitled to have a generous construction, yet I cannot think that a product is affirmatively shown to have a melting point of about 207 degrees when there is no proof of when it will melt at that heat, and there is proof that it will not melt at 220 degrees. It is true that Chandler says (Q. 10) that he had subjected the Adrin to all the tests required by the patent, and found that they corresponded; but this general statement cannot stand in the face of the express testimony of Sadtler upon that particular experiment. If the explanation of the experts be correct, that the high melting point is due to the mineral impurities, this finding is consonant with the finding that Adrin is not free from inert constituents. I therefore hold claim 4 not infringed.

Claim 6 is for a crystalline substance, and that Adrin certainly is. The only question which can arise is as to whether the base is crystalline, or whether it owes its crystalline character to the mineral admixtures. This claim, I think, should be construed as meaning that the substance is crystalline, however large or small the degree of mineral impurities may be. It is of no consequence if the crystals are composed in part of the earthy matter. So far as the substance is purified, the crystals will increasingly become crystals of the active principle.

Claim 7 is eliminated by my decision in regard to the melting point.

The new characteristic of claim 9 is that it shall have an alkali reaction. I do not understand that this is denied, and the same is true of claims 11 and 12.

The defendant's expert concedes that claim 13 covers the substance and claim 14 is involved in the decision of claim 12.

The defendant's Adrin answers all the characteristics of claim 15; the only question being as to the crystalline substance, which matter I have already passed upon.

Obviously the Adrin cannot infringe claim 16. I therefore find that the dry product infringes claims 1, 2, 6, 9, 11, 12, 13, 14, and 15.

The next question is whether the defendant's solution infringes any of the claims of patent No. 730,176. The solution is of a salt of Adrin

made with sodium chloride and boric acid, and this salt is dissolved in water and marketed with a preservative to keep it from decomposing. I entirely agree with the complainant that patent No. 730,176 covers solutions in general, and that the criticisms of the claims by the defendant in that respect are trivial. Not only would this be true independently, but the patent itself specifically provides that it shall cover solutions as well as the dried product. If, therefore, the alleged infringing solution was only a water solution of Adrin with a preservative added, I should have no trouble in holding that it infringed all the claims mentioned above. But, in view of patent No. 753,177, it seems to me quite clear that the earlier patent was not intended to cover any salt of the base itself. This is expressly recognized by the patentee himself on page 2, lines 88-93, where he says:

"Salts of the substance possess the same physiological properties as the substance itself and constitute new substances not claimed herein, but claimed in another application."

Again, claim 7 is for a substance "soluble in acids and forming salts therewith." The second patent was divided out upon the insistence of the examiner, who found that the bases of the salt were substances of separate and distinct chemical composition. Whatever, therefore, may be the proper scope of the claims of the patent, there can be no doubt that the patentee did not intend them to cover any salt, but that he distinguished the salt as a new substance not claimed in his mother patent. It so happens in my judgment that in this respect he was very fortunate, as will later appear.

The question next arises of the validity of all claims infringed by the dry product. This is attacked, first, because they are anticipated in the art; and, second, for a number of technical grounds which I shall take up in turn. The anticipations I will deal with first, because, in the view which I have taken of the two patents, that is the simpler consideration. The patentee originally attempted to claim the active principle itself. This was in his first application where he claimed process and product; but the examiner would not allow these claims, basing his rejection upon his interpretation of *American Wood Paper Co. v. Fibre Disintegrating Co.*, 23 Wall. 566, 23 L. Ed. 31, that no product is patentable, however it be of the process, which is merely separated by the patentee from its surrounding materials and remains unchanged. After some argument upon this score, the patentee voluntarily divided out the product patents expressing such intention on December 22, 1902. When he came to file his product patent, he proceeded upon the same theory, first claiming the active principle of the glands. The examiner required a division, but raised no objection to the form in which these claims were given. In his amendment of March 13, 1903, which was about two months after his first application, he changed all the claims so that they read substantially as they do at present and were not limited to the active principle. I think that this effected a substantial change in meaning, and that the defendant is right in insisting that the claims are now broader than a mere claim for the chemically free base, or active principle, and that they cover any substance

which possesses the physiological characteristics of the glands and is substantially pure. By doing this, Takamine therefore laid himself open to any anticipation which was a substance of that character, even though the substance did not contain the chemically pure base.

For example, if Abel had isolated the base of his monobenzoyleated salt, or Von Furth the base of his sulphate, Takamine would have been open to attack by either upon the theory that, even conceding that in neither case the base was that of the active principle alone and not in chemical composition, yet as a substance it corresponded to the claims. This he could have avoided had he limited his claims to the isolation of the active principle itself, and it would then have been of no consequence whether Abel's or Von Furth's compound had practically answered as well as his own. Nevertheless, as I have already said, the claims of patent No. 730,176 do not cover a salt and are especially designed to exclude a salt. It so happens, moreover, that all of four alleged anticipating products never existed except in the form of a salt. This Sadtler concedes. When I come to consider patent No. 753,177, I shall take up each of these products separately to see whether they anticipate the claims of that patent which covers the salts; but the only necessary question here is: Since they were not actually themselves bases, whether pure or impure, whether it involved invention to produce the base of Takamine. This question does not deserve any extended consideration. The difficulties of the old products were so great as made any substantial advance from them important. It is enough that Takamine was the first to isolate any base whatever, all other products existing in the form of a salt, because prior investigators were all trying to reduce the principle down as purely as possible. The invention was therefore novel.

[2] The first of the technical objections is because of the vague character of the claims of the patent and their fraudulent reduplication. I can see no basis whatever for this contention. As I have already said, the claims were not for the active principle, nor for the product of the process. Of course claims for a product not defined as the product of a process must contain in themselves adequate differentia, or they will not be good (*Cochrane v. Baddische Anilin Fabrik*, 111 U. S. 293, 310, 4 Sup. Ct. 455, 28 L. Ed. 433); but the only valid objection to multiplication of claims is when it appears that the patentee is trying deceitfully to go beyond the fair scope of his invention. I can see no evidence of that here, and the fact that I have sustained the broader claim is a complete answer to such a position. That Takamine in a number of instances should have added other claims more circumscribed in their scope was natural enough, and what every prudent solicitor ought to do. No one can in advance know how far anticipations will go or how little in the end his patent will cover. There is nothing improper, so far as I can see, in first putting your claims as broadly as in good faith you can, and then, *ex abundanti cautela*, following them successively with narrower claims designed to protect you against possible anticipations of which you are not yet aware. Indeed, the very case upon which the defendant relies (*Matheson v. Campbell*, 78 Fed. 910, 917, 24 C. C. A. 384) shows

the necessity of claims as broad as one can honestly support. If any one of the specified differentia of the claim is missing, the defendant's product does not infringe; if any anticipation includes all the differentia, the claim is bad. To pass between this Scylla and the Charibdis, I think a patentee may fairly be entitled to bend sails upon many yards. The question as to whether or not he is acting colorably is not answerable on general principles. He may, of course, attempt to monopolize more than was fairly his due, but in this case I have already said that I do not think he did so, especially as he was the first person who had ever isolated a nonsalt substance relatively pure.

Nor do any of the claims call for only an "effect." That rule I understand to mean nothing more than that the claims must not be too abstract. I do not think that any of the claims in the patent are at all abstract, but each forms a concrete enough criterion to test the product intended. There is no claim which selects a single characteristic or function. The very phrase "physiological characteristics and reactions of the suprarenal glands" refers to some 15 lines of the specification (page 2, lines 102-116), and this phrase is always coupled with at least two other differentia. That is sufficient to identify the product in my judgment in every case.

[3] Nor is the patent only for a degree of purity, and therefore not for a new "composition of matter." As I have already shown, it does not include a salt, and no one had ever isolated a substance which was not in salt form, and which was anything like Takamine's. Indeed, Sadtler supposes it to exist as a natural salt, and that the base was an original production of Takamine's. That was a distinction not in degree, but in kind. But, even if it were merely an extracted product without change, there is no rule that such products are not patentable. Takamine was the first to make it available for any use by removing it from the other gland-tissue in which it was found, and, while it is of course possible logically to call this a purification of the principle, it became for every practical purpose a new thing commercially and therapeutically. That was a good ground for a patent. *Kuehmsied v. Farbenfabriken*, 179 Fed. 701, 103 C. C. A. 243; *Union Carbide Co. v. American Carbide Co.*, 181 Fed. 106, 104 C. C. A. 522. That the change here resulted in ample practical differences is fully proved. Everyone, not already saturated with scholastic distinctions, would recognize that Takamine's crystals were not merely the old dried glands in a purer state, nor would his opinion change if he learned that the crystals were obtained from the glands by a process of eliminating the inactive organic substances. The line between different substances and degrees of the same substance is to be drawn rather from the common usages of men than from nice considerations of dialectic.

A final objection goes to the fact that the patent covers solutions as well as dry products, and that this solution is not stable. I agree with the defendant that the solution mentioned in patent No. 730,176 does not include a solution of the salt, and it is also in evidence that a plain aqueous solution is not stable in any sense of the word. On page 3, line 23 et seq., the patentee uses the following words:

"The substance may be kept in the solid form or in solution, and, where in the claims I have used the terms 'substance,' I desire it to be understood as referring to either the solid or the solution form of the substance, except when such signification would be plainly inconsistent with the terms of the particular claim."

There is indeed no way to avoid the conclusion, therefore, that the patentee has wrongfully specified his aqueous solution as stable, unless such an adjective would be plainly inconsistent with the terms of the particular claims. Now the infringed claims in which this word appears are Nos. 1 and 2. In these it is used in conjunction with the word "concentrated," and it appears beyond a doubt that the solution is not a concentrated substance, but, on the contrary, a highly dilute one. Thus, page 2, lines 104-107, the specifications mention solutions of 1 to 1,000 and 1 to 10,000. Moreover, the art knew that the only solutions of the suprarenal gland therapeutically possible were very dilute, though not to the extent indicated in the specification. I think that, considering this knowledge both from the patent itself and from the existing art, it is apparent that the two claims are "plainly inconsistent" with a solution, though the complainant appears to be content otherwise. And therefore I think that a solution is not comprehended by the adjective "concentrated." Indeed, without more knowledge than that it was a solution of the base, I should have no trouble in holding that it was not "concentrated." If so, the objection disappears to the instability of the solution, and the claims are valid, for no one asserts that the crystals are instable.

I therefore hold that dry Adrin infringes claims 1, 2, 6, 9, 11, 12, 13, 14, and 15.

[4] The next question is of patent No. 753,177, and the first matter there to be decided is of infringement. The defendant's solution is concededly a sodium chloride solution of the borate of the Adrin base with some preservative added. In the first place, one can easily dismiss the suggestion that only claim 2 is for a solution. It is trivial to urge that the substances mentioned in the other claims are solids and so do not cover themselves when in a water solution. What then are the claims? They are in three groups of two each. The first is for the "principle" which can only be Takamine's base—and any other stabilizing substance. The second is any substance having the properties of the base, and still stable. The third is for a stable salt of the "herein-described product," or the base. It is to be observed that the first and third groups are therefore explicitly for the base itself, and it is only the second which is answered by any substance defined only by its qualities. While this is not of consequence so far as infringement goes, it becomes so when the question arises of anticipation.

The only serious question which does arise upon the issue of infringement is whether the defendant's solution is "stable" or "inert" to the action of the air; these words being defined as used only in "a practical or commercial sense." The complainant attempts to help out this word by insisting that at least in claims 1 and 2 the addition of the preservative such as chloretone or chloroform can be considered as

within the nonsuprarenal substances which insure stability. It is conceded that the defendant's solution, and, for that matter, the complainant's also, is commercially stable, when to the salt solution is added some such preservative. I do not think, however, that the complainant can insist upon the use of the preservative as a part of the patent. Such use is stated on page 2, lines 39-41, to be optional, and it is well settled that what is optional in a patent cannot be taken as part of the patent itself. *Sewall v. Jones*, 91 U. S. 171, 185, 23 L. Ed. 275. Therefore the patent must be regarded as only including a substance which is stable without the addition of a preservative. Moreover, in claims 1 and 2 the nonsuprarenal substance is asserted to be in chemical combination with the active principle, and it does not appear that the preservative is in chemical composition. That phrase, of course, includes the molecular combination of the acid with the base, even though the molecules of each retain their own integrity atomically; but it cannot include the addition of a preservative, which so far as appears is only in physical admixture with the salt so created. It is quite clear that the words "chemical combination" in claims 1 and 2 are intended to refer to the same kind of combination which claims 5 and 6 intend when claim 6 speaks of the salt as being itself a "stable compound" even when in a water solution. This conclusion is further confirmed by the fact that on page 1, line 38, the patent states that the solution of the salts of the base and water is commercially stable; and further (page 1, lines 49-53) that the water solution refrains from absorbing the oxygen of the air to such an extent as to be practically stable for ordinary commercial handling use and sale. The same statement is also substantially repeated on page 1, lines 85-90.

The question therefore arises: What is commercial stability? There is no question that the boric acid adds to the stability of the base itself in solution, though even in a stopper bottle the defendant's Adrin without the preservative elements will not last for a long time. There is no evidence of just how long it takes for the solution without a preservative to become unfit for use. A slight discoloration owing to oxidation from contact with the air is not sufficient to be injurious, for it is only when after exposure it becomes a dark color that its therapeutic use ceases. Making allowance for the character of the patent itself which is in my judgment a pioneer, I am not disposed to construe the words "commercially stable" as not extending to the defendant's solution. That Takamine could not have meant more than the stability which in fact exists is indicated by the fact that it was known when the patent was applied for just what was the actual degree of stability of the solution without a preservative, and it can hardly be supposed that he was deliberately intending to misinform the public upon a matter as to which he could have no possible reason for so doing; at least, I can see nothing which he could gain by overstating in his patent the stability of the solution. Rather I prefer to interpret the words as controlled by his actual knowledge and as meaning only such stability as he himself then knew to exist. This is especially so since the alternative seems to be to hold the patent void as not containing an adequate disclosure to support the claims. I do

not feel disposed to take from the patentee the results of his ingenuity because he did not say that it would prove in practice desirable to use some one of the well-known preservatives. I therefore hold that the solution violates all six claims of the patent.

The question next arises of validity, and upon this the defendant urges two objections: First, the novelty of the patent; and, second, its forfeiture, because it has been publicly used in this country for more than two years prior to the filing of the application.

At the taking of testimony, the defendant introduced a great number of allegedly prior compositions; but in its brief it has omitted consideration of any but four, which are respectively Moore's Dialysate, Abel's Monobenzoylate Salt, Von Furth's Sulphate, and Von Furth's Iron Compound. The defendant's failure to deal with the other substances mentioned in the testimony indicates that it does not rely upon those. It will be necessary therefore to consider only the four above mentioned.

It is now supposed that the active principle which Takamine first isolated exists in the gland itself in the form of a salt; that is to say, in combination with an acid. For some time after the discovery in 1894 by Oliver and Schafer of the physiological action of the suprarenal glands, it had become customary to make therapeutic use of the substance by drying and powdering the glands and selling them in the form of a liquid solution preserved with chloretone. This the complainant itself had done, and the substance in that form attained a large and important use in therapy. Indeed, it was on occasion even used in intravenous injection; but, as the principle itself in this form was in physical admixture with many organic substances so as to form an apt nidus for bacteriological culture, the result was an extremely dangerous substance for injection into the body. The complainant, it is true, speaks of the demonstrated asepsis of the substance in this form; but that, I think, was too strong a statement, not in fact justified by the facts, and, indeed, as soon as Takamine Adrenalin became known, the use of the dry gland solution with a preservative practically disappeared altogether, so that the disadvantages of the original substance have the clearest proof in subsequent history. The too extravagant claims, even, of the complainant, for the aseptic character of the powdered dried glands, must therefore, in the light of subsequent facts, be disregarded.

Much had been ascertained about the substance itself prior to Takamine without which his invention would certainly have been impossible; but no one, as I have already said, had succeeded in chemically isolating the principle as now chemists suppose has been done. Indeed, it was not originally known whether the principle existed as a definite chemical compound in the gland itself, or whether it might not be a condition resulting from the coexistence of definite substances in the gland which might altogether disappear upon their dissociation. It is too much to say that the last statement remained uncertain after the disclosures of Abel and Von Furth; but the defendant itself does not assert that they ever succeeded in definitely isolating the principle out of combination.

The chemical reactions of what now is ascertained to have been, and what was supposed to be, the active principle, had undoubtedly all been known just as they are set forth in the patent No. 730,176; and it was by these reactions that Takamine in part assured himself that the substance which he had obtained was in fact the active principle, though the final test must rest, and did rest, upon its physiological activity. In this case, however, as I have construed the first patent, these prior compounds are not there of consequence; but in view of the prior discovery of allied substances as a salt, and also in view of the fact that patent No. 753,177 refers to and so incorporates into itself the disclosure of No. 730,176, it becomes essential to consider whether any of the former salts of the active principle anticipate the claims of No. 753,177.

The first of the four products is Moore's Dialysate. This discovery is set forth in an article in the *Journal of Physiology* by B. Moore, April, 1895. The successful experiment was described as follows: The dried glands were first extracted with ether. Then they were placed in absolute alcohol for three weeks. Both these steps were to remove the other substances from the glands. An extract was then made with a small quantity of distilled water, and the filtrate thus arising was allowed to dialyze into distilled water through parchment. The defendant has put in evidence three products of this process, the first of which showed an activity of about one-third that of Adrenalin; the second was the process carried down by evaporation to a crystalline salt; and the third was the precipitation of the active base from this salt by ammonia. The third is obviously the creation of Takamine's subsequent invention, and is not claimed to be an anticipation. There is considerable dispute as to the importance of the changes in the process which Sadtler adopted, particularly because he protected the extract with water during digestion by a film of paraffine so as to prevent any oxidation from contact with the atmosphere. Sadtler, on the other hand, insists that all the devices which he used were so common for chemists that it must be presupposed as an incident to Moore's process. However that may be, the resulting activity of the product is only one-third that of Adrenalin, and such a deficiency can hardly be accounted for except by the hypothesis that the substance is not as free as Adrenalin from inert substances. The Dialysate, it is true, shows no reaction to the biuret test which discovers proteid matter, and yet there is no reason to suppose that all inert substances can be of a mineral character, since there is in the process nothing chemically to change the organic substances extracted from the glands. Unless mineral substances existed as such in the gland and were carried out into the extract along with the salt, it is hard to see how the presence of so large a quantity of inert substances as is indicated by the small activity of the resultant Dialysate can be accounted for except upon the theory that they are organic substances from the gland itself. I do not forget that Sadtler says that such substances are colloidal, and so could not enter a Dialysate; but yet it is conceded that the natural salt itself is a crystalline organic product, a conclusion which seems at variance with the universality of the statement that all these or-

ganic compounds are amorphous and will not dialyze. At best it seems to me doubtful whether the Dialysate is a salt of the principle free from any but inorganic substances, and that doubt must of course be resolved against the defendant. As I shall show later, at least claims 5 and 6 require substantial freedom from organic impurities.

However this may all be, it is clear that Moore's experiment will not in any event serve as an anticipation. The description is so vague that at least two distinguished and ingenuous chemists cannot agree upon just what the process was. It was certainly not intended to be a set of directions for producing a commercially useful drug, even by skilled chemists, and it did not result in being so used, though the demand was great. While it did of course form a part of the science in the sense that it added to the store of knowledge about the active principle, the best proof that experts did not regard it as a satisfactory solution of what all were seeking is that Abel and Von Furth, who were both generous investigators, never treated it as of any consequence. Nor may this be laid down to their ignorance of Moore's work, because it was published in a well-known technical magazine, and was almost certainly known to such skillful and persistent scientists. It was at most only a laboratory experiment without practical and commercial fruit, for there is not the slightest evidence that any one has ever used it in a single instance. Such disclosures do not enrich the art in the sense required for an anticipation. The test is whether the disclosure would have answered itself for the claims of a patent, and that it obviously would not do. Sadtler has now, it is true, thrown down the active principle by Takamine's process; but it is an awkward process, which no one would think of substituting for the directer method first disclosed by the mother patent here in suit. I do not therefore regard Moore's Dialysate as an anticipation of any of the claims.

The next supposed anticipation is Abel's Monobenzoylated Salts. This is the salt of a base constituted in part by the atoms which together make up the active principle in question—Adrenalin—and for the remainder by a benzoyl radical; that is, a group of other atoms having their own proper integrity within the molecule. Now, the present science of chemistry presupposes that substances retain their identity so long as the atomic structure of their molecules remains the same, not only in the number and kind of atoms which go to compose them, but in their relative arrangement to one another, about which, as I understand it, final knowledge is not yet ascertainable. When two molecules come into permanent association, one being an acid and the other a base, a salt results; but chemists do not suppose that such association is of the same kind as that within the molecules themselves. Thus, as has been shown, the association may be broken, and the two substances dissociated, while each resumes its proper characteristics; the molecules retaining throughout their identity. Abel never succeeded in procuring a substance which contained the molecule of the active principle as such. His monobenzoylated compound had all the atoms of the base, but in atomic association within

a single molecule with the benzoyl radical. When he tried to dissociate the atoms of that radical, which were associated with the other atoms that together do form the base, he either affected their arrangement, or added to or subtracted from their numbers, so that the result was not physiologically active. Thus he did not, properly speaking, destroy the base in so doing, for it had never existed in a chemical sense at all, since that presupposes the existence of a molecule containing only such atoms in the proper arrangement, whatever that may be. It is true that the monobenzoylated salt which he did obtain seems to have been physiologically active, comparably with Adrenalin, though I can find no figure given to express its power. On this account the defendant insists that the question is immaterial of its exact chemical composition, since the claims do not speak of the free base and are not concerned with its molecular integrity.

Claims 1 and 2 are, however, specifically limited to "the blood pressure raising principle" of the glands in chemical combination with another substance. The "principle," so mentioned, is the organic substance first isolated by Takamine and does not include any other substance, whatever its properties may be. There is no room for ambiguity, because the word is used to cover only that product which all had been trying to get; that is, the "free base." Had Abel ever succeeded in isolating his monobenzoylated base, a serious question might have arisen as to whether that was a valid anticipation of the claims of patent No. 730,176, which, as has been seen, do not refer to the "principle"; but the claims of the present patent are drawn more nicely and speak in obviously chemical terms. The "principle" is the isolated principle which is described in the disclosure, but not the claims, of patent No. 730,176. Nor will it answer to say that the "principle" is chemically combined with the benzoyl radical as mentioned in these claims. In the first place, there is no evidence that the benzoyl elements add to the stability of the compound, and the "non-suprarenal substance" of the claims must have that effect. But the difficulty goes deeper than that. The principle does not exist at all, as I have said, till it is broken away from the benzoyl radical. It cannot be said to be in combination with the radical, because the very word "principle" presupposes its molecular integrity, not varied by the atomic union of any other group. The purpose of the claims is quite clear, and they speak in technical terms, with a corresponding limitation of scope. It will need no argument to show that it was invention to produce the "principle," notwithstanding the prior discovery of the monobenzoylated salt.

Similarly of claims 5 and 6, which speak of "the herein-described product of the suprarenal glands." Whatever the scope of the claims in No. 730,176, the product there described—which is the same as that described in No. 753,177—is the "crude product," and that, as I have already shown, is not the same chemical substance as Abel's base. Indeed, these claims are even more limited than claims 1 and 2, since they are limited practically to salts of the free base, with some inorganic impurities admixed. The patentee could, of course, if he liked, make his claim in narrow language and cover specifically only

the actual product of his process. That he has substantially done, with the result that he need not fear anticipations which are not covered by such claims.

However, I cannot interpret claim 3 as so limited. Here the patented product is not defined by the process or the chemical active principle, but by the properties of the product itself. That is in quite a different category and is anticipated by any product, whether chemically identical or not, which possesses the stated qualities. These qualities are those of the "salt," free from other constituents of the gland. It is anticipated by any substance which will have the physiological activity of the salt, and will be as stable and as pure. I omit reference to the chemical reactions because nothing turns upon these. Does Abel's salt conform to these requirements? It is certainly physiologically active, indeed apparently as active as Adrenalin. It is likewise as stable as that product. There remains therefore only the question of its purity; that is, of its freedom from the other organic constituents of the gland. Sadtler testifies that it is so free, and Chandler cannot definitely say to the contrary except as he so infers from its gross appearance (XQ. 159, 160). I must conclude, therefore, that it does answer the requirements of claim 3.

The only remaining question is whether as a publication it is a valid anticipation. It does not appear to have been ever used in practice; but that is not necessarily conclusive, for it was not merely a tentative experiment without adequate disclosure. On the contrary, it was fully described and published in well-known medical journals, and the disclosure would have answered the claims of a patent. While it was in a sense a laboratory experiment, it was published as a direction for all who wanted to use it, unlike Moore's vague disclosures, which were meant rather for investigators. In view of such publications, Takamine cannot claim to have been the first to discover a stable and pure salt having the physiological activity of the suprarenal gland.

As to the fourth claim, the question depends wholly upon what meaning is given to "compound" and what to "constituent." Chandler, especially when dealing with Von Furth's zinc sulphate, lays especial stress upon the word "compound" as indicating atomic association in a single molecule, an interpretation which would here result in making Abel's salts an anticipation. It is so used in the eleventh edition of the *Encyclopedia Britannica*, sub tit. Chemistry, and I think it must be so understood in the claim. The word "constituent" would then include those elements of the gland from which it is separated, and from those Abel's salts have been separated. The benzoyl radical is not from the gland, but is introduced by the process itself. Such a construction leads to the invalidity of claim 4.

The next alleged anticipating product is Von Furth's Sulphate. This product was patented to Von Furth in Germany on May 16, 1899, and was offered upon the market in Germany. There is therefore no ground for objecting to it as an anticipation provided that it falls within claims 1, 2, 5, and 6.

The first question is whether Von Furth succeeded in isolating a salt of the free base, for concededly he did not produce it as a base

but as a sulphate, and by a later patent as an iron salt. Sadtler presented a product made by a variation of Von Furth's process which he judged to be the pure base in physical admixture with zinc hydroxide. This is not put forward as in itself an anticipation because Von Furth never recognized it as the base, and carried on the process beyond the point at which Sadtler stopped it. A precipitate was formed by Von Furth through the introduction of ammonia into a zinc sulphate solution which precipitate Sadtler washed and dried and then examined microscopically. His conclusion was that the base was free, and from that conclusion he also believed that the "end product" of Von Furth was a sulphate of the free base. Indeed, though he agrees that Von Furth never explicitly claimed the precipitate to be the base (XQ. 178), he still insists (R. D. Q. 305) that inferentially that conclusion did appear from Von Furth's patent. I do not think that this at all satisfactorily appears. Von Furth called the precipitate a "zinc compound" (*Verbindung*), and speaks of it as decomposed (*zersetzt*) by the addition of sulphuric acid. Both words more properly designate a chemical combination, and indeed it would have been hardly possible that Von Furth could have recognized the base in mere physical admixture with the zinc hydroxide, and still have carried on the process as he did by decomposition and the subsequent zinc dust treatment. Moreover, Sadtler himself was originally unwilling to assert that the precipitate contained the free base (XQ. 84, 85, 92), or that Von Furth had ever isolated it, and that doubt he only abandoned after he had produced his three intermediate products and examined them. It by no means follows from the high activity of these products that they contain the base out of chemical combination, because, as appears in the case of Abel's Monobenzoylet Salt, there are chemical compounds of the base which are themselves equal in physiological activity to the base itself. Moreover, it is perfectly clear that both Abel and Von Furth thought that no ammonia precipitate did isolate the base, for they at once conceded to Takamine, as soon as they learned his process, that he had by so doing made a new step in the investigation of the substance. Chandler, who is himself a scientist of high reputation, insists that the precipitate is what Von Furth calls it, a zinc compound, and that the sulphuric acid added to the alcohol solution decomposes it, just as Von Furth says it does. In view of this conflict of authority, I cannot think that the defendant has proved that the precipitate was an admixture of zinc hydroxide with the free base, as Sadtler finally supposed. The most that one can say is that the matter must yet be regarded as doubtful.

Now all this is in itself not material, because the defendant does not put forward the intermediate products of Von Furth as in themselves anticipations, but it has an importance due to its bearing upon the character of the "end product" of Von Furth which is so put forward. Sadtler has no doubt whatever that this "end product" is a sulphate of the free base; but his conclusion in that respect depends, I assume, upon his earlier conclusion that the precipitate held the free base in mere admixture. It nowhere appears that he would say that the remainder of the process, beginning with the suspension of the pre-

precipitate in 95 per cent. alcohol, would itself have decomposed out a zinc compound of the base into a sulphate of the free base, which would be necessary, if he is wrong in his conclusion about the character of the precipitate itself. It is true that Chandler will not commit himself (XQ. 202), as to the effect which the remainder of the process has upon the precipitate, and it must be taken therefore as possible that the "end product" may be a sulphate of the free base, even if the precipitate be a zinc compound. In that regard he is at one with Sadtler's original guarded conclusion (XQ. 84, 85) that the result "may have been" a pure product, and his statement (XQ. 92) that he had never produced the free base by Von Furth's process. At that time, before he had reached his intermediate products, he appears to have thought that the precipitate was a zinc compound. The doubt about this question prevents the defendant from showing clearly enough that the sulphate is a salt of the base.

But, even if Von Furth's product be the sulphate of the active principle, it would not anticipate claims 5 and 6, however it might be with claims 1 and 2, because those claims call for a salt of the "herein-described product," and that product is "my crude product," of patent No. 730,176. It is not enough in order to sustain the patent, therefore, that a supposed anticipation should contain a salt of the free base chemically true; but it must also, like the "crude product," be practically free from inert and associated gland-tissue. That requirement Von Furth's sulphate does not fulfill, as indeed sufficiently enough appears by the fact that Takamine's invention has now substantially the whole field therapeutically. The chief reason for the impurity of the product arises from the process which produces it, for it is made by the precipitation of a zinc sulphate solution and precipitates the zinc along with the active principle. Now zinc has an affinity for many organic impurities containing amino acids or xanthin bases. Moreover, because of the same affinity, those portions of the base which may have become oxidized during the period of digestion and extraction will be carried down with the zinc, nor can it be eliminated by the subsequent boiling in zinc dust. In this respect the process is just the opposite of Takamine's, which frees the precipitate from organic impurities, leaving them suspended in the filtrate. It is true that Sadtler found the smallest trace of proteids with the use of the usual test reagents; but that, as I have shown, does not by any means exclude the presence of organic compounds. The presence of organic substances in large quantity would seem to be indicated by the low activity of the salt itself, which, beginning at about 25 per cent. of Adrenalin, finally disappeared in the course of time. While, as I have shown, this form of reasoning cannot be pressed too far under the testimony here, I think, in view of the small activity of this substance, only one-quarter that of Adrenalin, that it is fair to assume that it is not "practically free"; there being no mineral matter. Sadtler, XQ. 62. Moreover, Abel's opinion was that Von Furth's iron compound was the only one even approximately pure that he had ever got, and yet Von Furth speaks of this iron compound as being more or

less dark because of the "decomposition" products which it contained. If both are right, there must have been a substantial quantity of such products in the sulphate itself. That there is no adequate admixture of mineral or inorganic substances to account for such a diminution of activity does not seem to be denied, and, while this reasoning is not wholly satisfactory, as I have shown, it must count in the scale, for both sides concede that the hemostatic activity is due wholly to the free base and in proportion to its presence in the substance actually used.

Nor does the actual use, as indicated in contemporaneous documents, of Von Furth's sulphate, indicate that it is free from organic matters. It was perhaps as useful an extract from the glands, as had appeared up to the time of Takamine's disclosure and had value on that account. It is quite understandable that even intravenous injection might be indicated in extreme cases, though the sulphate was contaminated and dangerous. A disease of the heart might well call for such heroic measures as would in less desperate conditions be wholly out of the question. Therefore claims 5 and 6 are not anticipated even if the sulphate be that of the free base itself.

The last alleged anticipation is Von Furth's iron compound. There is no dispute that this was a chemical "compound"; that is, that the iron atoms were in intramolecular association with the base, and, under my treatment of Abel's salts, they cannot be anticipations of claims 1, 2, 5, and 6. It is true that Sadtler refuses to commit himself as to whether the iron is or is not in chemical combination with the atoms composing the base, and to that extent the experts cannot be said to be in affirmative agreement, for Chandler is satisfied that iron will not enter into association of molecules with the amide group, of which the base is apparently one. This, however, raises no dispute, as I have said, and fails to raise a valid anticipation under the construction that I have given to the claims of No. 753,177.

Finally the defendant urges that it involved no invention to create the salt after the base was once discovered. It is quite true that Abel had already found that his monobenzoyleated derivative of the base existed as salt, and that as such it had greater stability than the base; but then this was only an inference, for he never succeeded in isolating the monobenzoyleate base itself. Holme also inferred that the active principle had the properties of a weak base, and Moore observed that it resisted destruction better in combination with acids than with alkalis. So also Von Furth's "iron compound" patent refers to the greater stability of the salt. One claim of his "sulphate" was based especially upon the stabilizing of the product by "reduction," though just what he means is not apparent. However, no one had yet produced the free base, and no one knew what the effect of an acid would be upon it, when it was found. At best the former experimenters had only wise surmises, excellent lanterns of approach by which science alone can advance, but quite different from the full light of discovery. Even if any one had actually discovered the free base and knew it as such, it would be doubtful whether Takamine's discovery of a salt would not be invention, in spite of its apparently obvious character; but it

is not necessary to speculate about that, because no one did discover such a base. The new product, a salt of the principle, was therefore quite unanticipated and was entitled to a patent, nor is it of any consequence whether the patent for the base alone might not have covered the salt, if it had been so intended. Having, as I have shown, claimed the two products as separate and been compelled to divide one from the other, the patentee will be prevented from protecting the salt altogether if the second patent is held invalid. There is no warrant in law for such a holding; the salt which he produced being a wholly new product in the art.

Next arises the separate defense that the salt had been used for more than two years before the application was filed, a defense which rests upon the assumption that the original application out of which No. 753,177 was divided did not adequately describe the salts, so as to form the basis of a patent for them. As the patentee was required to divide, this defense ought not to prevail unless the patenting of the salt was quite clearly an afterthought. The original application, No. 35,546, included both process and product, and the product was subdivided into the "active principle" and the "salt." This application was filed in November, 1900, and the applicant after some struggles with the Patent Office decided voluntarily to divide out the product claims, which he afterwards did; the divisional application resulting upon compulsory division in Nos. 730,176 and 753,177. Now the only difficulty alleged to exist either in specification or claim with the original application is that the salt was then said to be crystallizable. Takamine apparently then supposed that he had crystallized, or could crystallize, his salts, and he so disclosed his discovery. Subsequent experiment satisfied him that he could not, and his application was erroneous in that particular. Suppose the whole original application had remained single for the process and the two products; would an amendment have been outside of the applicant's rights? That is, I think, the proper test upon this division. *Victor Talking Machine Co. v. Amer. Graphophone Co.*, 145 Fed. 350, 76 C. C. A. 180. If his result is a new invention, then of course it could not be introduced by amendment, but otherwise the amendment is unobjectionable. Indeed, in the case cited the second application was not even a division from the first, but an independent application. Now it scarcely needs argument to show that the salt remains the same invention whether Takamine was right or not in thinking it crystallizable. Moreover, apparently he was right when he thought so, or at least Sadtler appears now to agree with his original statement, for he presented in evidence crystallized salts of Adrenalin (*R. D. Q.* 297). I think that, regardless of this question of fact, the original applicant completely enough covered the invention in question, and that the point is not well taken.

Therefore I conclude that claims 1, 2, 5, and 6 are valid and infringed.

Whatever confusion the intricacy of the subject-matter causes, one fact stands out, which no one ought fairly to forget. Before Takamine's discovery the best experts were trying to get a practicable form

of the active principle. The uses of the gland were so great that it became a part of the usual therapy in the best form which was accessible. As soon as Takamine put out his discovery, other uses practically disappeared; by that I do not mean absolutely, but that the enormous proportion of use now is of Takamine's products. There has been no successful dispute as to that; hardly indeed any dispute at all. What use remains is, so far as the evidence shows, of the old dried glands, which every one concedes to have been dangerous, at least for intravenous use. All this ought to count greatly for the validity of the patent, and Takamine has a great start, so to speak, from such facts. It is true that he overstates the degree of stability of his acid solution without any preservative. Strictly it is not in that form fit for sale about in drug stores where it may be kept for long even in a stoppered bottle; but commercial or practical stability is a somewhat elastic term, and this is a case where he should be entitled to a lenient construction, for he has been author of a valuable invention and has succeeded where the most expert have failed.

I cannot stop without calling attention to the extraordinary condition of the law which makes it possible for a man without any knowledge of even the rudiments of chemistry to pass upon such questions as these. The inordinate expense of time is the least of the resulting evils, for only a trained chemist is really capable of passing upon such facts, e. g., in this case the chemical character of Von Furth's so-called "zinc compound," or the presence of inactive organic substances. In Germany, where the national spirit eagerly seeks for all the assistance it can get from the whole range of human knowledge, they do quite differently. The court summons technical judges to whom technical questions are submitted and who can intelligently pass upon the issues without blindly groping among testimony upon matters wholly out of their ken. How long we shall continue to blunder along without the aid of unpartisan and authoritative scientific assistance in the administration of justice, no one knows; but all fair persons not conventionalized by provincial legal habits of mind ought, I should think, unite to effect some such advance.

Let a decree pass upon the claims as above indicated; no costs.

BOYD et al. v. GREAT WESTERN COAL & COKE CO.

(Circuit Court, E. D. Oklahoma. July 17, 1911.)

No. 1,435.

1. REMOVAL OF CAUSES (§ 25*)—FEDERAL QUESTION.

While defendant may set up a federal question as a defense to an action in the state court and on an adverse ruling may test the question in the Supreme Court of the United States by writ of error, the case cannot be removed to a federal court from the state court because involving a federal question, appearing only from the facts alleged in the petition for removal, and not from plaintiff's statement of his case in his complaint or petition.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 58, 59; Dec. Dig. § 25.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. REMOVAL OF CAUSES (§ 19*)—GROUND—FEDERAL QUESTION—"FEDERAL CORPORATION."

Act Feb. 18, 1901, c. 379, 31 Stat. 794, extended over Indian Territory certain laws of Arkansas relating to corporations making the Arkansas law a part of the act of Congress as though incorporated therein in *hæc verba*. *Held*, that a private corporation organized in Indian Territory under such law prior to statehood was not a federal corporation in the sense of being incorporated under a federal law so as to authorize it to remove actions against it in the state courts after the territory became a state.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 37-48; Dec. Dig. § 19.*]

At Law. Action by Maggie Boyd and others against the Great Western Coal & Coke Company. On motion to remand. Granted.

H. H. Smith, for plaintiffs.

James H. Gordon, for defendant.

CAMPBELL, District Judge. The matter now before the court in this case arises on plaintiff's motion to remand this cause. This is a suit for damages for the death of the husband and father of plaintiffs, while engaged by defendant as a coal miner, originally instituted in the district court of Latimer county, Okl. Plaintiff's petition charged that the defendant is a domestic corporation organized under the laws of Oklahoma, and alleges as grounds of recovery various failures on the part of defendant to comply with the state laws regulating the operation of coal mines. In due time the defendant filed in the state court its petition and bond for removal to this court, alleging that it is a corporation other than a banking corporation incorporated under the laws of the United States of America on the 22d day of July, 1902, and now operating under such laws, and, as such, is a federal corporation, and has a defense to this suit arising under and by virtue of the laws of the United States, to wit, its act of incorporation.

In the petition for removal it is further pointed out that the various breaches of duty relied upon in the petition arise from the alleged failure of the defendant to comply with certain provisions of the state laws relating to coal mines, and that the defendant is operating under leases from the United States, pursuant to certain rules and regulations prescribed in connection therewith, and under certain acts of Congress, relating thereto, with which the requirements of said state laws conflict, or act in derogation thereof, or imposing upon defendant additional burdens, all of which, it is contended, the state is without power to do, and that the determination of defendant's liability in this cause depends upon the construction of the federal and state statutes referred to.

[1] But a perusal of the plaintiff's petition fails to disclose any such federal question, and it is now settled that in such case, while the defendant may set up a federal question as a defense to the action in the state court, and on adverse ruling thereon by the highest state court may test the question in the Supreme Court on writ of error

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to the state court, the cause cannot be removed from the state court to a federal court unless the plaintiff's statement of his case in his complaint or petition necessarily discloses such federal question, and, if it does not so appear, the want cannot be supplied by any statement in the petition for removal. *Chappel v. Waterwords*, 155 U. S. 102, 15 Sup. Ct. 34, 39 L. Ed. 85; *Texas & Pacific R. R. Co. v. Cody*, 166 U. S. 606, 17 Sup. Ct. 703, 41 L. Ed. 1132. Therefore unless the defendant is a corporation organized and existing under the laws of the United States, in such sense as to bring it within those decisions of the Supreme Court relating to the right of removal of causes by federal corporations, the motion to remand must be sustained.

[2] By Act Cong. Feb. 18, 1901, c. 379, 31 Stat. 794, certain provisions of the law of Arkansas relating to corporations were extended over and put in force in Indian Territory, with such substitution of terms as to make them applicable. Prior to this act no provision of law existed for the creation of corporations for the conduct of business in its nature local to Indian Territory. By the adoption of the sections of the Arkansas law specified a complete system of laws for the creation and control of corporations within the Indian Territory was provided. While it was accomplished by an act of Congress, and the sections of the Arkansas law adopted became as much a part of the act as if set forth in *hæc verba* therein, it was in effect very similar to the laws of the several states relating to the creation and control of domestic corporations, in that its operation was confined to the territory comprised within what was known as Indian Territory. The defendant was organized as an Indian Territory corporation prior to statehood under the terms of the foregoing act, and contends that it thereby became and is a federal corporation, organized and existing under the laws of the United States, and, as such, is entitled to remove this cause to this court. This presents the question as to whether a corporation organized under the laws in force in Indian Territory may, after statehood, when made defendant in a cause in a state court involving the jurisdictional amount, remove the same to the federal court solely on the ground that it is a corporation organized and existing under the laws of the United States. In behalf of its contention the defendant cites, among other authorities, *Canary Oil Co. v. Standard Asphalt Co.* (C. C.) 182 Fed. 663, from the Circuit Court for the District of Kansas, wherein this question was presented and the right of removal upheld by that court. As suggested in that opinion, the question is whether these corporations originally organized under the laws of Indian Territory may now be said to be corporations organized and existing under the laws of the United States in such sense that causes in which they are defendants may be removed from a state to a federal court solely on the ground that, by reason of their original creation under the general act of Congress providing for corporations in Indian Territory, such cases may be said to arise under the laws of the United States, as contradistinguished from suits to which corporations created under the laws of an organized territory may be parties.

The effect of the intervention of statehood upon corporations created under the laws of an organized territory is thus tersely stated by Justice Field in *Kansas Pacific R. Co. v. Atchison, etc., R. Co.*, 112 U. S. 414, 5 Sup. Ct. 208, 28 L. Ed. 794:

"The admission of Kansas as a state into the Union, and the consequent change of its form of government, in no respect affected the essential character of the corporations or their powers or rights. They must after that change be considered as corporations of the state, as much so as if they had derived their existence from its legislation. As its corporations they are to be treated, so far as may be necessary to enforce contracts or rights of property by or against them, as citizens within the clause of the Constitution declaring the extent of the judicial power of the United States. It has been expressly held that they are to be so considered when they have controversies with citizens of other states. And the same course of reasoning which led to this decision must also lead to the conclusion that in all cases where a federal court can take jurisdiction of like controversies between corporations, and treat them as citizens of the state under whose laws they were created or continue to exist."

It follows that if Congress had seen fit to provide by organic act for a territorial form of government in Indian Territory, and the Legislature of the territory so established had enacted a law providing for domestic corporations, and the defendant had been organized under that law, rather than a direct act of Congress, there would be no question of its status now as a domestic corporation of the state, and, of course, could not remove this case to this court, for a corporation organized under the laws of a territory is not a federal corporation, not being organized under the laws of the United States. *Maxwell v. Federal Gold & Copper Co.*, 155 Fed. 110, 83 C. C. A. 570, and cases cited. So that, as suggested, the question here is whether the fact that Indian Territory corporations were organized under direct legislation of Congress, rather than territorial acts, constitutes them federal corporations, and makes any case to which any one of them may be now a party one arising under the laws of the United States, and cognizable in or removable to a federal court, notwithstanding Congress has since by the enabling act (June 16, 1906, c. 3335, 34 Stat. 275 [U. S. Comp. St. Supp. 1909, p. 154]) provided for the admission of the Indian Territory as a portion of the sovereign state of Oklahoma.

Now let us see what precisely is the relation of a territorial government to the general government. That question is so fully answered by Mr. Justice Bradley in *Mormon Church v. United States*, 136 U. S., loc. cit. 42, 10 Sup. Ct. 802, 34 L. Ed. 478, that I cannot do better than quote his language. Prior to the organization of the territory of Utah, the Mormons had set up there a provisional government, known as the "State of Deseret," by the legislature of which an act was passed incorporating "The Church of Jesus Christ of Later Day Saints." After the organization of the territory, the territorial Legislature, by certain acts, gave validity to this corporation. Thereafter Congress passed acts abolishing polygamy, and disapproving and annulling the act incorporating the church and the acts of the territorial Legislature validating the same. The power of Congress to so legislate was attacked, and of its validity Justice Bradley said:

"The power of Congress over the territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States. It would be absurd to hold that the United States has power to acquire territory, and no power to govern it when acquired. The power to acquire territory other than the territory northwest of the Ohio river (which belonged to the United States at the adoption of the Constitution) is derived from the treaty-making power or the power to declare and carry on war. The incidents of these powers are those of national sovereignty, and belong to all independent governments. The power to make acquisitions of territory by conquest, by treaty, and by cession is an incident of national sovereignty. The territory of Louisiana, when acquired from France, and the territories west of the Rocky Mountains, when acquired from Mexico, became the absolute property and domain of the United States, subject to such conditions as the government in its diplomatic negotiations had seen fit to accept relating to the rights of the people then inhabiting those territories. Having rightfully acquired said territories, the United States government was the only one which could impose laws upon them, and its sovereignty over them was complete. No state of the Union had any such right of sovereignty over them; no other country or government had any such right. These propositions are so elementary, and so necessarily follow from the condition of things arising upon the acquisition of new territory, that they need no argument to support them. They are self-evident. Chief Justice Marshall in the case of the American Insurance Company v. Canter, 1 Pet. 511, 542 [7 L. Ed. 242], well said: 'Perhaps the power of governing a territory belonging to the United States, which has not by becoming a state acquired the means of self-government, may result necessarily from the facts, that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Which ever may be the source whence the power is derived, the possession of it is unquestioned.' And Mr. Justice Nelson delivering the opinion of the court in *Benner v. Porter*, 9 How. 235, 242 [13 L. Ed. 119], speaking of the territorial governments established by Congress, says: 'They are legislative governments, and their court's legislative courts, Congress, in the exercise of its powers in the organization and government of the territories, combining the powers of both the federal and state authorities. Chief Justice Waite in the case of *National Bank v. County of Yankton*, 101 U. S. 129, 133 [25 L. Ed. 1046], said: 'In the organic act of Dakota there was not an express reservation of power in Congress to amend the acts of the territorial Legislature, nor was it necessary. Such a power is an incident of sovereignty, and continues until granted away. Congress may not only abrogate laws of the territorial Legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial Legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the territories and all the departments of the territorial governments. It may do for the territories what the people, under the Constitution of the United States, may do for the states.' In a still more recent case, and one relating to the legislation of Congress over the territory of Utah itself (*Murphy v. Ramsey*, 114 U. S. 15, 44 [5 Sup. Ct. 747, 763. 29 L. Ed. 47]). Mr. Justice Matthews said: 'The counsel for the appellants in argument seem to question the constitutional power of Congress to pass the act of March 22, 1882, so far as it abridges the rights of electors in the territory under previous laws. But that question is, we think, no longer open to discussion. It has passed beyond the stage of controversy into final judgment. The people of the United States as sovereign owners of the national territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion, they are represented by the government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the

Constitution, or are necessarily implied in its terms.' Doubtless Congress in legislating for the territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers than by any express and direct application of its provisions. The supreme power of Congress over the territories and over the acts of the territorial Legislatures established therein is generally expressly reserved in the organic act establishing governments in said territories. This is true of the territory of Utah. In the sixth section of the act establishing a territorial government in Utah approved September 9, 1850, it is declared 'that the legislative powers of said territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of this act. * * * All the laws passed by the Legislative Assembly and Governor shall be submitted to the Congress of the United States, and if disapproved shall be null and of no effect.' 9 Stat. 454."

In *Snow v. United States*, 18 Wall., loc. cit. 319, 320, 21 L. Ed. 784, it is said:

"The government of the territories of the United States belongs, primarily, to Congress; and, secondarily, to such agencies as Congress may establish for that purpose. During the term of their pupillage as territories, they are mere dependencies of the United States. Their people do not constitute a sovereign power. All political authority exercised therein is derived from the general government. It is, indeed, the practice of the government to invest these dependencies with a limited power of self-government as soon as they have sufficient population for the purpose. The extent of the power thus granted depends entirely upon the organic act of Congress in each case, and it is at all times subject to such alterations as Congress may see fit to adopt. * * * Strictly speaking, there is no sovereignty in a territory of the United States, but that of the United States itself. Crimes committed therein are committed against the government and dignity of the United States. It would seem that indictments and writs should regularly be in the name of the United States, and that the attorney of the United States was the proper officer to prosecute all offenses. But the practice has been otherwise, not only in Utah, but in other territories organized upon the same type."

In *Sims v. Sims*, 175 U. S., loc. cit. 168, 20 Sup. Ct. 60, 44 L. Ed. 115, it is said:

"In the territories of the United States, Congress has the entire dominion and sovereignty, national and local, federal and state, and has full legislative power over all subjects upon which the Legislature of a state might legislate within a state, and may, at its discretion, intrust that power to the legislative assembly of a territory."

In *Binns v. United States*, 194 U. S. 491, 24 Sup. Ct. 817, 48 L. Ed. 1087, Justice Brewer said:

"It must be remembered that Congress, in the government of the territories as well as of the District of Columbia, has plenary power, save as controlled by the provisions of the Constitution, that the form of government it shall establish is not prescribed, and may not necessarily be the same in all the territories. We are accustomed to that generally adopted for the territories of a quasi state government, with executive, legislative, and judicial officers, and a Legislature endowed with the power of local taxation and local expenditures, but Congress is not limited to this form. In the District of Columbia it has adopted a different mode of government, and in Alaska still another. It may legislate directly in respect to the local affairs of a territory or transfer the power of such legislation to a Legislature elected by the citizens of the territory. It has provided in the District of Columbia for a board of three commissioners, who are the controlling officers of the district.

It may intrust to them a large volume of legislative power, or it may by direct legislation create the whole body of statutory law applicable thereto. For Alaska Congress has established a government of a different form. It has provided no legislative body, but only executive and judicial officers. It has enacted a penal and civil code. Having created no legislative body and provided no local legislation in respect to the matter of revenue, it has established a revenue system of its own, applicable alone to that territory. Instead of raising revenue by direct taxation upon property, it has, as it may rightfully do, provided for that revenue by means of license taxes."

From the foregoing authorities, it appears that the Legislatures of the several organized territories are mere agencies of Congress, for the purpose of representing it locally in making laws for the government of their internal affairs. The act of a territorial Legislature providing for the creation of domestic corporations, while not in form a direct act or law of Congress, it seems to me is not essentially different from direct congressional legislation to that end, because it is the act of a congressional agency established by Congress to relieve it of the burden of such local legislation. But the Legislature is still only its agent, and nothing more, and Congress may at any time step in and legislate directly with regard to any matter of local concern. Suppose in one of the organized territories Congress should exercise its right to legislate directly regarding the creation of corporations within its territorial limits, as it did within the territorial limits of the unorganized Indian Territory, and abolish all prior territorial legislation on the subject, and thereafter corporations should be organized under the act and then such territory should become a state, could it be successfully contended that such corporations, after statehood, were federal corporations, rather than corporations of the state, as held in *Kansas & Pacific R. Co. v. Atchison R. R. Co.*, supra? I think not. If a Legislature of an organized territory is merely a congressional agency for the enactment of laws local to the territory, and in the establishment of such agency Congress still retains the right at any time to legislate directly upon any subject of local concern, what essential difference is there between the legislation of the agent, the territorial Legislature, and that of the principal, Congress? I can conceive of none. If, then, the only difference between an organized and unorganized territory, as regards necessary local legislation, is that in the former Congress, while retaining its power to legislate directly has for its own convenience established a local legislative agency, to enact such legislation as it may not see fit to directly enact, while in the latter all local legislation comes directly from Congress, what essential difference could there be between the direct legislation of Congress controlling a matter of local concern within an organized territory, and such legislation controlling a matter of local concern within an unorganized territory? Manifestly none. In the *Pridgeon Case*, 153 U. S. 48, 14 Sup. Ct. 746, 38 L. Ed. 631, the court said:

"But it is suggested on behalf of the United States that the provisional and temporary adoption by Congress of the Nebraska Criminal Code for the territory of Oklahoma had the effect of making larceny or horse stealing an offense against the United States punishable on the federal side of the courts of the territory. The Supreme Court of the territory has held that the

Criminal Code of Nebraska, established by Congress, was to be treated as if it had been enacted by the territorial Legislature, and was to be dealt with as if the crimes thereby declared were crimes not against the United States, but against the territory. Thus in *Ex parte Larkin*, 1 Okl. 53, 57 [25 Pac. 745, 746 (11 L. R. A. 418)], Green, C. J., says: 'It was intended by Congress that the laws of Nebraska should constitute a territorial code, as distinguished from the laws of the United States in force in the territory of Oklahoma, and that they should sustain the same relations to the courts and to the people of the territory and to the legislative assembly as a code of laws enacted by the legislative assembly.' If, as suggested by counsel for the government, section 11 of the act of May 2, 1890, c. 182 [26 Stat. 81], could be treated as establishing the provisional criminal code therein mentioned, as a law of the United States, and as creating offenses against the federal government, pending the first session and adjournment of the Oklahoma Legislature, so as to make horse stealing during that time a crime, not against the territorial government, but against the United States, the proceeding on the federal side of the court was entirely lawful, the sentence of five years, as well as the imposition of 'hard labor,' being authorized by the Nebraska Criminal Code as above quoted. It was certainly competent for Congress to have adopted the Criminal Code of Nebraska so as to make horse stealing a crime against the United States in the Oklahoma Territory, just as by section 5391, Revised Statutes [U. S. Comp. St. 1901, p. 3651], it has adopted the Penal Code of the states in respect to offenses committed in forts, dock yards, navy yards, and other places ceded to the United States, where the offense is not prohibited, or the punishment thereof is not specially provided for by any law of the United States. But we are of opinion that the Supreme Court of the territory in *Ex parte Larkin* has taken the proper view of the effect of section 11 of the act of May 2, 1890, in holding that the laws of Nebraska were adopted as a territorial code, and, this being so, a court of the United States did not have jurisdiction of the offense of horse stealing within the territorial limits of Oklahoma under the act of May 2, 1890, or by virtue of the Nebraska Criminal Code, provisionally adopted for the territory."

The case to which all later decisions involving the question of removal of causes by federal corporations mainly refer is that of *Osborn v. United States Bank*, 9 Wheat. 738, 6 L. Ed. 204, decided by Chief Justice Marshall. The bank was organized under special act of Congress, and the question was as to the validity of that portion of the act expressly giving the bank the power to sue and be sued in the court of the United States, and the determination of that question was held to rest upon the question as to whether the case was one arising under a law of the United States, because of the fact of its existence under an act of Congress. The court held that it was such a case, saying:

"The case of the bank is, we think, a very strong case of this description. The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same law. Can a being, thus constituted, have a case which does not arise literally, as well as substantially, under the law? * * * It is said that a clear distinction exists between the party and the cause; that the party may originate under a law with which the cause has no connection; and that Congress may, with the same propriety give a naturalized citizen, who is the mere creature of law, a right to sue in the courts of the United States, as give that right

to the bank. This distinction is not denied; and if the act of Congress was a simple act of incorporation, and contained nothing more, it might be entitled to great consideration. But the act does not stop with incorporating the bank. It proceeds to bestow upon the being it has made, all the faculties and capacities which that being possesses. Every act of the bank grows out of this law, and is tested by it. To use the language of the Constitution, every act of the bank arises out of this law. A naturalized citizen is, indeed, made a citizen under an act of Congress, but the act does not proceed to give, to regulate, or to prescribe his capacities. He becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the Constitution, on the footing of a native. The Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national Legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The Constitution then takes him up, and, among other rights, extends to him the capacity of suing in the courts of the United States precisely under the same circumstances under which a native might sue. He is distinguishable in nothing from a native citizen; except so far as the Constitution makes the distinction. The law makes none. There is, then, no resemblance between the act incorporating the bank and the general naturalization law."

In the *Pacific Railroad Removal Cases*, 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. Ed. 319, wherein was raised the question of the right of the several railroad companies, organized under acts of Congress, to remove suits instituted against them in the state courts to the federal courts, the court reviewed *Osborn v. Bank*, supra, and, after quoting the foregoing portion of the opinion in that case, said:

"If the case of *Osborn v. Bank of the United States* is to be adhered to as a sound exposition of the Constitution, there is no escape from the conclusion that these suits against the plaintiffs in error, considering the said plaintiffs as corporations created by and organized under the acts of Congress referred to in the several petitions for removal in these cases, were and are suits arising under the laws of the United States. An examination of those acts of Congress shows that the corporations now before us, not only derive their existence, but their powers, their functions, their duties, and a large portion of their resources, from those acts, and by virtue thereof sustain important relations to the government of the United States."

In the case of the bank above referred to, it is noted that its operation was of national extent and was closely related to the fiscal affairs of the government, and as said by the court, supra, the railroads not only derived their existence, but their powers, their functions, their duties, and a large part of their resources from the acts incorporating them, and by virtue thereof sustain important relations to the government. And this, I think, will be found to be characteristic of most federal corporations whose cases the Supreme Court has held to arise under a law of Congress solely by reason of the federal character of the acts creating them. A notable exception is *Knights of Pythias v. Kalinski*, hereafter referred to. But in the case of these Indian Territory corporations there is nothing to give them any national character or function unless it be the simple fact that their incorporation is under an act of Congress, and as suggested by Chief Justice Marshall, in the *Bank Case*, where it is simply an act of incorporation, it may well be questioned whether this alone gives the creatures of the act the national character necessary to entitle them to remove their causes to the federal courts. Aside from the fact

that they are created under an act of Congress, there is nothing which distinguishes them from ordinary domestic corporations of the state or an organized territory. The operation of the act was confined to Indian Territory. The domicile of the corporation organized under it was to be Indian Territory, and not elsewhere. The purpose of their organization was for the transaction of business of an entirely local character, having no more relation, necessarily, to national governmental affairs than a private business of any individual resident of the Indian Territory, and, in fact, the sole purpose of the act was to give to corporations the right to engage locally in the Indian Territory in certain kinds of business, the same as individuals. As said by Justice Field in the *Kansas Pacific Case*, *supra*:

"A private corporation is, in fact, but an association of individuals united for a lawful purpose and permitted to use a common name in their business, and to have a change of members without dissolution. * * * The grant of incorporation is to bestow the character and properties of individuality on a collective and changing body of men."

A corporation therefore is entirely a creature of legislation. Congress saw fit to permit their creation in Indian Territory. Not having provided for a local Legislature, it provided by direct legislation for their existence. But their character and sphere of operation was in no sense different in essential respects from that of corporations created under the laws of Oklahoma Territory.

The case of *Knights of Pythias v. Kalinski*, 163 U. S. 289, 16 Sup. Ct. 1047, 41 L. Ed. 163, was an action begun by the plaintiff in a state court of Louisiana on a policy of life insurance issued by the defendant upon her husband's life. The defendant is a benevolent organization, having an insurance feature, domiciled in Washington, D. C., organized under a general act of Congress, and the cause was removed to the Circuit Court of the United States for the Eastern District of Louisiana on the theory that it was a federal corporation, and that the cause was therefore one arising under the laws of the United States. It does not appear that the jurisdiction of the federal court was questioned, and the Supreme Court assumes jurisdiction without comment, and passes upon the merits of the case, treating the defendant as a federal corporation. An examination of Act Cong. May 5, 1870, c. 80, 16 Stat. 98, under which the order of Knights of Pythias was organized, shows that it is a general incorporation act, providing for the organization of charitable, benevolent, business and railroad corporations within the District of Columbia. In this respect the act resembled the Indian Territory corporation act now being considered. The authority of Congress to enact this general incorporation law of the district is found in that clause of section 8 of article 1 of the federal Constitution, reading:

"To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square), as * * * may become the seat of government of the United States."

It is observed from this constitutional provision that by it the several states relinquished any rights of government any of them might have over any ten miles square of territory which might at any time in

the future become the site of the federal government, and gave to Congress exclusive control thereof. This control is not, as in the territories, organized or unorganized, only temporary and with a view of ultimate statehood, but in the nature of things is perpetual, and shall exist so long as the government exists under the Constitution. In the Kalinski Case the act of incorporation was not only a congressional act, but at the time the suit was instituted and tried this exclusive congressional control still existed. No change had taken place, as in the case at bar, whereby the congressional authority to so legislate had been by Congress itself granted to the local state government.

On the other hand, as we have seen from the Mormon Church Case, *supra*, the power of Congress to enact the law in question relating to corporations in Indian Territory arose from the power to acquire territory, and the authority given by the Constitution (art. 1, § 8) to make all "needful rules and regulations" respecting the territory belonging to the United States. All such laws in the nature of "needful rules and regulations," so far as they relate to territories, organized and unorganized, are of necessity to be of only temporary application, and in each instance have served their purpose when the particular territory to which they apply becomes a state. For several years before the date of this Indian Territory incorporation act, Congress had been enacting laws looking to ultimate statehood, and this act was manifestly passed by Congress for the purpose only of providing a means of incorporation until statehood, just as a territorial Legislature in an organized territory might do pending statehood. By the enabling act subsequently passed, Congress has now provided for a state, and has thereby relinquished its right to create or control corporations local to the state.

In my opinion there is no fundamental difference between a law passed by a territorial Legislature, pursuant to authority delegated to it by Congress, and a law of a similar character, local to a territory, whether organized or unorganized, which Congress, in the absence of a territorial Legislature, directly enacts. They are each the result of the exercise by Congress of its power to make "needful rules and regulations" for the territory of the United States, exerted in the one instance indirectly, in the other directly. In the Pidgeon Case Congress extends a law of Nebraska over Oklahoma Territory for a local purpose. In this case Congress extends a law of Arkansas over Indian Territory for a local purpose. The latter was no more a general law of the United States than was the former, and was not in my judgment intended by Congress to be different in effect from the similar local incorporation act passed by the Legislature of Oklahoma Territory intrusted by it with the power to so legislate for that territory. While the act providing for corporations in Indian Territory was a direct act of Congress, and emanating as it did from the national Legislature was a law of the United States, as were all the statutory provisions adopted from Arkansas in force in Indian Territory, they were intended by Congress to comprise only a local system of laws for the government of the unorganized territory until such time as state-

hood should be granted, it being manifest from other contemporaneous congressional legislation which must also be considered that ultimate statehood was at all times contemplated. So that, as in the Pridgeon case, *supra*, a direct act of Congress adopting certain Nebraska criminal laws was not given the effect of a law of the United States, the violation of which was cognizable on the federal side of the court, but rather considered as a territorial law only, so also must the laws adopted from Arkansas for the local government of Indian Territory be considered as territorial laws, rather than as laws of the United States in the sense that being involved in any way in a case filed now, after statehood, they may constitute it a case "arising under the laws of the United States." It must be borne in mind that the act of Congress under which these Indian Territory corporations were created had served its purpose when the Indian Territory became a state, and, like other laws put in force in Indian Territory by Congress, has been by the force of the enabling act and statehood superseded by state laws. I cannot escape the conclusion that Congress intended that these incorporation laws of Arkansas extended over Indian Territory should serve identically the same purpose as to Indian Territory that the territorial incorporation laws of Oklahoma Territory served in that territory, and that Congress intended that, after the state of Oklahoma should be admitted into the Union, the corporations of Oklahoma Territory and of Indian Territory should have exactly the same status so far as the jurisdiction of the federal court is concerned, and that there is no more reason or authority for holding that a case now filed since statehood may be removed to the federal court solely because the defendant is a corporation originally organized under the laws in force in Indian Territory than there is for removing a case solely because the defendant is a corporation originally organized under the laws of Oklahoma Territory, and it is settled by the authorities heretofore cited that in the latter case a removal may not be had.

The motion to remand will, therefore, be sustained, and the cause remanded to the state court.

REPUBLIC IRON & STEEL CO. v. CARLTON.

(Circuit Court, D. Maryland. June 23, 1911.)

1. CORPORATIONS (§ 268*)—STOCKHOLDERS' LIABILITY—UNPAID SUBSCRIPTION—ACTION BY CREDITOR—COMPLAINT.

In an action by a corporate creditor against a stockholder to recover an unpaid stock subscription, the complaint was not demurrable for failure to negative that defendant purchased the stock for less than par under circumstances which would relieve him from further payment, or to show that the stock was not issued and sold for less than par, as authorized by Code Pub. Gen. Laws Md. 1904, art. 23, § 408.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1138; Dec. Dig. § 268.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. CONSTITUTIONAL LAW (§ 46*)—DETERMINATION OF VALIDITY OF ACT—ABSTRACT PROPOSITION.

Whether so much of a statute as provided that it should be retroactive was unconstitutional would not be determined in a suit brought after the passage of the act.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 43-45; Dec. Dig. § 46.*]

3. CONSTITUTIONAL LAW (§§ 145, 169*)—OBLIGATION OF CONTRACTS—STOCKHOLDERS' LIABILITY—UNPAID SUBSCRIPTION.

In Maryland, the liability of a stockholder of a corporation to a creditor is one founded on contract, which the Legislature has no right to impair by subsequent legislation, nor can the Legislature so change the remedy as to subsequently impair or lessen the value of the contract right.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. §§ 145, 169.*]

Statutory change of remedy as impairing obligation of contracts, see note to City of Cleveland, Tenn., v. United States, 93 C. C. A. 281.]

4. CORPORATIONS (§ 562*)—STOCKHOLDERS' LIABILITY—STATUTORY LIABILITY—NATURE AND EFFECT.

In the absence of special statutory provisions a stockholder's liability to creditors in addition to the par value of the stock subscribed for, is not an asset of the corporation, and does not pass to the corporation's receiver or trustee in bankruptcy, but is exclusively a liability attaching for the benefit of creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2265-2279; Dec. Dig. § 562.*]

5. CORPORATIONS (§ 562*)—STOCKHOLDERS' LIABILITY—UNPAID STOCK SUBSCRIPTIONS.

A stockholder of a corporation, independent of statute, is liable to the corporation for the unpaid balance of his subscription and the right to recover such balance is an asset of the company and passes to a receiver or to a trustee in bankruptcy.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2265-2279; Dec. Dig. § 562.*]

6. CONSTITUTIONAL LAW (§ 169*)—STOCKHOLDERS' LIABILITY—REMEDY—CHANGE—CONTRACT RIGHTS—VIOLATION.

Prior to Laws 1908, c. 305, a creditor was entitled to sue a stockholder of a Maryland corporation for his unpaid subscription to the capital stock, and apply the proceeds of the suit to his own exclusive benefit, though the creditor's right to judgment terminated if, before judgment was rendered, the defendant paid the balance to the corporation, to a receiver, or to another creditor, or another creditor or a receiver of the corporation recovered judgment against defendant for such balance, whether the judgment was confessed or rendered as the result of a genuine contest. Laws 1908, c. 305, declared that the exclusive remedy for the enforcement by creditors of the liability of a stockholder for unpaid subscriptions should be as against stockholders residing in Maryland, by a bill in equity as a creditor's bill against such stockholders by creditors in the county or city of the principal office of the corporation, and abated all actions of law brought subsequent to July 1, 1907, as against such stockholders to enforce unpaid subscriptions. *Held*, that such act did not so alter the contract remedy theretofore existing in favor of a creditor of a corporation to recover stockholders' unpaid subscriptions as to render the same invalid as an impairment of the creditor's contract rights.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 474, 478-502; Dec. Dig. § 169.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

7. COURTS (§ 366*)—FEDERAL COURTS—DECISIONS OF STATE COURTS—STOCKHOLDERS' LIABILITY TO CREDITORS.

Where a contract by delinquent stockholders of a corporation to pay the amount due on their stock was implied from a remedy which the Maryland courts had worked out for the enforcement of the statutory liability imposed by the state on persons who became members of its corporations, the construction given to the statute by the highest court of the state at and before the time at which they became stockholders and creditors determines the meaning of such contract.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954-957, 960-968; Dec. Dig. § 366.*]

At Law. Action by Republic Iron & Steel Company against Howard Carlton to recover as creditor an unpaid stock subscription of defendant to the South Baltimore Steel Car & Foundry Company. On demurrer to declaration. Sustained.

J. Kemp Bartlett and L. B. Keene Claggett, for plaintiff.

Moses R. Walter, Joseph C. France, and J. Southgate Lemmon, for defendant.

ROSE, District Judge. This is an action at law. The Republic Iron & Steel Company is the plaintiff. It is a New Jersey corporation. It will be called the plaintiff. Howard Carlton is the defendant. He is a citizen of Maryland. He will be styled the defendant. The suit is brought to recover from the defendant unpaid installments of subscriptions alleged to have been made by him to the capital stock of the South Baltimore Steel Car & Foundry Company. It is a Maryland corporation. It will be spoken of as the company.

The defendant demurs to the declaration. The facts admitted by the demurrer are as follows: The company owes the plaintiff \$15,839.12 for merchandise sold and delivered. The defendant became a stockholder of the company before such indebtedness was incurred. He remained a stockholder until the suit was brought. He held 360 shares of the preferred and 718 of the common capital stock of the company, the aggregate par value of which was \$107,800. The stock was acquired by the defendant from the company by subscription or purchase. The company received for it \$89,200. \$18,600 of the par value of said stock has never been paid into the company's treasury. As to said shares the defendant was an original stockholder. He knew that said stock was not fully paid and of the extent of such nonpayment. The declaration asserts that the 360 shares of preferred stock held by the defendant were not of the class known as ordinary or pure preferred capital stock, and were not issued under and in accordance with section 408 of article 23 of the Code of Public General Laws of Maryland 1904.

In support of his demurrer the defendant says, first, the declaration is bad in substance; second, it states no cause of action of the plaintiff against the defendant; third, the exclusive remedy for the enforcement by the plaintiff against the defendant of the rights it may have against the defendant as set forth in the declaration is by a bill in equity in the nature of a creditors' bill filed against the stockholders

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the company by one or more of its creditors on behalf of themselves and of all its other creditors who may come in and make themselves parties thereto.

[1] The objections to the declaration intended to be raised by the first and second grounds of demurrer, other than the one specifically set up by the third, are: First. There may be circumstances under which a person may subscribe for the stock of a corporation or buy such stock from the corporation for less than its par value without becoming liable to pay anything further upon such stock. *Handley v. Stutz*, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227; *Clark v. Bever*, 139 U. S. 96, 11 Sup. Ct. 468, 35 L. Ed. 88; *Fogg v. Blair*, 139 U. S. 118, 11 Sup. Ct. 476, 35 L. Ed. 104; *Rickerson R. M. Co. v. Farrell Foundry & Machine Co.*, 75 Fed. 554, 23 C. C. A. 302. The declaration does not negative the existence of such circumstances. Second. The declaration alleges that 360 shares of stock held by the defendant of the par value of \$36,000 is preferred stock. The total difference between the aggregate par value of the stock, common and preferred, held by the defendant and the amount he paid for the same may have been due to his getting the preferred stock at less than par. By section 408 of article 23 of the Code of Public General Laws of Maryland 1904, a corporation may dispose of its preferred stock by sale on such terms as it may prescribe. In another case in this court Judge Morris has held that this company had the right to dispose of its preferred stock upon such terms as seemed to it best. The declaration says that the preferred stock held by the defendant was not preferred stock issued under section 408 of article 23 of the Code. The defendant answers that all preferred stock issued by a Maryland corporation is necessarily issued under that section. It is not necessary to pass upon either of these contentions. Such defenses are not open in all cases. When they are defendant may set them up by plea. To require the plaintiff to negative them in advance leads to unnecessary prolixity in pleading.

The defendant's third ground of demurrer is based on the provisions of chapter 305 of the Acts of 1908. This act declares that the exclusive remedy for the enforcement by creditors of the liability of a stockholder for unpaid subscriptions to capital stock of a corporation shall be as against stockholders residing in Maryland by a bill in equity in the nature of a creditors' bill filed against such stockholders by creditors in the county or city of the principal office of the corporation. The act became law April 6, 1908. It declared that it should be operative as of July 1, 1907. It abated all actions at law brought since July 1, 1907, against stockholders to enforce liability for unpaid subscriptions to capital stock. The plaintiff says that so much of this act as declared that it should go into effect nine months before it was passed, and directed the abatement of suits which had been properly instituted before its passage, is unconstitutional. In this case it is immaterial whether the plaintiff is right or not.

[2] Its suit was brought April 20, 1908, two weeks after the passage of the law. The provisions of the enactment which direct the abatement of previously instituted suits do not affect the plaintiff. It is

not proper, therefore, to pass upon their validity in this case. *Southern Railway Co. v. King*, 217 U. S. 534, 30 Sup. Ct. 594, 54 L. Ed. 868; *Engel v. O'Malley*, 219 U. S. 135, 31 Sup. Ct. 190, 55 L. Ed. 128.

In the case of *Knickerbocker Trust Co. v. Myers*, 133 Fed. 766, in the Circuit Court, and in the same case in the Circuit Court of Appeals for the Third Circuit as reported in 139 Fed. 111, 71 C. C. A. 199, 1 L. R. A. (N. S.) 1171, the Maryland act declared unconstitutional was not passed until after the suit sought to be abated by it had been instituted.

The plaintiff says that when the defendant subscribed for his stock and when the company became the plaintiff's debtor the plaintiff had a right to sue the defendant at law. Any judgment recovered in such suit would be for the plaintiff's exclusive benefit. The right so to sue, it asserts, became vested at the time the company became indebted to it. Legislation taking from it such a right and compelling it to proceed in a court of equity against all the stockholders for the benefit ratably to all the creditors, it argues, impairs the obligation of its contract, and is, therefore, invalid.

[3] In Maryland the liability of a stockholder to a creditor of a corporation is one founded on contract. *Norris v. Wrenchall*, 34 Md. 499; *Coulbourn v. Boulton*, 100 Md. 351, 59 Atl. 711; *Brant v. Ehlen*, 59 Md. 27; *Steel Co. v. Equitable Society*, 113 Md. 80, 77 Atl. 255. It follows that the plaintiff has a right to insist that the obligation of that contract shall not be impaired by subsequent legislation. Nor may the state so change the remedy as substantially to impair or lessen the value of the contract. *Seibert v. Lewis*, 122 U. S. 284, 7 Sup. Ct. 1190, 30 L. Ed. 1161. Whether the act of Assembly of Maryland relied on by the defendant does either of these things depends, first, on what was the contract upon which the defendant is sought to be held; and second, what remedies the plaintiff had for the enforcement of such contract at the time it became a creditor of the company. These questions will necessarily be considered together.

The contract of the defendant was that he should pay the full par value of his stock to the company. Until he did, he remained liable to pay such balance to the creditors of the company. There have been and still are other obligations, contractual in their nature, under which by the Maryland law a stockholder in some kinds of companies may come to its creditors. Article 3, § 39, of the state Constitution, makes the stockholders of any banking corporation liable to the amount of their respective share or shares of stock for all the corporation's debts and liabilities upon note, bill or otherwise. Prior to the passage of chapter 101 of the Acts of 1904, stockholders in safe deposit, trust, guaranty and fidelity companies were liable to the depositors and creditors of such corporation for double the amount of stock at par value held by such stockholders in such corporations. This liability, originally imposed in most instances upon stockholders of particular companies by special act of the Legislature, was expressly made applicable to all such companies by section 85L of chapter 109 of the Acts of 1892. This liability was reduced by chapter 101 of the Acts of 1904 to the amount of each stockholder's stock at the par value thereof

in addition to the amount invested in the stock. The contract, under which the stockholders in banking and trust companies became liable to the creditors, is not in any sense a contract with the corporation. The liability of the stockholders was not an asset of the corporation. The right to enforce it did not vest in the receiver of the corporation. *Colton v. Mayer*, 90 Md. 712, 45 Atl. 874, 47 L. R. A. 617, 78 Am. St. Rep. 456.

[4] In the absence of special statutory provisions such liability of stockholders never is an asset of the corporation. It does not pass to a receiver nor to a trustee in bankruptcy. In *re Jassoy Co.*, 178 Fed. 515, 101 C. C. A. 641. It was the liability imposed by section 85L of chapter 109 of the Acts of 1892 which was in question in *Knickerbocker Trust Co. v. Myers*, supra. In Maryland such liability could not at the time the Knickerbocker Trust Company sued Myers have been enforced either by the corporation itself or by a receiver of it. Payment to the receiver or to the corporation would not have extinguished the liability.

[5] The plaintiff in the case at bar says the defendant has never fully paid for his stock. The defendant, therefore, at common law and independent of statute is liable to the company for the unpaid balance of his subscription. The right to recover such balance is an asset of the company. It is an asset which does pass to a receiver or to a trustee in bankruptcy. *Colton v. Mayer*, 90 Md. 712, 45 Atl. 874, 47 L. R. A. 617, 78 Am. St. Rep. 456; *Scovill v. Thayer*, 105 U. S. 155, 26 L. Ed. 968; In *re Remington Automobile Co.*, 18 Am. Bankr. Rep. 389, 153 Fed. 345, 82 C. C. A. 421. In this state at the time the defendant became a stockholder in the company, and at the time the plaintiff became a creditor of it there were statutory provisions as construed by the Maryland courts which enabled a creditor of a corporation to enforce such liability against a stockholder otherwise than through a receiver.

[6] Stockholders of manufacturing companies incorporated under the provisions of chapter 338 of the Acts of 1852 were severally and individually liable to the creditors of the company to an amount equal to the amount of stock held by them respectively for all debts and contracts made by the company until the whole amount of capital stock fixed and limited by the company had been paid in. This provision was in substance carried into the General Incorporation Law of 1868 as section 59 of chapter 471 of the Acts of that year. It thus became applicable to all corporations incorporated under the general law. Stockholders in such companies were thus subjected to a statutory obligation which might be much greater in amount than their common-law liability.

Assume that, under the act of 1852, or under the act of 1868, a corporation had been incorporated with a capital of \$50,000. Forty-five thousand dollars of this capital had been subscribed and paid in. Five thousand dollars of it was either never subscribed, or, if subscribed, was not paid in. A stockholder in such a company who had subscribed for stock to the par value of \$1,000, and had paid \$1,000 in cash on such subscription, would still have remained liable to the

creditors of the company for another \$1,000. His liability ended, however, when the total capital stock of the company became paid up. *Booth v. Campbell*, 37 Md. 522. A creditor could enforce such liability so long as it existed by a suit at law against a stockholder. The bringing of such suit arrested the running of the statute of limitations. It gave the creditor who bought it a start over all other creditors whose suits were subsequently instituted. He had somewhat a better chance than they of obtaining the first judgment. He had no certainty of so doing. Various accidents and mischances might delay him without delaying others who began their actions later. The stockholder might come in and confess judgment to another creditor. Among creditors who obtained judgments against any particular stockholder the creditor whose judgment was earliest in date had the first right to be paid, whether his suit was brought before or after other creditors. *Garling v. Baechtel*, 41 Md. 326; *Miners' Bank v. Snyder*, 100 Md. 63, 59 Atl. 707, 68 L. R. A. 312, 108 Am. St. Rep. 390. Moreover, there was no certainty even after suit brought that a judgment could be obtained by any creditor. If the capital stock of the company became fully paid before judgment rendered, the suit abated.

On April 11, 1871, the capital stock of a company was increased to \$45,000. One Booth subscribed for \$4,000 of this increase. He paid for it in full in cash. On July 14, 1871, the company issued a short-term promissory note. It was not paid at maturity. On November 10, 1871, the holder of this promissory note sued Booth. On July 14, 1872, eight months after suit was brought, the stock of the company became fully paid up. In the court below judgment was given for the holder of the note against Booth. This judgment was reversed by the Court of Appeals. The latter tribunal said if the whole capital stock was paid in before the trial of the suit the antecedent liability of Booth had terminated, and the holder of the promissory note was not entitled to prosecute his claim to a judgment against him. *Booth v. Campbell*, 37 Md. 522. Since 1872 a stockholder in a Maryland corporation, other than a bank or trust company, cannot be called on to pay any more money than he is liable for at common law. He is still subject to a liability which in kind was the same which had been imposed by the acts of 1852 and 1868. The Legislature of 1872 (Laws 1872, c. 203) re-enacted section 59 of the Incorporation Act of 1868, but it added to it the proviso that no stockholder shall be individually liable to the creditors of such corporation except to the amount of his, her, or their unpaid subscription to capital stock. Under the law of Maryland as interpreted at the time the plaintiff became a creditor and the defendant a stockholder of the company the defendant was liable to the company or to its receiver for the unpaid portion of his subscription to the capital stock. *Fiery v. Emmert*, 36 Md. 471; *Colton v. Mayer*, 90 Md. 712, 45 Atl. 874, 47 L. R. A. 617, 78 Am. St. Rep. 456; *Crawford v. Rohrer*, 59 Md. 604. If this liability had been enforced by the receiver, the money collected from the defendant would have been divided ratably among all the company's creditors. The defendant was also liable to the creditor or creditors of the company who should first recover judgment against him for the amount

of their judgment or judgments not exceeding the unpaid balance of his subscription. If he paid the receiver after the creditor had sued him, but before judgment was recovered, the suit abated. If the creditor recovered judgment before the receiver was paid, and before the receiver recovered judgment, the receiver's claim against the stockholder was reduced to the amount, if any, by which the unpaid subscription exceeded the creditor's judgment. *Emmert v. Smith*, 40 Md. 129; *Strauss v. Heiss*, 48 Md. 292.

Had there been no statutory provision on the subject the liability of the stockholder to pay the unpaid balance of his subscription would have been an asset of the company. As such it would have passed to its receiver when one was appointed. An individual creditor's right to institute a suit at law for his own exclusive benefit for its collection would have been at an end. The same result doubtless would have followed had the statute contented itself with declaring that a stockholder should remain liable for the balance of his subscription to its capital stock. In either of such events the present question could not have arisen in this case. Nearly six months before the present suit was instituted the United States Circuit Court for the District of Maryland appointed receivers for the company. The company was insolvent, and its receivers converted its assets into money and distributed them among its creditors. But such was not the law of Maryland. The receiver had the unquestioned right to collect unpaid balances of stockholders' subscriptions. Nevertheless, our courts held that as the Act of Assembly still declared that a stockholder remains liable to the creditors, the liability was one which a creditor might also enforce. As the law was before the act of 1908, a stockholder could not plead, in defense of a suit brought against him by a creditor, the pendency of a bill in equity against him by creditors, other stockholders, or a receiver to enforce his liability for unpaid subscriptions. *Norris v. Johnson*, 34 Md. 485.

This review of the Maryland law as it stood before the passage of the act of 1908 makes it possible to state with accuracy the precise contract, to the unimpaired obligation of which the plaintiff is entitled. It had the right to sue the defendant for his unpaid subscription to capital stock of the company. The proceeds of such a suit it might apply to its own exclusive benefit. To bring suit against a solvent defendant who still owed money upon his stock subscription might have profited the plaintiff nothing. Its right to judgment would have been at an end if, either before or after suit brought and before judgment recovered, first, the defendant paid such balance to (a) the company, or (b) a receiver of the company, or (c) to another creditor of the company; second, another creditor or a receiver of the company had recovered judgment against the defendant for such balance. It would have made no difference whether the judgment had been confessed or had been rendered as the result of a genuine contest.

The decisions which established the above principles of law were given many years before the case of *Knickerbocker Trust Co. v. Myers*, supra, came before the United States Circuit Court of Appeals for the Third Circuit. That court was therefore in error in holding that the

right of a plaintiff who was the first to *bring suit* against a particular stockholder to enforce his liability as stockholder became exclusive of the similar right of other creditors. In the case at bar the contract was not made by statute between the state and another party. When the agreement is so made the federal courts will construe the contract—that is to say, the statute—for themselves. They are not bound by the decisions of the state courts.

[7] The contract here relied on is implied from the remedy which the courts of Maryland had worked out for the enforcement of the statutory liability imposed by the state of Maryland upon persons who became stockholders in its corporations. Those who become stockholders or creditors of Maryland companies enter into the contract prescribed by statute as then interpreted by the state courts. The construction which has been given by the highest courts of the state to that statute at and before the time at which they became stockholders and creditors determines the meaning of the contract they have made. *Sauer v. New York*, 206 U. S. 549, 27 Sup. Ct. 686, 51 L. Ed. 1176. This rule of law is decisive of the case now under consideration. The plaintiff did not become a creditor of the company until July 18, 1907. On November 30, 1904 the Court of Appeals of Maryland handed down its opinion in the case of the Miners' & Merchants' Bank of Lonaconing v. Snyder, 100 Md. 57.¹ In 1903 the City Trust & Banking Company, a Maryland corporation, became insolvent. The Miners' & Merchants' Bank of Lonaconing was a creditor of the broken company. It sued Snyder, who was a stockholder in that company, to enforce against him for its benefit the liability imposed on him by statute. Before judgment was secured the Legislature of Maryland declared that the exclusive remedy of creditors to enforce the statutory liability of stockholders in a trust company should be by a bill in equity on behalf of all the creditors against all the stockholders. It further directed that all pending actions at law against such stockholders should be abated. The court held that such act was valid, and that the suit of the Miners' & Merchants' Bank abated. As has already been stated, the liability sought to be enforced in the last-mentioned case was a liability exclusively to creditors. It was one which could not have been defeated by payment to the corporation or to its receiver. Nevertheless, the court held that in Maryland the implied power was reserved to the Legislature so to alter the contract made by such a statute as to take from a creditor the right to sue at law for his own benefit, and to require it to unite with all the other creditors in a proceeding in equity against all the stockholders. When the plaintiff in this case sold the merchandise to the company, for the price of which it is now suing, it did so, knowing that in Maryland the contract created by statute between it and the defendant had the meaning given nearly three years before to a similar contract by the highest court of the state.

The case which comes nearest to supporting the plaintiff's contention is *Harrison v. Remington Paper Co.*, 140 Fed. 387, 72 C. C. A. 405, 3 L. R. A. (N. S.) 954. There a creditor sued at law a stockholder of a Kansas corporation. When the debt was contracted the

¹ 59 Atl. 707, 68 L. R. A. 312, 108 Am. St. Rep. 390.

law of Kansas provided that when the corporation suspended business for more than one year it was deemed dissolved. Suit might then be brought by any creditor against any person or persons who were stockholders at the time of its dissolution. Such creditor was not required to join the corporation as a defendant in the suit. If execution was returned unsatisfied upon a judgment against the corporation, the creditor in whose favor the judgment had been given might upon motion have execution issued on such judgment against any stockholder of the corporation for an amount equal to the amount of stock held by such stockholder. The creditor might bring an action against such stockholder upon the unsatisfied execution. The corporation involved in the suit in question was the Topeka Capital Company. It suspended business November 18, 1895. Something more than three years after the suspension of the business, but before suit brought, the Legislature of Kansas so amended the law as to provide an exclusive statutory remedy to enforce stockholders double liability. By the new act a creditor must first secure a judgment against the corporation; then there had to be a return of nulla bona upon an execution issued upon the judgment. After that was done the appointment of a receiver had to be made. The receiver then collected from the stockholders the amount due by them, or such portion thereof as might be necessary, and then distributed the sum so collected pro rata among all the creditors of the corporation. The Circuit Court of Appeals for the Eighth Circuit in the case above cited held that the defendant when he took his stock made a contract with the company and its creditors under the laws of Kansas as they then stood. It said that the act struck down the plaintiff's individual cause of action against the stockholders. It left him nothing but a right to a proportionate share with all the other creditors of the amount which a receiver, who could not be appointed until after a judgment and an unsatisfied execution against the corporation, might collect. The proceeding by judgment against the corporation by the subsequent appointment of a receiver and by his enforcement of the stockholders' liability and his distribution of the proceeds pro rata among all the creditors was a slower, a more complicated, and a less effective means of enforcing the contract. In the view of the court the change necessarily lessened the value of the contract and obstructed and postponed its enforcement.

The liability sought to be enforced against the stockholders of the Kansas corporation was a different liability from that of which the plaintiff here seeks the benefit. The stockholder in the Kansas corporation had fully paid for his stock. He was being sued for the additional liability imposed upon him by the Constitution and laws of Kansas. He could not have discharged this liability by payment to the corporation or to a receiver of the corporation either before or after suit brought against him. Under the Kansas law the first creditor who began proceedings against a stockholder acquired a lien on that stockholder's liability which could not be affected by proceedings of another creditor. *Wells v. Robb*, 43 Kan. 201, 23 Pac. 148. A Kansas stockholder who had been sued by a creditor to enforce his statutory liability could not subsequently seek out some creditor of the corporation other

than the plaintiff and pay him in preference to the plaintiff. *Brown v. Trail* (C. C.) 89 Fed. 645. That a Maryland stockholder could always do. Before the Remington Paper Company became a creditor of the Topeka Capital Company no Kansas court had decided that the remedies given by the Kansas statute to a creditor were subject to be changed at the legislative will in precisely the way in which they subsequently were changed.

Under these circumstances the authority of this case, if otherwise unshaken, could not be held to control the one now under consideration. Its authority is not unshaken. It is true that the Supreme Court of the United States denied the stockholder's petition for a writ of certiorari. 199 U. S. 607, 26 Sup. Ct. 747, 50 L. Ed. 331. Nevertheless, the same Kansas statute, declared unconstitutional by the Circuit Court of Appeals for the Eighth Circuit in *Harrison v. Remington Paper Co.*, was subsequently passed upon by the Supreme Court of the United States in the case of *Henley v. Myers*, 215 U. S. 373, 30 Sup. Ct. 148, 54 L. Ed. 240. In that case the receiver of a Kansas corporation had followed the procedure prescribed by the act in question. He had obtained a decree in equity against a stockholder requiring him to pay the amount of his liability to the receiver. The stockholder carried the case to the Supreme Court. He alleged that the obligation of his contract had been impaired by this change of remedy. The court said:

"In becoming stockholders the defendants did not acquire a vested right in any particular mode of procedure adopted for the purpose of enforcing their liability as stockholders. It is a well-established doctrine that mere methods of procedure in actions on contract that do not affect the substantial rights of parties are always within the control of the state. It is to be assumed that parties make their contracts with reference to the existence of such power in the state."

It is true that the Supreme Court in *Henley v. Myers* was dealing only with the complaint of the stockholders that the obligation of their contract had been materially altered to their prejudice. The plaintiff is entitled to argue that when it found that the stockholders before the court were not hurt by the change it did not stop to ask whether creditors who were not before the court had been injured.

After all said, however, the view taken by the Supreme Court of changes of procedure which affect the rights of the parties even more radically than it can be contended that made by the Maryland Legislature can possibly do, is shown by what it said in the case of *Bernheimer v. Converse*, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163. *Bernheimer* was a stockholder in a Minnesota corporation. He was a nonresident of Minnesota. Under the law of Minnesota, as it stood when he became a stockholder, his liability as stockholder for the debts of the corporation was absolutely unenforceable. *Hale v. Allinson*, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380. The Supreme Court said:

"The obligation of the contract binds the stockholder to pay to the creditors of the corporation an amount sufficient to pay the debts of the corporation which its assets will not pay, up to an amount equal to the stock held by each shareholder. Any statute which took away the benefit of such contract or obligation would be void as to the creditors, and any attempt to increase the obligation beyond that incurred by the stock-

holder would fall within the prohibition of the Constitution. But there was nothing in the laws of Minnesota undertaking to make effectual the constitutional provision to which we have referred, preventing the Legislature from giving additional remedies to make the obligation of the stockholder effectual, so long as his original undertaking was not enlarged. There is a broad distinction between laws impairing the obligation of contracts and those which simply undertake to give a more efficient remedy to enforce a contract already made."

It was settled many years ago that although the new remedy given by state legislation may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. *Bronson v. Kinzie*, 1 How. 315, 11 L. Ed. 143.

What has been the change made by the Legislature of Maryland in the remedy for the enforcement by the plaintiff of the defendant's contract? Before the act was passed it was absolutely in the power of the defendant to do what the Legislature now says he must do. The defendant could always have paid the money to the corporation or to its receiver. It would have been distributed among all the stockholders precisely as it will now be distributed. It was in the power of the defendant to keep the plaintiff from getting a single cent from him. After suit brought by the plaintiff the defendant could have paid another creditor or he could have confessed judgment to another creditor. In either case the plaintiff would have taken nothing by his suit. This, defendant can no longer do. As the law now stands the defendant cannot keep the plaintiff from getting his equitable share of what the defendant owes for his stock. Such a change in the remedy is not a change which substantially alters the plaintiff's remedy to the plaintiff's hurt. The Legislature must have the power to change the remedy. Every change may in some circumstances and under some conditions make the new procedure less convenient or satisfactory to one of the parties to the contract. It is not practicable for that reason to tie the hands of the Legislature. The power to alter the remedy is peculiarly necessary with reference to the class of contracts with which this case is concerned. Many corporations issue bonds payable 50, 75, and a hundred years after date. These bonds are secured by mortgages on the property of the corporation. In every, or nearly every, case they are also promises of the corporation to pay. The plaintiff says, in effect, that the method of enforcing stockholders' liability existing at the time such bond was issued cannot be changed by the Legislature during the whole time which must elapse before the maturity of the bond. If this act is unconstitutional it would seem that every state insolvent law which requires the surrender by the debtor of all his property to a trustee or assignee for his creditors generally is invalid as against creditors who became such before its enactment. It is difficult to see how such a suggestion can be seriously made. In the absence of legislation a debtor always had the right to convey all his property to a trustee for the equal benefit of all his creditors. No creditor could complain if the Legislature required a debtor, who could not pay all his creditors in full, to convey his property to a trustee or assignee for ratable division among all to whom he was indebted.

If a Legislature has the right to pass an insolvent law and to make it applicable to debts contracted before its passage, in so far as such act provides for the impounding of all the insolvent's property for the equal benefit of all its creditors, then the Legislature of Maryland had the right to pass the act complained of. The Legislature could not pass any act which would discharge the debtor from the obligation of a contract entered into before its passage. *Sturges v. Crowninshield*, 4 Wheat. 196, 4 L. Ed. 529; *Baldwin v. Hale*, 1 Wall. 223, 17 L. Ed. 531.

But that is another question. From the 1st day of December, 1839, to the 1st day of November, 1847, the Agricultural Bank of Mississippi was in possession as a tenant of the plaintiff of property in Natchez. By acts of the Legislature of Mississippi passed in 1843 (Laws 1843, p. 328) and 1846 (Laws 1846, c. 9), it was provided that upon the happening of certain events bank charters should become forfeited, and the courts were directed to appoint commissioners to audit claims against the property. A suit was brought by the plaintiffs in the United States Circuit Court for the District of Louisiana to recover for rent, some of which had accrued before the passage of the acts in question. The Supreme Court held that the case could not be maintained. *Peale v. Phipps*, 14 How. 368, 14 L. Ed. 459. The decision was placed on the ground of want of jurisdiction, the receiver being an officer of the state court and the property being in its custody. In the subsequent case of the Bank of Tennessee, 17 How. 157, 15 L. Ed. 70, the Court had before it an insolvent law passed by the Legislature of Louisiana. It said:

"Neither can there be any constitutional objection to this law of the state. The validity of a state law of this description has been fully recognized in the case of *Peale v. Phipps* [14 How. 368, 14 L. Ed. 459] and others and in the previous cases therein referred to, and cannot now be considered as an open question."

The question of the validity of this act now attacked has been before the Court of Appeals of Maryland. Its constitutionality has been affirmed. *Pittsburg Steel Co. v. Baltimore Equitable Society*, 113 Md. 77, 77 Atl. 255.

The demurrer of the defendant must be sustained. Its successful contention goes to the right of the plaintiff to maintain its action in any form. The plaintiff does not ask leave to amend. It follows that the defendant is entitled to judgment upon the demurrer.

RAGAN v. DONOVAN et al.

(District Court, N. D. Ohio, W. D. March 11, 1911.)

No. 1,330.

1. BANKRUPTCY (§ 166*)—PREFERENCE BY BANKRUPT—KNOWLEDGE OF PARTY.

The cashier of a bank, and through him the bank itself, for whom the cashier acted in receiving deeds from a debtor in which the consideration was not fixed at a fair valuation of the land conveyed, but apportioned to cover indebtedness to the bank, are chargeable with knowledge of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

debtor's insolvency, where the cashier knew that all of the debtor's visible resources were being exhausted in the transaction and knew of other transactions with the bank out of which liability to the bank would in all probability come against the debtor, and he made no inquiry as to mortgages which were then on the lands he took, nor as to other indebtedness of the debtor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250-258; Dec. Dig. § 166.*]

2. BANKRUPTCY (§ 163*)—PREFERENCES BY BANKRUPT—TRANSFERS OF PROPERTY.

Where the cashier of a bank received deeds from a debtor of the bank with the understanding that they were not to be recorded, but to be held as security, that the debtor was to continue in possession and manage the property as his own, and, as he sold them or otherwise met the pro rata obligation of the note secured, the deed for the particular parcel was to be returned, and this situation continued for five years, during which time the debtor sold some of the parcels and was permitted to make his own deed and to receive back the corresponding deeds he had made to the cashier, and the deeds were at all times in some measure under the control of the debtor, the judgment of a special master that the deeds were held by the cashier for the bank to secure preferences to the bank was proper.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 247, 248; Dec. Dig. § 163.*]

3. BANKRUPTCY (§ 165*)—PREFERENCES BY BANKRUPT—TRANSFERS OF PROPERTY.

Where a debtor gave deeds to a cashier to secure a note to the bank, and, the debtor being jointly indebted to the bank with two cotenants, who were attorneys of the bank, on another note, a readjustment was made five days after the deeds were given, by which the debtor gave a new note for an increased amount including an indebtedness of the debtor to his cotenants, the character of the original transaction as a preference by the debtor is not affected by the readjustment five days later.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260, 266; Dec. Dig. § 165.*]

4. BANKRUPTCY (§ 161*)—PREFERENCES BY BANKRUPT—TIME OF GIVING PREFERENCES—DELAY IN RECORDING DEED—"REQUIRED."

By General Code of Ohio, § 8543 (Rev. St. 1908, § 4134), providing that unrecorded deeds, as to bona fide purchasers for value without knowledge, are void, record of deed is "required" within Bankruptcy Act July 1, 1898, c. 541, § 60 (a), 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), providing that a person shall be deemed to have given a preference, if, being insolvent, he has, within four months before the filing of the petition, made a transfer of property, and the enforcement of the transfer will enable one creditor to obtain a greater percentage than other creditors of the same class, and that the period of four months shall not expire until four months from the recording or registering of the transfer, if by law such recording or registering is required.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 261-263; Dec. Dig. § 161.*]

5. BANKRUPTCY (§ 161*)—PREFERENCES BY BANKRUPT—TIME OF GIVING PREFERENCES—RECORD OF DEED.

For the purpose of determining whether a transaction was within four months of the filing of the petition in bankruptcy, deeds which were placed in the possession of the grantee with the understanding that the grantor could pay his indebtedness and have the deeds returned to him

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

were not delivered, and did not become effective, until they were filed for record.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 261-263; Dec. Dig. § 161.*]

Action by James P. Ragan, trustee in bankruptcy of Richard W. Cahill, against Dennis D. Donovan, as assignee for the benefit of the creditors of the Citizens' State Banking Company, and others. Heard on the report of a special master for the complainant. Findings and report of the special master approved and made the order of the court.

J. R. Linthicum and W. W. Campbell, for plaintiff.

E. N. Warden, Julian H. Tyler, and Smith & Beckwith, for defendants.

KILLITS, District Judge. This is an action by the trustee in bankruptcy of Richard W. Cahill against the assignee of the Citizens' State Banking Company of Napoleon, Ohio, and others, to avoid certain deeds of real estate of Cahill to the bank, as preferences. The special master, to whom the issue was referred, reports for the complainant, and the case is before the court on review.

January 7, 1904, Richard W. Cahill was clearly insolvent. He had title to real estate of the value of less than \$30,000, as we think the clear inference is from the testimony, incumbered by mortgages and other equities approximating \$4,000 or \$5,000. This was all his visible property. He was indebted to the Citizens' Banking Company directly in the sum of \$30,872, being in the shape of past-due notes and accrued interest thereon, and had other contingent indebtedness to the bank. He owed his joint tenants in one of the parcels of realty, Donovan (who is the same Donovan now assignee), and Warden, who were then partners in the practice of law and attorneys for the Citizens' Banking Company, more than \$2,000, in order to give him a full undivided one-third interest in the parcel of realty referred to.

On the 7th of January he gave to the Citizens' Banking Company a note for \$30,872, to replace the past-due notes and accrued interest, and, contemporaneously therewith, executed four separate deeds to the several parcels of realty in which he had the whole or an undivided interest, running to Groll, who was then the cashier of the bank. In determining what considerations should be placed in these several deeds, the effort was not to make a statement of the fair value of the lands conveyed, respectively, but to apportion to the several parcels a fair share of the indebtedness evidenced by the new note, and in that way the aggregate consideration was made to be \$30,800.

It is very plain from the testimony that the amount of these considerations exceeded materially the actual value of the land; some of the parcels subsequently selling for less than the consideration placed upon them in the deed.

[1] It is not a difficult matter to charge Groll with knowledge of the insolvent condition of Cahill at the time these deeds were made, and whatever knowledge, actual or constructive, Groll then had, is, of course, chargeable to the bank and to the defendant assignee. Not

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

only did Groll join, as his testimony shows, in an exaggerated value upon these separate parcels of land in the statement of consideration in the several deeds, which even then did not reach the amount of the indebtedness under consideration, but he knew that all of Cahill's visible resources were being exhausted in the transaction; he knew of other transactions with the bank out of which, in all probability, liability to the bank would come against Cahill; and, as cashier of the bank at which Cahill dealt extensively, he must have had some familiarity generally with Cahill's condition. In fact, in the testimony Groll says that he knew that the property would not meet Cahill's indebtedness to the bank by several thousand dollars, and that he made no inquiry whatever as to mortgages which were then on the lands he took, nor any inquiry of Cahill as to other indebtedness, although all the circumstances of the transaction unmistakably suggest that this business man was placed upon inquiry, and that that inquiry, if honestly met, would have shown the hopeless condition of Cahill's finances there can be no question. The doctrine of inquiry and the responsibility to inquire is too well settled to require citation of authorities. We think the special master was clearly right in ascribing to the bank, through Groll, knowledge on the date referred to that Cahill was insolvent.

[2] The deeds were given to Groll at this time with the understanding and agreement between the parties that they were not to be recorded, but to be held by Groll as security only for the note; that Cahill was to continue in possession of the several parcels, manage them as his own; and, as he sold them or otherwise met the pro rata obligation of the note as to any particular parcel, the deed for such parcel was to be returned. This situation continued for five years. In the meantime Cahill sold one or more parcels; was permitted by Groll, and the bank through Groll, to make his own deeds and to receive back again the corresponding deeds from the bank on the application of the proceeds of sale to the bank's indebtedness.

Circumstances show plainly that not only were these deeds not to be considered to be deeds absolute, but that they were in some measure always under the control of Cahill, and the whole situation renders inevitable the judgment that they were held by Groll for the bank to secure preferences to the bank, and we sustain the special master's judgment in that behalf.

[3] Donovan and Warden and Cahill at the time were jointly indebted to the bank on a note of \$4,000. Cahill, on computation, was found to owe Donovan and Warden \$2,184.11 in order to make him a one-third owner in one of the parcels involved in these deeds. This condition of affairs brought Donovan and Warden (whose relation to the bank as the bank's attorneys must not be overlooked) together with Groll and Cahill on the 12th of January, 1904, at which time a new note was made by Cahill to the bank for \$34,088.64, the note made five days previously being surrendered, and Donovan and Warden were given credit on the \$4,000 note, as against Cahill, for \$2,184.11, which sum was part of the difference between the old and the new notes. The assignee claims in this transaction the benefit of a new consideration for these deeds to the amount of \$2,184.11, assuming that that circum-

stance will avoid the weakness of the bank's position resulting from the fact that the former note, made contemporaneously with the deeds, was in fact for an antecedent indebtedness.

This court is satisfied that the assignee has not the right to rely upon the transaction of January 12, 1904, for such purpose. There is no question at all but that Cahill, and Groll, for the bank, committed themselves to the situation as it was on the 7th of January, 1904, and that the verbal understanding between all the parties five days later, after the former transaction was complete, out of which Donovan and Warden, the bank's attorneys, received a preference against their failing companion at the expense of the bank, should not be permitted to improve the condition of any of the parties at the expense of subsequent creditors of Cahill, whose equities against the bank are manifest, as will subsequently appear. The court is aided to this conclusion very materially by reflection upon the relationship which Donovan and Warden sustained as attorneys for the bank to this transaction. Neither Groll, for the bank, nor the bank's attorneys, can claim an advantage, we think, under the circumstances, out of this affair. At any rate, the deeds under attack in this case were not made in contemplation of the situation developed on the 12th of January, 1904, but as the parties arranged matters five days previously.

[4] January 2, 1909, the Citizens' State Banking Company made an assignment to Dennis D. Donovan, who, on the 4th of January, 1909, placed on record two of the deeds executed as above stated on the 7th of January, 1904 (the other two having been quietly returned to Cahill under the agreement referred to), and a third deed dated the 30th of November, 1908. This latter deed was from Warden and wife to Groll, Warden having held in trust for himself, Donovan and Cahill one of the parcels involved in the first transaction, the early deed whereof had been returned to Cahill and some of the lands described had been sold, this deed having been given to Groll simply to carry out the original agreement and to correct an oversight.

May 1, 1909, less than four months after the filing of these deeds, an involuntary petition in bankruptcy was filed in this court against Cahill, and these three deeds are the ones that are attacked in this court as preferences, as above stated.

The schedule in the bankruptcy proceedings charges Cahill with \$106,063.65 of liability, including \$32,500 indebtedness to the Citizens' State Banking Company, and ascribes to him assets nominally of the value of \$74,527. The assets are shown, however, to be of little, if any, value, except the real estate. Cahill scheduled as his own property the same real estate involved in these deeds, but stated that they were subject to deeds of trust to the Citizens' Banking Company to secure obligations which are in fact new notes made by Cahill at various times subsequent to January, 1904, to take up the note made January 12, 1904, for \$34,088.64.

A consideration of Cahill's liabilities is highly illuminative and instructive as to the equities of this case. The citizens' State Banking Company appears to be a creditor for the following sums: \$30,988.82 on notes secured by the so-called deeds of trust: \$35,000, on which

Cahill is liable as stockholder and indorser with four other persons, against which is hypothecated Cahill's interest in the Napoleon Manufacturing Company, a bankrupt corporation, the interest being 404 shares of stock scheduled at a nominal value of \$40,000 and of no actual value; \$15,577.69, on which he is liable as indorser for the defunct Napoleon Manufacturing Company, with four other persons; \$2,379, liability on a note with one surety; for \$1,255.89, on open account. All of these liabilities were incurred during the time that the bank, through Groll, was secretly holding these deeds to all of Cahill's real estate, over which Cahill was exercising publicly the absolute dominion incident to unrestricted ownership. Surely, the several persons who went to the Citizens' State Banking Company and involved themselves in these heavy liabilities on Cahill's paper have a forceful equity against the representative of the bank that permitted Cahill to masquerade to the world as the owner of a large amount of real property and thus a reasonably safe man with whom a joint liability might be incurred.

In addition to these liabilities, during the time that the bank, through Groll, was thus keeping these deeds off record, Cahill incurred liability with divers persons for money borrowed and for indorsements obtained amounting to more than \$12,000, and the circumstances suggest that either the bank, through Groll, its cashier and manager, knew of his involving himself to this extent also, or was willfully and purposely blind to conditions which eyes but reasonably open might have seen.

The court is justified, we think, in holding that the interpretation placed upon the language of section 60, paragraph (a), read in connection with section 3, paragraph (b), of the bankruptcy act, by the cases of *English v. Ross* (D. C.) 140 Fed. 630, *Loeser v. Savings Deposit, Bank & Trust Co.*, 148 Fed. 975, 78 C. C. A. 597, 18 L. R. A. (N. S.) 1233, and *In re Beckhaus*, 177 Fed. 141, 100 C. C. A. 561, should be applied to a transaction where deeds of realty are involved, as in this case, and that we should hold that the preference, manifestly attempted in behalf of the bank, should be referred for date to the time of filing the deeds.

The law applicable to this situation (section 60, paragraph a, of the Bankruptcy Act) reads:

"A person shall be deemed to have given a preference, if, being insolvent, he has, within four months before the filing of the petition, * * * made a transfer of any of his property, and the effect of the enforcement of such * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of recording or registering of the transfer, if by law such recording or registering is required."

The cases cited above (*In re Beckhaus* and *Loeser v. Savings Deposit, Bank & Trust Company*), to be sure, deal with unrecorded chattel mortgages. In the latter case, the gist of the decision is stated in the first paragraph of the syllabus as follows:

"A state statute which requires a conveyance or transfer to be recorded in order to be effectual against any class or classes of persons is a law by which such recording is 'required,' within the meaning of Bankruptcy Act July 1, 1898, c. 541, § 60a, as amended by Act February 5, 1903," etc.

Commenting upon the reasoning of the Court of Appeals in the Loeser Case, the Court of Appeals of the Seventh Circuit, in *Re Beckhaus*, *supra*, say.

"The primal canon of statutory construction is that the language actually used be given its full and fair meaning, that unqualified words be taken without qualification, and that in the absence of ambiguity extraneous matter be not considered. Under this canon probably nothing more can profitably be said than, if recording is required, it is required. If required for any purpose, or without purpose, how can it be said to be not required? If recording be not required, unless required for all purposes, it could never be said to be required where the instrument is valid between the immediate parties without recording."

And the court proceeds to say that any other ruling than that, when recording is required for any purpose or to protect any class of persons, it is "required" under section 60a, is to work positive injustice.

Chattel mortgages in Illinois, in which state this case was decided, as in Ohio, where the Loeser Case was decided, need not be recorded as between the immediate parties, but as to some classes of persons recording is essential to their validity.

Section 8543, General Code of Ohio (Rev. St. 1908, § 4134), provides that unrecorded deeds, as to bona fide purchasers for value without knowledge, are void; that is to say, for some classes of persons deeds are required to be recorded, and as to other classes they are valid without record. Then adopting the reasoning of the Court of Appeals in the Beckhaus Case that, recording being required for some purpose, recording is "required" under this statute, it seems to us that the application of these authorities to this situation is too clear to need further argument, which might be well grounded upon the case of *English v. Ross*, *supra*.

The effect of this is to deprive the case of *Kemper v. Campbell*, 44 Ohio St. 210, 6 N. E. 566, of application, because the case at bar is affected peculiarly by the provisions of the bankruptcy law, construed as we find it by the cases cited from the Federal Reporter.

There are, moreover, such vital differences between the facts in *Kemper v. Campbell* and in the case at bar that that case might perhaps be disregarded, even if the construction we place upon the bankruptcy law did not compel that course. It would seem to be a fair position to take that one who assumes to receive to himself what he intends to have no other effect than a mortgage should be held to the incidents of a mortgage, and that one ought not to be permitted, in the face of equities such as exist here, to claim, in one breath, that his papers were but mortgages, and, in the other, that, although they were mortgages, he was entitled to the safeguards surrounding absolute transfers.

In *Kemper v. Campbell*, a deed, absolute in form, intended, however, to secure the payment of money due from the maker to the grantee, and which the court said need not have been recorded to give

it prevalence over a subsequent assignment for creditors, was given, for the greater part, for a new consideration passing from the grantee to the grantor. It was off record for two months, and no question at all arose as to the good faith of the transaction or that any creditor became such upon the faith of the apparent ownership of the property by the grantor. The court in its opinion says (page 214 of 44 Ohio St., page 567 of 6 N. E.):

"It is not a proper mortgage. In equity it is construed to be such for the purpose of preventing imposition and injustice; but at law it is simply, what on its face purports to be, an absolute conveyance in fee simple. And no other or different construction will be placed on the deed, unless necessary to accomplish the ends of justice. To do otherwise would be foreign to the spirit of equity, and would violate the plainest principles upon which equity jurisprudence has always been administered by the courts. No one of the maxims of equity is of more unvarying application than that 'he who seeks equity must do equity.'"

We commend this language to the parties and counsel in this case. To give *Kemper v. Campbell* the effect claimed for it by defendants would be, under the circumstances of the case at bar, to work out instead of to prevent "imposition and injustice." The bank, through the assignee, in this instance is not here doing the equity it seeks.

[5] If, however, we are wrong in so applying the cases cited above, and it is not the law that an unrecorded deed is subject to the treatment we have attempted for the deeds involved in the proceeding before us, there is another reason why, in the judgment of the court, the special master was right in his report in favor of the complainant.

Groll testifies that these deeds were to be severally handed back to Cahill as Cahill redeemed them, either by selling the property conveyed by them, respectively, or by otherwise meeting the obligations against which they were ratably applied. Mr. Warden, testifying as a lawyer, is not willing to state the matter the same way. His testimony is:

"It was understood at the time that Mr. Cahill could pay his indebtedness and have the property retransferred to him at any time within a reasonable time. That was the understanding and intention of Mr. Cahill there."

However, and without at all suggesting that Mr. Warden's generalization just quoted manifests an intention to testify other than truthfully, the circumstances suggest very clearly that the arrangement was as Groll repeatedly says, for that was the arrangement that the parties acted upon. It was not deemed necessary when Cahill effected a sale of the most important property to Armbruster and Vajen that the title should be retransferred to Cahill; but he was permitted, with the knowledge of all of the parties, to make deeds to these people as if his title was unaffected by the deed lying in the possession of the bank. And as to one other parcel, when a portion of it was sold, the deed in Groll's possession, representing the whole parcel, was actually handed back. There are other circumstances which support the conclusion that these papers, although in Groll's possession, were not by the parties considered to be effective to transfer title from Cahill to Groll.

The facts raise the question of whether delivery such as is necessary to effect a transfer of property was ever made. If it were understood by maker and grantee that the title to the grantee was not actually passing with the possession of the deeds in the grantee, but that those apparent muniments of title were subject to the informal recall of the grantor up to the time that something else was done, to wit, recording by the grantee, in order to finally effect the purpose of the instrument, then we deem it to be clear that the delivery did not become effective until the grantee did the final act which would give the instruments complete effect.

Delivery may be accomplished in many ways, and without formality; but it is not concluded until there results from it final and absolute transfer to the grantee of the rights of which the instrument speaks. It is true that, unexplained, mere tradition of a deed from the maker to the person to whom it is made or to some person for his use suggests delivery, and this is so because of the presumption that the instrument is taken by the receptor for the purposes of its execution. But this is presumption only, overthrown if it is plain that in the tradition either the grantor is not intending to part with the title described in the deed, or that the receptor is not exercising acceptance of the title as passing out of the grantor to him. The criterion of a delivery, in whatever form, is that through it the grantor absolutely parts with control of the instrument. That both Cahill and Groll considered the latter's holding of each of these deeds to be subject to the former's recall is, as we have said, clearly the evidence. Delivery, therefore, was not complete and effective until some act was done which was within the contemplation of the parties and which ended Cahill's dominion over the papers. That act was to file them for record, which was an eventuality clearly within the plans of the parties when they were made. Then only was there delivery.

If this position is tenable, then the preference which Cahill unquestionably undertook to make to the bank and the bank undertook to obtain, on the 7th of January, 1904, was not completely effective until the 4th of January, 1909, when the deeds were filed for record which date is within four months of the filing of the involuntary petition.

The findings and report of the special master are approved and made the order of the court.

LEWIS v. FRICK, Immigration Inspector.

(Circuit Court, E. D. Michigan, S. D. April 20, 1911.)

1. ALIENS (§ 54*)—DEPORTATION—DETERMINATION BY DEPARTMENT—CONCLUSIVENESS.

A determination by the Department of Commerce and Labor of a question of fact involved in a deportation proceeding is not reviewable by the courts, if sustained by some evidence, but errors of law may be reviewed.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. ALIENS (§ 53*)—ENTRY—FACTS NOT CONSTITUTING.

Where an alien has had an established residence and occupation in the United States for six years, and he crosses the border into a foreign country not his native country for a mere temporary purpose, and returns within an hour, especially at a point like the Detroit-Windsor crossing, the return cannot be deemed an entry within the immigration laws.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 53.*]

3. ALIENS (§ 53*)—DEPORTATION—GROUNDS.

That an alien was convicted of or pleaded guilty to disorderly conduct on withdrawal of a charge of housebreaking does not show conviction or admission of a crime or misdemeanor involving moral turpitude warranting deportation.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 53.*]

4. ALIENS (§ 53*)—DEPORTATION—GROUNDS.

An alien cannot be deported for unlawful entry, where the only complaint relates to an offense committed long after his entry.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 53.*]

5. ALIENS (§ 53*)—DEPORTATION—GROUNDS.

An alien cannot be deported as having procured his admission by false and misleading statements, where any such statements were made on his return, and not on his entry into the country, and related not to himself, but to a woman accompanying him.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 53.*]

6. ALIENS (§ 53*)—DEPORTATION—GROUNDS.

Immigration Act Feb. 20, 1907, c. 1134, § 2, 34 Stat. 898 (U. S. Comp. St. Supp. 1909, p. 448), excludes from admission an alien who attempts to bring in a woman for immoral purposes. Section 3 makes it a felony for an alien to import an alien woman for such purposes, and authorizes deportation on conviction. *Held*, that an alien may be deported on account of importing a woman for immoral purposes only on conviction of that offense.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 53.*]

Petition by Samuel Lewis for a writ of habeas corpus against G. Oliver Frick, Immigration Inspector. Petitioner discharged.

Watson, U. S. Atty., and Bland, Asst. U. S. Atty., for Inspector in Charge.

Florian, Moore & Wilson, for petitioner.

DENISON, District Judge. The petitioner, Samuel Lewis, came from Russia, to this country, entering at the port of New York, and regularly passing inspection, on September 20, 1904. He lived in, or in the vicinity of, New York, until March, 1910, when he came to Detroit, where he has since made his home, and worked as a painter and paper hanger, and it is undisputed that he was industrious and orderly and in no trouble until November 17, 1910. On that day, he went across the river, from Detroit to Windsor, remained not more than an hour or so, and brought back with him, into the United States, a woman claimed to be his wife. On this occasion, he made to the immigration officers a statement as to the woman and her recent history, some part of which statement was concededly untrue. In December following he was indicted by the grand jury for violation of section 3 of the immigration law (Act Feb. 20, 1907, c. 1134, 34 Stat. 898 [U. S. Comp. St. Supp. 1909, p. 447]) as amended March 26, 1910

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

(Act March 26, 1910, c. 128, 36 Stat. 263), the sole charge being that, in bringing this woman across the river on November 17th, she was, by him, imported for an immoral purpose. This indictment duly came on to be tried in the District Court of this district, and on March 23, 1911, the trial jury rendered a verdict of not guilty. The issue was whether the woman was in fact, or was believed to be, his lawful wife. On November 24, 1910, he was arrested by an immigrant inspector upon a warrant of arrest issued by the Department of Commerce and Labor, and specifying, as its moving causes: (1) That he had been convicted of or admitted having committed a felony or other crime or misdemeanor involving moral turpitude prior to his entering the United States; (2) that he had brought into the United States a woman for immoral purposes; (3) that at the time of his entry (November 17, 1910), he was likely to become a public charge; and (4) that he entered without inspection, and hence was unlawfully in the country. Certain hearings and examinations were held before the inspectors. Complaint is made concerning some features of these examinations, and it is said that he did not have a fair hearing or such hearing as the law requires. So far as concerns the main question of fact into which the department undertook to examine, viz., the importing of the woman, I do not see sufficient ground for these complaints, and if the department had jurisdiction, under the existing circumstances, to hear and determine this question of fact and to deport upon that ground, I should not undertake to review its conclusion. What I understand to be a complete file copy of the department proceedings does not show any formal finding by the department upon the charges made, but that is, probably, not material, because on February 14, 1911, the Secretary of Commerce and Labor issued his warrant of deportation, reciting that, after due hearing, he had become satisfied that Lewis, who landed at Detroit, Michigan, from Canada, November 17, 1910, was in this country in violation of the immigration law as amended March 26, 1910, in this, to wit:

"That the said alien was a member of the excluded classes in that he has been convicted of and admits having committed a felony or other crime or misdemeanor involving moral turpitude prior to his entry into the United States; that he procured, imported, and brought into the United States a woman for an immoral purpose; that at the time of his entry into the United States he was a person likely to become a public charge; and that he is unlawfully within the United States, in that he secured admission by false and misleading statements thereby entering without the inspection contemplated by law, and may be deported in accordance therewith."

Thereupon, the warrant directed that he be taken to New York and be from there deported to Russia. February 28th, the department directed that his deportation be stayed until he was released by the court authorities in connection with the pending indictment. March 23d, Mr. Frick was authorized to stay deportation for 10 days further to enable Lewis to submit additional information. Lewis, by his attorneys, submitted to the department, at Washington, a showing that he had been acquitted on the indictment, and also some character evidence, April 13th, and, it is to be assumed after this additional showing, the Secretary withdrew the stay and directed Mr. Frick to ex-

ecute the warrant immediately. Thereupon, a writ of habeas corpus was allowed from this court. Mr. Frick, appearing in person and by the United States district attorney, makes return. The foregoing facts and others to be hereafter mentioned, appear without dispute either from the petition and return or from the statements made by Mr. Frick and the District Attorney in open court upon the hearing. The immigration inspector insists that this court is without jurisdiction to make the inquiry which will be necessary in order to release the petitioner from custody, while the petitioner insists that the department was without jurisdiction to issue the warrant.

[1] It is entirely clear that when the petitioner, in such case, is an alien, and when the right to deport him depends upon a question of fact and when there has been a hearing by the department of that question, such hearing being upon disputed evidence, and the conclusion of the Secretary is based upon some evidence, such conclusion cannot be reviewed by the courts, and if the fact so found does, in law, justify the deportation, it must proceed, however mistaken the conclusion of the department may seem to the court to have been. On the other hand, it is equally clear that errors of law, by the department, may be reviewed by the courts; that an erroneous conclusion of law, made by the department, cannot be sustained by being mistakenly called a conclusion of fact; that a conclusion of fact based upon no evidence tending to support it is of no force; that the hearing at which no evidence is introduced is no hearing; and that the secretary's authority for deportation must be found in the statute. See cases cited in note 1.

[2] Except as to the charge as to the woman, all the charges depend upon the theory that Lewis' entry into the United States was on November 17, 1910. I think this is a wholly mistaken theory, on the undisputed facts. There has been a great diversity of holding under varying circumstances as to the effect of a temporary return to his native country by an alien who had established a domicile in this country. Sometimes it is quite clear that the return therefrom to this country must be considered a new entry, and sometimes whether a new entry might be a question of fact; but I find no case supporting the theory that where an alien has an established residence and occupation in this country which has extended, as in this case, for six years, and where he crosses the border, not into his native country but into another foreign country and so crosses for a mere temporary purpose, and returns within an hour—particularly at a point like the Detroit-Windsor crossing where hundreds are crossing and recrossing every day—I find no support for the theory that the return in such case can be considered as the entry to which the immigration laws relate. See cases cited in note 2.

[3] It is conceded that the charge relating to having been convicted of or admitting a felony or other crime or misdemeanor has no basis whatever, excepting that two or three years before coming to Detroit and after he had been two or three years in this country, Lewis was arrested by the New York police on the charge of housebreaking, that this charge was withdrawn, and a charge of disorderly conduct placed against him, and that to this he pleaded guilty (or perhaps was con-

victed) and paid a fine of \$10. It is further said that at about the same time and in Atlantic City Lewis was convicted as a disorderly person and paid a small fine. It does not appear, however, that this Atlantic City charge was ever brought to Lewis' attention in the department proceedings. As to the New York City charge, Lewis insisted from the beginning that he was guilty of nothing, and did not know what he was arrested for, and paid a fine because he was ordered to. In this matter, the department may suspect that Lewis was guilty of housebreaking or that he was consorting with thieves and burglars, but he has neither admitted nor been convicted of any such thing. Certainly, there is no basis for the idea that disorderly conduct, fined \$10, is a "crime or misdemeanor involving moral turpitude," any more than is the case of carrying concealed weapons, considered by Circuit Judge Ward in *Ex parte Saraceno* (C. C.) 182 Fed. 955.

[4] Jurisdiction to deport cannot rest on this charge; and this without regard to the date of the offense which was long after Lewis' actual entry into the United States. The latter consideration alone would end the question.

As to the accusation that at the time of his entry he was likely to become a public charge, it is to be noted, first, that this has to do with his actual entry in 1904, as to which no claim is made and no proof taken; second, that at the time of the Windsor-Detroit crossing, he was able bodied, industrious and self-supporting, and nobody has suggested the contrary; and, third, that the proposition advanced by the department as the only one upon which this claim was ever thought to rest is that inasmuch as he was bringing in a woman contrary to law, he was likely to be arrested and convicted and imprisoned and so become a public charge. It therefore appears that this element of his offense is collateral to the other or importing charge and must stand or fall therewith even if it could otherwise have force.

[5] The final ground recited is that he procured admission by false and misleading statements. It is conceded by the inspector that this relates wholly to the Windsor-Detroit admission of November, 1910, and on this subject, it is to be observed, first, that this was not the time of his admission to the country; second, that his alleged false and misleading statements related wholly to the woman and had nothing to do with himself or his right to admission; and, third, that if their falsity had been discovered when made, he would, nevertheless, have had a perfect right to return to his domicile in Detroit. This ground of deportation, obviously, cannot stand on its own merits, and is collateral to the charge of importation.

This leaves for consideration only the last named charge, viz., that relating to the woman. The jury found Lewis not guilty. From my familiarity with the evidence, I can say I think the evidence as fully developed on the trial (it being, in a substantial way, the same as the evidence before the department) justified a strong suspicion that Lewis was guilty, but did not justify a conviction under the rules of criminal law. The case is one where the courts could not review the conclusion of the department, if the department has jurisdiction to hear such question at all.

[6] However, I am unable to find in the immigration law any authority whatever for deporting an alien because he has imported a woman for immoral purposes. Such importation might be fully proved, or, indeed, might be admitted by the alien, and still the department would have no jurisdiction to deport. It has such jurisdiction only under section 3, and that exists only in case of conviction.

I am led to this conclusion by study and comparison of sections 2 and 3. Section 2 excludes from admission into the country a person who attempts to bring in a woman for immoral purposes. In terms, it applies only to excluding one who is attempting to get in, but it has been construed to be effective by relation in deporting those who had entered; and I accept that construction. Whether it could, in any event and standing by itself, be a basis for deporting an alien who had established and maintained a domicile in this country for six years, and in a case where the offense had nothing to do with the entry of the person to be deported, it is not necessary in this case to decide.

By section 3, Congress has provided that where the woman imported is an alien, and the person importing is an alien, a felony is committed; and that the person who is convicted of this felony may be deported. Under the general rules of statutory construction (Noyes, C. J., in *Wong Yun v. U. S.*, 181 Fed. 313, 104 C. C. A. 535), the intent seems clear that out of the general class covered by section 2, Congress has selected a particular class named in section 3 and submitted it to a severe punishment, but, in connection therewith, has limited the right to deport to cases where there is a conviction.

The right to prosecute criminally and the right to deport are inconsistent as concurrent rights. They cannot both be exercised at the same time. Congress saw the necessity of making the proceedings successive; and it clearly and probably purposely made the second step depend on the result of the first step.

The conclusion is inevitable that the deportation warrant is void, and that the petitioner should be discharged. An order may be entered accordingly; but the discharge may be stayed for a further period of 10 days to enable the district attorney to perfect an appeal, if desired.

NOTES.

The following notes cover all pertinent cases found in the Federal Reporter since volume 150. Chinese cases are (generally) not included, because they are *sui generis*. *Rodgers v. U. S.* (C. C. A., 3d Circuit) 152 Fed. 346, 81 C. C. A. 454. All relevant Supreme Court cases are reviewed in the citations.

NOTE 1.—The jurisdiction of the federal courts on habeas corpus, in cases where the Department of Commerce and Labor has ordered deportation.

A. INSTANCES WHERE JURISDICTION DISCUSSED AND SUSTAINED.

- (1) *U. S. v. Nakishima* (C. C. A., 9th Circuit) 160 Fed. 842, 87 C. C. A. 646.
- (2) *U. S. v. Watchorn* (C. C.) 160 Fed. 1014 (Ward, Circuit Judge.)
- (3) *Ex parte Petterson* (D. C.) 166 Fed. 539 (Purdy, District Judge).
- (4) *U. S. v. Williams* (D. C.) 173 Fed. 626 (Hand, District Judge). Because determined by a question of law.
- (5) *Botis v. Davies* (D. C.) 173 Fed. 996 (Sanborn, District Judge). See comments on attempt of department to stand on inapplicable laws (pages 1001, 1002).

(6) *Ex parte Koerner* (C. C.) 176 Fed. 478 (Whitson, District Judge). Question of law involved. Cases reviewed.

(7) *Ex parte Sibray* (C. C.) 178 Fed. 144 (Orr, District Judge). Discussion on page 150.

(8) *Davis v. Manolis* (C. C. A., 7th Circuit) 179 Fed. 818, 103 C. C. A. 310. Controlling question held to be one of law.

(9) *Sprung v. Morton* (D. C.) 182 Fed. 339 (Waddill, District Judge). Cases reviewed on pages 333-335, 339.

B. INSTANCES WHERE JURISDICTION DENIED.

(1) *U. S. v. Watchorn, Re Funaro* (C. C.) 164 Fed. 152 (Ward, Circuit Judge). This decision seems not to consider the point that the Secretary had no jurisdiction unless an "admission" was involved. In so far as it seems to hold the Secretary's decision final on a question of law, see *Ex parte Saraceno* and *In re Nicola*, *infra*.

(2) *Ex parte Crawford* (D. C.) 165 Fed. 830 (Adams, District Judge).

(3) *Re Tang Tun* (C. C. A., 9th Circuit) 168 Fed. 488, 93 C. C. A. 644.

(4) *U. S. v. Williams* (D. C.) 175 Fed. 275 (Hand, District Judge).

(5) *Edsell v. Mark* (C. C. A., 9th Circuit) 179 Fed. 292, 103 C. C. A. 121.

(6) *De Bruler v. Gallo* (C. C. A., 9th Circuit) 184 Fed. 566. In all of these cases, there was involved what was thought to be an "admission," so giving effect to the finality section, and the controlling question was thought to be one of fact.

C. CONCLUSION.

That inferences of law from undisputed facts are to be finally drawn by the courts and not by the department is clearly shown by the two latest cases from the Second circuit:

(1) *Ex parte Saraceno* (C. C.) 182 Fed. 955 (Ward, Circuit Judge), holding that there is no authority to deport unless the person is a member of one of the statutory classes, and that the decision of the department is not binding if not based on any evidence. "It is impossible to avoid the conclusion that the real ground for the order is that the immigration authorities think the alien is an undesirable citizen, which is a class not excluded by the immigration law."

(2) *In re Nicola* (C. C. A.) 184 Fed. 322. The question of citizenship, as one of law on undisputed facts, was considered, and the order of the immigration officer reversed.

NOTE 2.—The case of an alien who has a domicile in the United States, but returns to his native country, and whose re-entry into the United States is challenged.

A. INSTANCES WHERE ADMITTED.

(1) *Rodgers v. U. S.* (C. C. A., 3d Circuit) 152 Fed. 346, 81 C. C. A. 454. Had resided in U. S. four years; returned to native country four months. Act of 1903 is considered, but upon reasons applicable to act of 1907.

(2) *U. S. v. Nakishima* (C. C. A., 9th Circuit) 160 Fed. 842, 87 C. C. A. 646. After two years' residence in United States, had been in native country two years.

(3) *Sprung v. Morton* (D. C.) 182 Fed. 330 (Waddill, District Judge). Nine months in native country, after several years in United States. See page 337, for review of cases.

B. INSTANCES OF EXCLUSION.

(1) *Taylor v. U. S.* (C. C. A., 2d Circuit), 162 Fed. 1, 81 C. C. A. 197. This case discusses whether the statute covers an alien who is not also an immigrant. It was by a divided court, has been doubted by the Circuit Court of Appeals for the Ninth Circuit (160 Fed. 842), and reversed (on another point) by the Supreme Court (207 U. S. 120, 28 Sup. Ct. 1, 52 L. Ed. 95).

(2) *Re Funaro* (C. C.) 164 Fed. 152 (Ward, Circuit Judge). In native country for five months, after being in United States six years.

(3) *Ex parte Crawford* (D. C.) 165 Fed. 830 (Adams, District Judge). Circumstances not stated.

(4) *U. S. v. Hook* (D. C.) 166 Fed. 1007 (Morris, District Judge). A return to native country for four days only.

(5) *Ex parte Peterson* (D. C.) 166 Fed. 536 (Purdy, District Judge). Nine months in native country, after five years in United States.

(6) *Looe Shee v. North* (C. C. A., 9th Circuit) 170 Fed. 566, 95 C. C. A. 646. This case holds that the admission continues inchoate until the end of the specified probationary period. It does not relate to a domicile once perfected.

(7) *U. S. v. Villet* (C. C.) 173 Fed. 500 (Holt, District Judge). The result reached depended on the departmental considerations stated.

(8) *Ex parte Hoffman* (C. C. A., 2d Circuit) 179 Fed. 839, 103 C. C. A. 327. A return to Russia for three months, after three years in United States.

C. CONCLUSION.

The rule seems fairly settled in the Second circuit that the second entry is to be treated as a new original, and in the Third and Ninth, to the contrary. Judge Taylor's opinion in *U. S. v. Aultman* (D. C.) 143 Fed. 922, affirmed in 148 Fed. 1022, 79 C. C. A. 457, indicates that the latter view is the law of this circuit. It concerns a contract laborer, and an older law, but I see no distinction in principle.

It is to be noted also that Lewis is ordered deported to Russia, and his entry from Russia was in 1904. If his crossing of November, 1910, was the unlawful admission, he should have been deported to Canada.

SHELTON v. CANADIAN NORTHERN RY. CO.

(Circuit Court, D. Minnesota, Fourth Division. April 19, 1911.)

1. TRIAL (§ 136*)—CONSTRUCTION OF FOREIGN LAW—QUESTIONS OF FACT AND LAW.

Where the construction of statutes of a foreign country arises in a federal court of the United States, it is a question of fact and not of law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 318-327; Dec. Dig. § 136.*]

2. COURTS (§ 98*)—CONCLUSIVENESS.

A holding by the Canadian courts that Canadian Railway Act 1906, § 284, providing that a railroad company shall not be relieved by any notice, condition, or declaration if the damages arise from its own negligence, includes contracts is binding on a federal court of the United States required to apply such section.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 324; Dec. Dig. § 98.*]

3. CARRIERS (§ 234*)—CONTRACT—LIMITED LIABILITY—FOREIGN CONTRACT.

Since, under the law of Canada, a carrier granting a shipper a free pass to care for his stock and goods in transit, may by contract relieve itself from liability for injuries to such caretaker, even though arising from the negligence of the carrier or its servants, a contract so made in Canada, governing a shipment wholly between Canadian points, would be enforced in an action in the federal court sitting in Minnesota for injuries to a shipper in Canada, though such contract was contrary to the public policy of Minnesota or of the United States in so far as it attempted to exempt the railway from liability for negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 965, 1263, 1538; Dec. Dig. § 234.*]

4. CARRIERS (§ 318*)—INJURIES TO PASSENGER—NEGLIGENCE.

Where a passenger was injured in a wreck caused by the failure of a switch tender to throw a switch so that the train would go onto the main line, causing the train to pass onto a side track and run into a train standing thereon, the facts showed ordinary negligence, and not a wanton or malicious injury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1307-1314; Dec. Dig. § 318.*]

5. CARRIERS (§ 307*)—INJURY TO PASSENGER—LIMITED LIABILITY.

The public policy of the United States as declared by the Supreme Court allows a railroad company to exempt itself from liability even for its own negligence in the case of a person traveling on a free pass.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1252-1259; Dec. Dig. § 307.*]

6. CARRIERS (§ 158*)—TRANSPORTATION OF GOODS—VALUATION.

Where a carrier's transportation contract provided that it should not be liable for more than \$1,200 for the contents of plaintiff's car, it was liable for such proportion of that amount as the value of the property destroyed bore to the value of all the property in the car.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 663-667, 699-710; Dec. Dig. § 158.*]

7. CARRIERS (§ 158*)—CONVERSION OF PROPERTY—CONTRACT.

A carrier's contract for the transportation of property providing that it should only be liable for \$1,200 for the contents of a car had no application to a cause of action for the carrier's conversion of property in the car not destroyed, and to which plaintiff was entitled to recover the value of the property at the time it was converted.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 663-667, 699-710; Dec. Dig. § 158.*]

At Law. Action by Sylvester J. Shelton against the Canadian Northern Railway Company. Judgment for a part only of the relief demanded.

The plaintiff, a resident of South Dakota, entered into a contract in Canada with the defendant company for the transportation of a car load of household goods and live stock from Emerson Junction to Lloydminster, both in the Dominion of Canada. The car was wrecked, admittedly through the negligence of the defendant, at a station called Borden, Canada, some 160 miles east of the point of destination. In the wreck the plaintiff was injured, some of the live stock killed, and the household goods more or less destroyed. He brings this suit for damages for the injury to himself and to some of his personal effects, and also to recover the value of that part of the goods not destroyed, which he claims was converted by the defendant to its own use. The contract of carriage which was signed by the plaintiff contained among other things, a recital that the company would not be responsible for an amount exceeding \$1,200 for the contents of the car, and the following provision: "In case of the company granting to the shipper or any nominee or nominees of the shipper a pass to ride on the train in which the property is being carried, for the purpose of taking care of the same while in transit and at the owner's risk, as aforesaid, then, as to every person so traveling on such a pass the company is to be entirely free from liability, in respect of his death, injury or damage, and whether it be caused by the negligence of the company, or its servants or employes or otherwise howsoever." The contract also contained the words "Pass man in charge." The defendant denied all responsibility as far as the injuries personal to the plaintiff were concerned.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Mr. Larabee and John A. Shelton, for plaintiff.
Hector Baxter, Mr. Clark, and Pierce Butler, for defendant.

WILLARD, District Judge (orally). In this case the first question to be considered is whether the defendant is liable in damages under the law of Canada for the personal injuries received by the plaintiff. It is claimed by the plaintiff that section 284, par. 7, of the Railway Act of 1906, expressly provides that the company cannot exempt itself from liability for loss occurring through its own negligence or that of its servants; and that the provisions of section 340 which allow the Board of Railroad Commissioners to determine to what extent a contract limiting liability may be made, do not authorize that board to infringe the provisions of section 284. In other words, that the Board of Railway Commissioners can allow contracts limiting liability, but not to the extent of limiting liability for accidents occurring by the negligence of the railway company.

[1] It has been suggested that the determination of this question involves a construction of these two provisions of the act, and that consequently it is a question of law and not of fact. But it is well settled that, when a question arises in this court as to foreign law, it is a question of fact and not of law. What the law of Canada is must be proved by evidence.

In this case it is not the duty of this court to compare these two sections, and to determine from a construction of them alone whether the Board of Railway Commissioners had power to authorize a contract releasing a railway company from liability for an injury occurring through its negligence. He would be an unwise man who would undertake to determine from foreign statutes alone what the law of a foreign country was. The law of a foreign country, like our own law, consists not only of statute law, but more in the construction placed upon the statutes by the courts of the country by which they are enacted. There is a good illustration of this proposition in this very case. Section 284 says that the company shall not be relieved by any notice, condition, or declaration, if the damages arise from its own negligence. If I were going to construe that section myself, I should have some difficulty in saying that it included a contract.

[2] The Legislature, it seems to me, has very carefully refrained from the use of the word "contract"; yet it is agreed by the defendant that, by the construction given to the law by the courts of Canada, it does include the word "contract." I am bound, of course, by that construction, and must hold that it does include contracts. So, in determining whether the Board of Railway Commissioners has a right to allow a certain contract which limits the liability of a railway company, I must be governed by the decisions of the Canadian courts upon that subject.

This question may be viewed from two standpoints: The first relates to the effect of the approval by the Board of Railway Commissioners of this contract. It has been proved that the precise contract which was signed in this case by the plaintiff has been approved by the Board of Railway Commissioners. From the deposition of Mr. Chrysler,

which was offered in evidence, it appears that he is a lawyer practicing in Canada, and his testimony as to what the law of Canada is is competent evidence in this case: Also his testimony as to what the legal effect in Canada of these various provisions is is competent. He testified as follows:

"Q. Looking again at Exhibit C, and the form of contract annexed thereto, will you say whether that is such a form of contract as the board under the provisions of the railway act then in force had power to approve?"

That contract is identical with the contract here in question.

"A. Yes; a contract of this description when approved by order of the board has the force of law in Canada as if enacted by statute."

It is therefore proven in the case that this contract has the same force as if it had been included in an act of the Canadian Parliament.

[3] We have, then, here a law of Canada which expressly authorizes this contract, and expressly allows a railway company to limit its liability for the transportation of a person riding on a free pass, even for its own acts of negligence. Under that construction of the law it is apparent that the plaintiff could not recover in Canada if he had brought his action there. In my judgment the same result must be reached if we take the other viewpoint; that is, from the authorities and from the decisions of the Canadian courts.

It has been held in the first place, and it is not disputed by plaintiff, that there can be a limitation of liability, even for the negligence of the company, so far as respects the value of the property injured. It is not denied that the limitation contained in this contract with regard to the value of the property is good, even against the provisions of section 284, and in a case where by the law of negligence the company would be liable. That would go far to show that the provisions of section 284 were not absolutely controlling. It was not beyond the power of the railway company, even without the sanction of the Board of Railway Commissioners to make a contract in some way limiting its liability. But the courts have gone further than that, and they hold that it is competent for railroad companies in the case of persons traveling, as this plaintiff was, upon a free pass accompanying stock, to provide that they shall not be liable for any injury to the person so traveling, even though the injury be caused by the negligent act of the railway company or its servants.

The case of *Goldstine v. Canadian Pacific R. W. Co.*, 21 Ontario Appeal Reports, 576, involved this identical contract. The contract is set out at considerable length, and it turns out to be precisely the same as the contract here. In that case the court said at page 579:

"Quite independently of the special contracts having been approved by the Board of Railway Commissioners, it was, according to the decisions in *Hall v. North Eastern R. W. Co.* (1875), L. R. 10 Q. B. 437, and *Bicknell v. Grand Trunk R. W. Co.* (1899), 26 A. R. 431, quite competent for the shippers or their nominee to agree with the defendants to travel at their own risk of personal injury in consideration of being allowed to travel free."

That decision to my mind settles the controversy, so far as the law of Canada is concerned. It not only holds that it is competent for a

railway company to make this contract independently of the approval of the Board of Railway Commissioners, but it also makes a far more important holding, namely; that this man was traveling free, and that he was not being carried for hire.

In the case of *Bicknell v. Grand Trunk R. W. Co.*, 26 Ontario Appeal Reports, 431, it is stated in the syllabus, as follows:

"A contract was made by a railway company for the carriage of cattle to a point on the line of a connecting railway company at a fixed rate for the whole journey. The contract provided that the shipper (or his drover) should accompany the cattle; and that the person in charge should be entitled to a "free pass," but only "on express condition that the railway company are not responsible for any negligence, default, or misconduct of any kind on the part of the company or their servants."

It was held that the condition was valid, and could be taken advantage of by the Canadian Railway Company. The court in its opinion said at page 449 as follows:

"I have come to the conclusion, differing with great respect from the learned trial judge that what the plaintiff was to receive and what he did receive was a free pass. That was his own understanding of his dealing with the company as may be seen from his evidence, although it is now contended that his fare was included in or was part of what he paid for the carriage of the cattle."

This case, as the case of *Bicknell* against the railway company is important in two respects: In the first place, because it holds that the contract in this case was valid; and, in the second place, because it holds that the man was traveling on a free pass. It has been suggested that the plaintiff was required to accompany his stock, and that this would make a difference, but that same feature appeared in the other case. While the contract may have required the plaintiff to accompany the stock, yet it nowhere requires the company to carry him for nothing. It may be readily conceded to mean that he must accompany the stock; but he must pay his fare, and then he would be in the same condition as any other passenger who was being carried for hire.

I have come to the conclusion therefore that under the laws of Canada the plaintiff cannot recover. This contract was valid, and if he had brought his action in Canada he could not have prevailed. But it is claimed that though he could not have maintained an action in Canada, because he had entered into a valid contract which exempted the company from liability, yet he can escape the onerous conditions in the contract by coming into Minnesota and here maintaining an action; that in Minnesota, or anywhere in the United States, that part of the contract which allowed the railroad company to exempt itself from liability in a case where the injury was caused by its own negligence cannot be put in force, because it is contrary to the public policy of the United States.

The case of *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627, is relied upon more largely perhaps by the plaintiff than any other case. I have examined that and the other cases to which my attention is called, but I find no one of them just like this case. In no one of these cases was the contract made in a foreign country, was it to be performed in the foreign country, and did the accident happen in a foreign

country. Therefore no one of the authorities cited fulfills all the conditions of this case.

In the case of *The Glenmavis* (D. C.) 69 Fed. 472, which was an action for damages in the transportation of goods from some foreign port to Philadelphia, the accident happened in Philadelphia. It might very well be said that the accident happening in a country where the law prohibited a contract relieving the company from liability for its own negligence, the liability could be enforced, although there was a contract made in a foreign country relieving the company from such liability.

In *The Kensington*, 183 U. S. 263, 269, 22 Sup. Ct. 102, 104 (46 L. Ed. 190), it appeared that some packages had been shipped from Antwerp to New York. It further appeared that the packages were entirely destroyed on the high seas, and not in any foreign country where the law of such foreign country allowed such a limitation as the Canadian law allowed. It also appeared that the ticket which contained the limitation was not signed by Mrs. Bleeker or by her daughter who were passengers. The Supreme Court stated the question as follows:

"The contention amounts to this: Where a contract is made in a foreign country, to be executed at least in part in the United States, the law of the foreign country, either by its own force or in virtue of the agreement of the contracting parties, must be enforced by the courts of the United States, even although to do so requires the violation of the public policy of the United States. To state the proposition is, we think, to answer it."

The contract in this case was not to be executed in the United States; it was not only made in Canada, but was to be entirely executed in Canada.

The case of *Liverpool Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788, is much relied upon by the plaintiff. It was claimed in that case that the law of England where it may be said the accident happened allowed a limitation of liability even in case of negligence on the part of the carrier. There was no proof, however, in the court below as to what the law of England was. There was an attempt made after the case had been closed to open it, and permission was asked to prove the law of England, but it was denied. The court said that it would not disturb that ruling; but it did proceed further, and passing that point, discussed the general question as to the conflict of laws. It said on page 461 of 129 U. S., on page 479 of 9 Sup. Ct. (32 L. Ed. 788):

"Our conclusion on the principal question in the case may be summed up thus: Each of the bills of lading is an American and not an English contract."

It appears in that case that the contract was made in America, and the shipment of the goods was from America to England.

"And so far as concerns the obligation to carry the goods in safety, it is to be governed by the American law, and not by the law, municipal or maritime, of any other country. By our law, as declared by this court, the stipulation by which the appellant undertook to exempt itself from liability for the negligence of its servants is contrary to public policy and therefore void."

That statement takes that case out of the rule which must govern the decision in this case. Here there was no contract made in the

United States to be performed in Canada, but it was a contract made in Canada, to be performed in Canada and was performed there. I see as I stated before, nothing in any of those cases which necessarily holds that this contract would not have to be enforced in this country exactly the same as it would have to be enforced in Canada. The case of *Chicago, Burlington & Quincy Railway Co. v. Gardiner*, 51 Neb. 70, 70 N. W. 508, was one where there was under discussion a statute of Nebraska which did not allow a common carrier to limit its liability for negligence. It does not appear from the report where the accident happened. The goods were transported from Peoria to Nebraska, but it does not appear whether the accident happened in Nebraska, in Iowa, or in Illinois where the statute allowed such limitation. But it is urged very strongly that the *Lockwood Case* held that the plaintiff in that case, the defendant in error in the court above was not a free passenger, but was being carried for hire, and it is insisted that that must control in this action. There are two reasons why in my judgment that case does not control. The first is that it does not appear from the facts in the *Lockwood Case* that they were the same as they are in this case. It is proven in this case that the contract was made at a rate of \$35 and some cents; that it was a reduced rate; and that it was the rate at which the property was to be carried by the railroad company whether a man went with the property or not. Under classification No. 14 the railroad company was entitled to charge that amount for carrying the property, and was not required to carry a man with it for that amount. It seems to me that it would necessarily follow that if the railroad company was entitled to \$35 for carrying the property, and they carried him in addition, they carried him for nothing. But the more controlling reason is that the courts of Canada have held that under this classification and under this precise contract the man is being carried free, and is not being carried for hire.

So admitting the entire force of the *Lockwood Case*, and admitting that a contract like the contract in the *Lockwood Case* is contrary to public policy, and would not be enforced in this country, although the contract was made and was to be performed in Canada, admitting all that, yet to my mind the fact that he was being carried free takes this case out of that rule. And the decision here must be governed not by that case, but by the case of *Northern Pacific Railway Co. v. Adams*, 192 U. S. 440, 24 Sup. Ct. 408, 48 L. Ed. 513. It was suggested in the argument that there was no proof of negligence in that case, and that there was no negligence. But I think the case does not bear out that statement. On page 448, of 192 U. S., on page 409 of 24 Sup. Ct. (48 L. Ed. 513), Mr. Justice Brewer says:

"As the negligence of the company, found by the jury to have caused the death," etc.

So it seems to necessarily follow that there was some negligence. Then again on page 451 of 192 U. S., on page 410 of 24 Sup. Ct. (48 L. Ed. 513) the court said:

"We shall assume, however, but without deciding, that the jury were warranted, considering the absence of the vestibule platform and the high rate

of speed in coming round the curve in finding the company guilty of negligence; but clearly it was not acting either willfully or wantonly in running its train at this not uncommon rate of speed, and all that can at most be said is that there was ordinary negligence."

It was suggested that in this case there was something more than ordinary negligence, but I do not think that the evidence would justify the jury in finding that there is anything more than negligence. Certainly there was no evidence to show that this engineer wantonly and maliciously ran his train onto the side track and into another train.

[4] It would be going a great way to say that the failure of the switch tender to throw the switch so that the train would go on the main line was a wanton and malicious neglect. The only thing that can be said is that some one was careless, and that is admitted. In the Adams Case the Supreme Court held that a contract by which a railroad company agreed to carry a passenger free was not contrary to public policy; so that even assuming that the courts of this country would not enforce a contract made and to be performed in a foreign country which was against the public policy of this country, yet we have nothing here that is against the public policy of this country.

[5] The public policy of the United States as declared by the Supreme Court allows a railroad company to exempt itself from liability, even for its own negligence, in the case of a person traveling on a free pass. That is the case here; the plaintiff cannot recover at all on account of his personal injuries, and therefore I shall direct the jury accordingly.

[6] Upon the question of the loss of property I shall charge the jury that the railroad company is liable for the value of the property which was destroyed by the collision, and that the loss is to be ascertained by determining what proportion that part of the property which was destroyed was to the entire amount of property carried. If they decide that it is ten-seventeenths of the entire amount carried, then the plaintiff is entitled to recover ten-seventeenths of \$1,200, which was the maximum amount fixed by the contract as the value of the contents of the car.

[7] I have also indicated that I shall charge the jury that as to the property not destroyed the contract has no binding force. The cause of action stated in the complaint is for conversion—conversion of the property after the accident happened; and for that conversion the defendant is liable for what the jury may find was the value of that property at the time it was converted.

I have also stated what I shall charge the jury with reference to the value of the horses. I have not seen any occasion to change my mind as to that.

I do not think that there was any obligation on the part of the plaintiff to pay the feed bill. Nor was there any evidence to show what the feed bill was, or that it was a reasonable bill. All that the evidence shows is that the station agent told the plaintiff that the feed bill amounted to \$165, but it does not show that that was a reasonable charge for taking care of the horses.

PACIFIC IMPROVEMENT CO. v. CHATTANOOGA SOUTHERN R. CO.
(LAMB, Intervener).

(Circuit Court, N. D. Georgia. March 31, 1911.)

1. CORPORATIONS (§ 308*)—OFFICERS—COMPENSATION.

The president of a corporation may not claim a salary for his services as such, where none was voted him before the rendition of the services; but, where he renders extra services clearly outside the ordinary duties of his office, he may recover the reasonable value of such extra services under an implied promise to pay for them.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1334-1349; Dec. Dig. § 308.*]

2. CORPORATIONS (§ 308*)—OFFICERS—COMPENSATION.

The president of a corporation in the hands of a receiver filed an intervening petition for services as president, and alleged that he had rendered valuable services to the corporation as president, and that he had never received any compensation therefor, and that the corporation was justly indebted to him in a specified sum. An amended petition alleged that, at the request of high officials of the corporation, he devoted a great part of his time to the affairs of the corporation and rendered services; that he was nominally recognized by the board of directors as the president; but that his duties were such as might arise out of the needs of the corporation; and that he gave himself to the management of the business of the corporation and rendered, constantly, various services. *Held*, that the amended petition, taken, as it must be, in connection with the original petition, did not state facts justifying a recovery for services out of the assets of the corporation.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 308.*]

Suit by the Pacific Improvement Company against the Chattanooga Southern Railroad Company, in which Henry L. Lamb filed an intervening petition for an allowance against defendant for compensation for services rendered as its president. Demurrer to intervention, as amended, sustained.

Norris Headrick, for intervener.

Coleman & Frierson, for demurrant Chattanooga Southern R. Co.

Watkins, Thompson & Watkins, for demurrant Margaret Olivia Sage.

NEWMAN, District Judge. Henry L. Lamb filed his intervening petition in this case, asking to be allowed to recover against the company compensation for services rendered as its president. The original petition is as follows:

"In compliance with the decree rendered in the above-styled cause, Henry L. Lamb, by his attorney, Norris Headrick, respectfully shows to the court that he is, and continuously has been since the year 1893, president of the defendant railroad company, and, as such president, he has rendered and continues to render valuable services to said company; that he has never at any time received any sum by way of compensation for said services; and that therefore the said defendant, Chattanooga Railroad Company, is justly indebted to your petitioner in the sum of fifteen thousand dollars (\$15,000.00) as evidenced by statement filed herewith, executed and sworn to by your petitioner, marked as Exhibit No. 1 to this petition. Your petitioner prays that his said account be allowed, and that said indebtedness be paid in full out of the proceeds realized in the within cause."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 189 F.—11

The account attached to said petition is as follows:

"The Chattanooga Southern Railroad Company, Dr.
"To Henry L. Lamb,

"For services as president of the company, \$15,000.

"State of Tennessee, Hamilton County—ss.:

"Personally appeared before me, Norris Headrick, a notary public in and for the county and state aforesaid, Henry L. Lamb, with whom I am personally acquainted, who being sworn on his oath says: That his foregoing account in the sum of fifteen thousand dollars, (\$15,000.00) against the Chattanooga Southern Railroad Company, a corporation, is just, true and correct, and that said sum remains due and unpaid.

"[Signed] Henry L. Lamb.

"Sworn to and subscribed before me, this the 15th day of April, 1910.

"[Signed] Norris Headrick,

"Notary Public, Hamilton Co., Tenn."

This claim was referred to G. E. Maddox, Esq., standing master in chancery, and his report thereon is as follows:

"Henry L. Lamb filed his claim for the sum of \$15,000 for services as president of the defendant company, from the year 1903; his claim being set forth in detail. To this petition demurrers were filed by the railroad company, and E. C. Osborne, receiver therefor; also by Mrs. Margaret Olivia Sage, one of the creditors of the defendant company. After hearing the argument of counsel, I am of the opinion that the demurrers should be sustained. I therefore sustain the demurrers and dismiss the claim."

This case coming before the court on exceptions to the master's action, the intervener was allowed to amend his petition, which he did as follows:

"Leave to amend the original intervening petition filed in this cause by this intervener having been granted, he now comes and amends his original petition and says:

"That your petitioner, Henry L. Lamb, was requested by certain high officials of the Chattanooga Southern Railroad Company to overlook the affairs of that company. This request was made in 1893, and immediately thereafter your petitioner acceded to it and began to devote a great part of his time to the affairs of the company. Your petitioner was in the employ of the said company from the time before mentioned until the filing of the bill in this cause and the appointment of the receiver, rendering during that time a great deal of attention to the affairs of the company. He was nominally recognized by the board of directors of the company as its president, but his duties were any such as might arise out of the needs of the company. He gave himself to the managing and running of the railroad belonging to the company, and in doing that was constantly called upon for various services. The railroad owned by the company was not of any magnitude, being less than 100 miles long, and consequently your petitioner was called on to look after a variety of things. Your petitioner was kept busy in the service of the company for years, and during that time made no application for compensation for what services he had rendered and was rendering because he realized that such would be futile, the affairs of the company being so involved that financial recompense at the time was practically impossible, and your petitioner thought it best to not further embarrass the company by any application for compensation when it was due, but to wait until the affairs of the company were in better shape. Thus waiting, the bill herein was filed before your petitioner had made any application.

"Your petitioner served the company, along the lines herein set out, until 1907, and has never received any compensation for such services. He therefore asks, as in his original petition filed herein, that the sum of \$15,000 be allowed him."

Two questions are made as to this intervening petition. The first is that the president of a railroad company cannot recover compensation from the corporation that becomes insolvent in the hands of receivers, under the circumstances indicated in this original and amended intervention. The next is the statute of limitations.

If the first point made against this intervener as to his right to recover is good, it is unnecessary to consider the second.

[1] There is no pretense here that any salary was voted to Henry L. Lamb, as president, by the board of directors before the services were rendered. The claim simply stands on what is stated in his petition, that he rendered valuable services, as president, to the company, and that he is consequently entitled to recover for the same.

In Cook on Corporations, vol. 2, § 657, p. 1924, it is said:

"The president (that is, the president of a corporation) cannot claim a salary for his services as president where none was voted to him before the services were rendered"—citing quite a number of authorities, among them St. Louis, etc., R. R. v. O'Hara, 177 Ill. 525, 52 N. E. 734, 53 N. E. 118; Henry, etc., Co. v. Schaefer, 173 Mass. 443, 53 N. E. 881, 73 Am. St. Rep. 305; Metropolitan Elev. Ry. v. Kneeland, 120 N. Y. 134, 24 N. E. 381, 8 L. R. A. 253, 17 Am. St. Rep. 619; Merrick v. Peru Coal Co., 61 Ill. 472; Holland v. Lewiston Falls Bank, 52 Me. 564; Barril v. Calendar, etc., Co., 50 Hun (N. Y.) 257, 2 N. Y. Supp. 758; Commonwealth Ins. Co. v. Crane, 47 Mass. 64; Kilpatrick v. Penrose, etc., Co., 49 Pa. 118, 88 Am. Dec. 497.

In Home Mixture Guano Co. v. Tillman, 125 Ga. 172, 53 S. E. 1019, what was determined by the Supreme Court of the state will be shown by an extract from the opinion of Chief Justice Fish:

"The court should have then sustained the general demurrer and dismissed the petition, as it failed to state a cause of action against the defendant corporation. Whatever cause the plaintiff may have had for feeling aggrieved by the conduct of the other two stockholders and directors in voting to themselves salaries as officers of the corporation and refusing to provide a salary for him as its president, his petition clearly shows that he could not, under its allegations, recover of the corporation, under either an express or an implied contract. The petition expressly negated the idea that any corporate action had been taken providing for the payment of a salary, or any compensation whatever, to the president for his services. Hence the plaintiff had to rely upon an implied contract, and sought to recover for his services as president upon a quantum meruit. It is well settled in all jurisdictions that the directors of a private corporation are not entitled to salary or other compensation for performing the usual and ordinary duties pertaining to their office, as defined by the charter or by-laws, or by custom, unless there is an express agreement or provision for compensation when the services are performed. 'They cannot recover on implied contract for what the services were reasonably worth, for the law will not imply a promise on the part of the corporation to pay; and it can make no difference, in the application of this rule, that the services were performed with the expectation of compensation, or with the general understanding among the directors themselves that they should receive compensation. The courts have based this doctrine on the ground that the directors, president, and other managing officers of a corporation are in effect trustees, and the law does not imply any promise to pay trustees for performing their duties as such, or allow them to take compensation out of the funds in their hands, in the absence of an express provision or agreement for compensation.' 3 Clark & Marshall on Priv. Corp. 671a, and numerous cases there cited. By the weight of authority this rule applies to directors serving as president, vice president, treasurer, etc. Id.; 21 Am. & Eng. Enc. L. 903, 906, and citations. The rule is succinctly stated by Judge

Thompson in his work on Corporations, in the following language: 'In the absence of some provision in the articles of incorporation, in the by-laws, or in some resolution of the board of directors legally passed, the general rule is that the president and other officers of private corporations are presumed to serve without compensation, and cannot maintain an action against the corporation to recover compensation for their official services.' 7 *Thomp. Corp.* 8581. In *Ellis v. Ward*, 137 Ill. 509 [25 N. E. 530], the court not only announced this rule, but went further and held that a private corporation cannot legally pay its officers for past services rendered in the performance of their usual duties, unless prior to the rendition of such services a by-law or resolution has been adopted authorizing and fixing compensation therefor; and that, 'where a president of an incorporated company performs services as such, without any by-law or resolution providing compensation for his services, and afterwards accepts a salary voted to him for past services, he will be liable to refund the same in favor of creditors of the company.' In the opinion it was said that this doctrine was well settled by that court, and a number of its decisions were cited. The general rule which we have been discussing is not applicable where a director, or managing officer, of a private corporation renders extra services, which are clearly outside of the usual and ordinary duties of his office, but he may recover the reasonable value of such services as upon a quantum meruit, where they were performed under such circumstances as to raise an implied promise on the part of the corporation to pay for them; especially if it was understood by the other officers of the corporation that he was to perform these services and to be paid for them by the corporation: 3 *Clark & Marshall on Priv. Corp.* 671c. The plaintiff was not obliged to serve the corporation as its president after the majority of its directors had declined to adopt a by-law or pass a resolution providing a salary for the incumbent of that office, and he was not entitled to compensation for services which he had then already rendered the corporation as its president."

[2] It is clear that the amendment to the intervention must be taken in connection with what is stated in the original intervention. In that, as will be seen, the intervener sues "for services as president of the company." What is stated in the amendment is perhaps somewhat an enlargement of what is contained in the original intervention, but is not sufficient to bring the case within any of the exceptions to the general rule on the subject of the right of the president of a company to recover under such circumstances as are here shown.

In *Home Mixture Guano Co. v. Tillman*, supra, it is said:

"Even if the allegations of the petition, as amended, in reference to the assistance which the plaintiff rendered the corporation in the successful conduct and management of its financial affairs, by the use of his personal influence with financial institutions in its behalf and the pledging of his own credit for its benefit, etc., can be considered as presenting a case of services rendered the corporation, outside of his regular official duties, of such a character and under such circumstances as to raise an implied promise on the part of the corporation to compensate him for them, he did not sue for the value of such services. His suit was for 'a fair, reasonable, and adequate sum of money in payment of salary as president of the defendant company from the 19th day of June, 1900, to the 14th day of July, 1904.'"

There is no view of this intervention, considering the original and amendment together, which would authorize the intervener to recover anything out of the assets of this insolvent corporation.

It would have been better practice for the demurrer to the intervention to have been heard originally by the court; but it seems to have gone to the master under an order of reference, and I do not

see what else he could have done than sustain the demurrer. At all events, it is perfectly evident to the court now that the demurrer to the intervention as amended should be sustained, and an order may be entered to that effect.

LAWSON v. BARBER & CO., Inc.

(Circuit Court, E. D. New York. July 22, 1911.)

1. EQUITY (§ 43*)—JURISDICTION—RETENTION OF JURISDICTION ACQUIRED.

Though complainant in a suit in equity to rescind a contract with defendant, who was nominally an agent, but really the principal, and for an accounting, had an adequate remedy at law for breach of warranty, where the court on the first argument refused to dismiss in equity and remit the party to an action at law, the action having been tried in 1904, and finally submitted in 1906, and resubmitted on final argument in 1907, and the parties having taken over four years to submit their briefs, the equity court will decide the cause on its merits.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 121-140; Dec. Dig. § 43.*]

2. SALES (§ 441*)—REMEDIES OF BUYER—SUIT FOR BREACH OF WARRANTY—SUFFICIENCY OF EVIDENCE.

In a suit in equity, evidence held insufficient to show a breach of warranty of the quality of coal sold by the respondent to complainant, or any legal basis for estimating damage from such a breach.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1277-1283; Dec. Dig. § 441.*]

3. SALES (§ 442*)—ELEMENTS—DAMAGES.

Where complainant purchased coal from respondent as agent of a seller in Wales, but the respondents were in fact the principals, and on a dispute arising as to the quality of the coal the complainant sent a representative to Wales to see the supposed principal, the complainant is entitled to recover the provable disbursements in sending the representative to Wales.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1284-1301; Dec. Dig. § 442.*]

In Equity. Suit by William C. Lawson against Barber & Co., Incorporated. Decree for complainant, for reference to determine one item of damages, and for respondent, dismissing the balance of the bill.

Peale & Blair, for complainant.

Butler, Notman & Mynderse (Archibald G. Thacher, of counsel), for respondent.

CHATFIELD, District Judge. The complainant has brought a suit in equity asking for relief in the form of rescission of contract between the complainant, as assignee of two parties, the Hazard Wharf Company and one Lloyd, an attorney at law, and the respondent, nominally an agent, but whom the complainant now alleges to be principal. The complainant also demands an accounting, in order that he may be allowed the amount by which his expenses in disposing of the subject-matter of the contract in question, namely, two

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

steamship loads of coal, may be fixed, and that he may be decreed to be entitled to receive the amount by which his expenses, including the sum paid for the coal, exceeded what he received therefor.

In order to dispose of the issues raised, an exact determination of the positions of the parties is necessary, and will serve the purpose both of establishing premises for fixing their legal responsibility and also finding the facts upon the testimony as presented.

Barber & Co. are steamship agents, and during the pendency of the coal strike in 1902 undertook to deliver by steamship to the Hazard Wharf Company certain coal from Wales. This was after negotiations in September of that year, through an agent of Barber & Co., with a representative of the Wharf Company from Baltimore.

A contract was entered into, and one steamship load of coal was delivered. The contract shows that it was not sold according to sample, but that the government regulations and classifications as to it were had in mind, and that the price was fixed for certain grades of coal according to size.

The feature of this contract which the respondent alleges was a material misrepresentation was that Barber & Co. undertook as steamship agents to contract for one Jones as principal, and the first cargo of coal was delivered by them nominally as agents. This cargo was accepted and paid for, and meanwhile the Hazard Wharf Company ordered another cargo. Lloyd, who, as has been said, was a lawyer, also undertook to order a cargo, in which he transferred his rights to the Wharf Company. Neither of these cargoes arrived until after the output of coal in the United States, at the termination of the strike, had caused a reduction of prices and made the cargo of coal from Wales undesirable and unprofitable in competition with the coal that could be then procured in the United States.

According to the terms of the contract, the coal had to be paid for upon certificates of loading, and both of the cargoes in question were paid for before arrival, by the complainant's assignors. When the cargoes arrived a question arose, as is contended by the respondent because of the change in the market, and as is contended by the complainant because of the condition of the coal, under which the complainant's assignors made objection to the respondent, soon after they accepted and unloaded the cargoes. At this time the situation was considered, and the purchaser, feeling that it was under contract to take these cargoes of coal and having already advanced payment therefor, went ahead with the unloading, but sent a representative to New York, who interviewed Barber & Co.'s agent, and even then did not learn that Barber & Co. were the principals in making the contract, and not the agents for Jones in Wales, as the terms of the contract stated.

If Barber & Co.'s representative could have gained any advantage by concealing the fact that they were principals, it would be strong evidence of fraud; but all of the reasons for the acceptance of the cargoes existed substantially as strongly in dealing with Barber & Co. as with Jones in Wales, and it would seem that Barber & Co.'s rep-

representative allowed the complainant's agent to continue under the impression that Jones was the principal in the contract, and even to go to Wales to see Jones, purely to save trouble for the respondent, or to cover up his own transactions so far as Barber & Co. were concerned. And if this action were brought for a recovery of the additional expenses incurred by the concealment of the fact that Barber & Co. were the real principals, there would be little reason to decide that Barber & Co. did not cause the additional expense and damage without right so to do.

[1] But that is not the entire question we have to deal with here. This action was tried in 1904, finally submitted in 1906, and, owing to a change in the office of judge of this court, heard again on final argument in 1907. The parties have taken over four years to submit their briefs, and the court is now asked to decide that the complainant should not have come into equity, but should have brought an action at law upon a breach of the warranty that Barber & Co. were contracting agents and that Jones was the responsible principal in the transaction.

As has been said, if the complainant were suing merely for the additional damage, such a cause of action might have been proper. As it is, the court upon the first argument having refused to dismiss in equity and remit the parties to an action at law, it would seem that the case should now be disposed of upon the merits and an accounting ordered, if upon the facts there seems to be any liability within the limits of the cause of action alleged, as the testimony (already put in in great detail) shows loss of profits and actual expense resulting from the transaction, if the respondent should account therefor.

It will be remembered that the goods were not sold according to sample. They were sold at a certain price per ton, the quantity to be at the seller's option, and the only warranty as to quality was implied warranty that the coal should be of the sort represented. The complainant did not refuse to take the coal and demand his money back. He alleges as a reason therefor that he thought he was bound by contract to receive this coal with a man in Wales, and had contracted with many individuals to deliver the coal to them. He had already advanced payment for the coal, and the demurrage and other expenses incident upon any dispute or delay would be so great that he determined to complete the contract and then sue the parties whom he considered were responsible. He therefore completed the contract by accepting the coal and using it. The testimony shows that advertising had been carried on, and large quantities of the coal had been paid for, and were still desired by customers. The testimony does not show whether some of these indicated orders never materialized, nor does the testimony show whether the complainant ultimately sold the coal at a smaller price to the same parties who had been wishing it; but the record does show that the purchaser went ahead, screened and rescreened the coal, so as to remove the finer particles and dust,

and also to get out, as they say, foreign material which had been allowed improperly to be shipped with the coal, and sold the coal as best it could.

[2] If the complainant had rescinded the contract and refused to accept the coal, and had then held it subject to the seller's orders, ultimately disposing of it at the seller's risk and for his account, the result would be the same as the relief the complainant now asks, namely, that the seller pay him for the actual expense of the coal and its sale, including the price paid, and he would have accounted to the seller for the amount received for the coal. He would then have had an action in which he could claim damages for misrepresentation or breach of warranty against the proper party. He could also, as the matter now turns out, have kept the cargoes and sued Barber & Co. on this breach of contract or breach of warranty, because it is now admitted that Barber & Co. were the real principals to this contract, and that any representations or guaranties contained in the contract were actually made by them, and not by the dealer in Wales. But the complainant did not bring such an action at law, he did not sue Barber & Co., who were responsible parties, for damages, nor did he preserve any evidence, in the form of samples of the coal, so as to justify his claim that the coal was not worth the market price for which a first-class grade of the same article could have been sold, even after the termination of the coal strike. The complainant did communicate with Barber before the coal had entirely been unloaded and disposed of, and did indicate an intention to hold the seller, whom he supposed to be in Wales, accountable for what he claimed to be the poor condition of the coal. But it is impossible to see how his position was changed by the fact that Barber & Co. in reality sold him the coal, and could have been sued or held responsible for a breach of contract, and that he did not learn of this before making the trip to Wales.

It would seem, therefore, that the motion to dismiss, on the ground that the complainant had an adequate remedy at law, might have been granted, and that this action should be for damages, if any cause of action were made out. But, as has been said, the size of the record, the thoroughness of the proof, and the time which has elapsed makes it necessary to dispose of the case upon the merits, and the court will place its decision upon the testimony, which seems to show plainly that the disappointment in the result as to the later cargoes of coal, when compared with the profits from the first cargo, were caused by the conditions resulting from the settlement of the strike, and from the fact that, even when the boat landed, coal of the size in question could not be disposed of at a profit. But their position was not changed through anything that occurred with Barber & Co., nor (whether Barber & Co. acted as principals or agents) did lack of knowledge of the fact relieve the complainant from deciding as to accepting the coal when delivered. If any breach of warranty as to the quality of the coal, or any additional expense in the way of damage from Barber & Co.'s failure to disclose their own position result-

ed, it should have been made the basis of a legal action, rather than of a suit to put the parties back in the position in which they were before the contract was made. But as a matter of fact no breach of warranty as to quality is shown. It must be held that upon the evidence no proof of such damage, and no legal basis for estimating any such damage, other than the expense of the trip to Wales, has been shown.

[3] Inasmuch, however, as it is now impossible to attempt to collect those damages at law, and as the scope of this accounting proceeding is broad enough to cover any matter of accounting relating to this cause of action, the complainant may have a decree allowing the provable disbursements in sending a representative to Wales to find out what should have been told him by Barber & Co.'s representative at New York. A reference therefore may be had, if necessary, as to this cause of action.

The respondent should have a decree dismissing the balance of the bill. No costs will be allowed to either party, except for the reference to be held, which the complainant may tax.

In re BELLEVUE PIPE & FOUNDRY CO.

(District Court, N. D. Ohio, W. D. December 3, 1910.)

No. 1,437.

1. SALES (§ 150*)—CONTRACTS—PERFORMANCE.

A seller unable, because of limited means of transportation, to completely fill his obligations, must prorate his shipments to his customers and must show by competent testimony that a buyer complaining received his fair quota.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 150.*]

2. SALES (§ 181*)—CONTRACTS—PERFORMANCE.

Evidence *held* not to show that a seller, unable, because of limited means of transportation, to completely fill his obligations, prorated his shipments to his customers, and to show that a buyer did not receive his fair quota.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 181.*]

3. SALES (§ 89*)—CONTRACTS—MODIFICATION—EVIDENCE.

Evidence *held* not to show that a contract for the sale and delivery of iron for a specified period was extended.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 89.*]

4. CORPORATIONS (§ 397*)—ACTS OF OFFICERS—CONCLUSIVENESS.

The mere fact that the same person was the president of two corporations, one of which became bankrupt, is not sufficient to make the bankrupt a party to a transaction between the solvent corporation and a third person, and, though the president could bind the bankrupt to furnish materials to the third person on the charge of the solvent corporation, the third person, who has not changed his position, may not complain of the refusal of the board of directors of the bankrupt corporation to fill the order.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 397.*]

5. BANKRUPTCY (§ 154*)—CLAIMS—OFFSET.

A claimant ordered materials from a corporation, but another corporation which became bankrupt, intending to charge the same to the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

claimant, furnished the materials. The claimant, before changing his position or suffering any loss, learned of the facts and insisted on receiving the materials from the bankrupt. *Held*, that claimant made itself a debtor of the bankrupt without any right to offset against the shipment any claim it had against the other corporation.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 154.*]

6. SALES (§ 384*)—BREACH OF CONTRACT—MEASURE OF DAMAGES.

The measure of damages for breach of contract of a product of manufacture with a well-understood value in the market, fluctuating as the market fluctuates, is the difference between the contract price and the market value at the time of the breach; but, where the article has no standard market value, the measure of damages is the difference between the cost to the seller of its manufacture and delivery and the contract price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1098-1107; Dec. Dig. § 384.*]

In the matter of the bankruptcy of the Bellevue Pipe & Foundry Company, a bankrupt. On petition for review of the decision of the referee on the trustee's petition to expunge claims of the Sloss-Sheffield Steel & Iron Company and the National Supply Company. Petition denied.

Smith & Beckwith, for Sloss-Sheffield Steel & Iron Co.
 Taber, Longbrake & O'Leary, for National Supply Co.
 Jesse Vickery, for trustee.

KILLITS, District Judge. The affairs of this bankrupt are before the court for investigation upon petitions for review of the decision of the referee on the trustee's petition to expunge the claim of the Sloss-Sheffield Steel & Iron Company, and also of the action of the referee with reference to the claim of the National Supply Company, and upon exceptions to the report of the special master commissioner on the unliquidated claims of the Warner Iron Company, of the receiver of the Sheffield Coal & Iron Company, and Woodstock Iron Works, Incorporated.

It will be unnecessary to discuss the facts of the case with reference to either one of these questions, for the court is impelled to sustain the referee touching the claims of the Sloss-Sheffield Steel & Iron Company and the National Supply Company, dismissing the petition to review the action of the referee in behalf of each of these claims, and also to follow the advice of the special master commissioner and to dismiss the exceptions to his report. As to each of these matters, the referee, who was also special master commissioner in the matter of the claims of the Warner Iron Company and the receiver of the Sheffield Coal & Iron Company and the Woodstock Iron Works, Incorporated, has in writing in detail set forth the facts and conclusions of law, and, in the main, the court adopts the reasoning of the referee and special master as its own.

In addition to the referee's finding in the matter of the Sloss-Sheffield Steel & Iron Company, we might add that it does not seem to us that the claimant has made a case bringing it within the provision of its contract with the bankrupt to the effect that it should not be held

* For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to a compliance with the terms of delivery if it were embarrassed by difficulties in transportation.

[1] It is established that, under a contract such as the one made by the iron company with the bankrupt, when means of transportation are limited so that the seller is not able to completely fill its obligations, to be exculpated it must show that it prorated its shipments and that the buyer complaining received his fair quota.

In this case, it was upon the iron company to show, by competent testimony, that the bankrupt in this particular received the same treatment ratably as any other customer. As the facts in this behalf are known particularly to the seller, it would seem that his mere assertions that he obeyed the obligation to prorate, unsubstantiated by data concerning the manner in which he met the requirements, are hardly sufficient.

[2] In this particular case, the iron company, in making its contract with the bankrupt, knew that its plant was partly out of commission; it took its chances that its furnaces would be in condition to make iron during the life of the contract; and knew also that the bankrupt would need iron from the beginning of the year 1907. The facts show that the iron company had, in the middle of January, 6,410 tons of iron in its yards of the qualities mentioned and embraced in the two contracts with the Bellevue Pipe & Foundry Company. It claims that during this month and the succeeding months was the period of greatest embarrassment to it on account of lack of cars for shipment; but it appears that its stock of iron of this quality in the two months between the 14th of January and the 14th of March had been lowered by shipment to the extent of nearly 3,000 tons, in addition to the increment of the furnaces manufacturing during this period to about half their capacity. In other words, that, notwithstanding the furnaces making the iron required to fill the Bellevue contracts were running to the extent of considerably more than 100 tons per day, yet the stock of iron in the yards, in the two months, decreased from 6,410 tons to 2,561 tons. We think it is a fair inference that, during the first three months of 1907, the iron company shipped out in the neighborhood of 15,000 tons of iron of the quality demanded by the Bellevue Company, and in this time not a pound was sent to Bellevue.

Whether we are to interpret the contract as intending that the thousand tons of iron contracted for by the Bellevue Company were to be shipped in equal installments during the six months prior to the 1st of July, 1907, or not, the fact remains that, applying to the interpretation of the contract the circumstances under which it was made and the purposes for which the iron was demanded by the Bellevue Company, known to the iron company, it must be that it was within the fair contemplation of the parties that some considerable quantity of iron, at least, was to be sent during the first three months of 1907.

This situation raises a very strong presumption that during the first half of the life of these two contracts the Bellevue Company did not have the benefit of the rule of ratable distribution during the period when transportation was most difficult to obtain, according to the

claimants, and the disproportion between the quotas received by bankrupt in the next three months and the capacity of the works is so great as to call for something more than mere assertions that bankrupt was fairly treated.

[3] Upon the other question decided adversely to the claimant by the referee, and in addition to the reason given by him, we have to suggest that the impression, gained from the fact that it was in the amended petition where claimant first set up the ground, that the claim that its contracts had been extended after the 1st of July, 1907, was an afterthought, is strengthened by a consideration of the record. Voluminous correspondence is brought into this record by way of exhibits, and from it it is noteworthy that not only was no claim made by the iron company of an extension of life of the contracts beyond the middle of the year when complaint was made to it that there was a default in shipments, but several times after the visit of Mr. Keller, upon which the claimant relies for an extension of the contract, claimant insisted on interest upon past-due shipments in a manner inconsistent with the thought that on the Keller visit it had been agreed that bygones should remain bygones.

On the 21st of May the bankrupt wrote an insistent letter, demanding faster shipment, and calling the attention of the iron company to the fact that the iron was all due during the first half of 1907, indicating that the bankrupt had no feeling that the contracts were extended beyond that period, and the failure of the iron company to respond in that behalf is strange if it in fact thought that the contracts were given extended life.

But the most striking feature of this correspondence in this particular is the way in which the claimant treated the letter of Mr. Stahl, of the 30th of July, in which he charges the claimant with holding the Bellevue people up, involving them in a large loss, and notifying them that, if the balance of the iron due on the contracts "is not in transit within two weeks, we will hold the amount that is due and bring suit for the amount of damage that we have been put to, adopting whatever means we may find necessary. Apparently you are under the impression the contracts were made for your benefit only. We think that a little experience in the courts of Ohio will teach you that both parties have rights under contracts in this state."

It would seem to the court that the receipt of this letter would be a loud call upon the iron company to bring forth its belief, if it had any, that the contracts had been extended through their negotiations with Mr. Keller in April. On the contrary, the only response to this letter of Mr. Stahl, in behalf of the Bellevue Pipe & Foundry Company, was a letter from Robert Field, sales agent of the claimant, dated August 10, 1907, reading in part as follows:

"I have been working most industriously with Sloss on the question of your Bellevue shipments, and Mr. McQueen makes me the following reply:

"Field, you may say to your Bellevue friends that we now have all of our furnaces in North Alabama working fine. We are making more iron and better iron in that section than ever before. There is now absolutely no reason why we should not catch up with our contracts, and I am confident that before the end of August we will have gotten out all the overdue tonnage,

where our customers are ready to receive it. Let Mr. Keller and Mr. Stahl understand this situation, have them join with us in working it out, and they will have no further trouble with us. Remit for the overdue tonnage and pay when accounts are due in future, and your friends will be taken care of at this end.'"

It is inconceivable, if Mr. McQueen and Mr. Keller had made the arrangement which Mr. McQueen testifies to and which Mr. Keller denies, extending the contracts beyond the 1st of July, that Mr. McQueen would write a letter upon the subject in the language quoted above, for then there would be no such a thing as overdue tonnage chargeable to the claimant.

There seems to be no question about the damages sustained in this particular by the Bellevue Company, and we think that the referee was right in his conclusion that the claim of the Sloss-Sheffield Steel & Iron Company should be expunged.

[4] In the matter of expunging the claim of the National Supply Company, as indicated above, we believe the referee was right, and his judgment is approved.

It appears that there was no privity on the part of the Bellevue Pipe & Foundry Company in the dealings between the National Supply Company and the Northwestern Company, the Detroit concern. The mere fact that Keller was president of both companies, at Bellevue and Detroit, would not be sufficient to make the Bellevue Company a party, and while Keller might perhaps, until repudiated, bind the Bellevue Company to furnish pipe on the charge of the Detroit concern but to the National Company, yet, until the National Supply Company was put in a worse position by its reliance upon Keller's action, it would have no right to complain if Keller's superiors in the management of the Bellevue Company—the board of directors—should refuse to fill the order.

[5] In this case, it is very plain that the Bellevue Company did not extend credit to the Detroit concern for the two car loads of pipe sent to the National Supply Company, but that the bankrupt intended to charge the same to the claimant. Of course, this same pipe was ordered, not of the Bellevue Company, but of the Detroit Company; but, before the National Supply Company changed its position in any degree or suffered any loss of any sort, it learned that the Bellevue Company was not supplying the pipe on its order to the Detroit Company, and when, with this knowledge, it insisted on receiving the pipe, it made itself a debtor of the Bellevue Company without any right to offset against the shipment any claim it had against the Detroit Company.

The exceptions to the report of the special master upon the unliquidated claims of the Warner Iron Company and the receiver of the Sheffield Coal & Iron Company and the Woodstock Iron Works, Incorporated, are dismissed, upon the reasoning and grounds set out in the special master's report.

It seems to us that the master did the only allowable thing when he fixed upon the day of the termination of the several contracts as originally provided for as the day for the default of the bankrupt in each case, and that he did as much as he could for each of these claim-

ants in excusing them under the circumstances from tendering to the bankrupt before that time all the iron called for by the contracts, respectively.

[6] The only question that caused much inquiry was that raised by the trustee—whether the proper rule of damages had been applied by the master. It seems to us that this rule is supported by the authorities given by the master in his opinion, and, in addition, by the case of *Southern Cotton Oil Co. v. Heflin*, 99 Fed. 339, 39 C. C. A. 546.

In cases where the subject of the contract is a product of manufacture which has a well-understood value in the market, fluctuating as the market fluctuates, such as a staple like pig iron, the only possible measure of damages is the difference between the contract price and the market value at the time of the breach. In cases involving as the subject of contract an article having no standard market value as a staple, such as that in the case of *Kingman v. Western Mfg. Co.*, 92 Fed. 486, 34 C. C. A. 489, the rule is properly the difference between the cost to the seller of their manufacture and delivery and the contract price; but, in a case where a company is manufacturing a staple product, such as cotton seed cake and meal, as in the *Heflin Case*, or pig iron, as in this case, it would be absurd to hold the seller to a measure of damages involving mere profits.

LOUISVILLE & N. R. CO. et al. v. EMPIRE STATE CHEMICAL CO.

(Circuit Court, N. D. Georgia. June 14, 1911.)

No. 50.

1. CARRIERS (§ 100*)—TRANSPORTATION OF FREIGHT—DELIVERY OF CARS—DEMURRAGE—DEFENSES.

In a carrier's action for demurrage, an allegation that the carrier delivered cars to defendant in such large numbers and so unreasonably concentrated them as to prevent defendant from handling them promptly, choking and overwhelming defendant's side track with cars, when they knew it was impossible for defendant to handle and unload them, stated a sufficient defense.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 427-433; Dec. Dig. § 100.*]

Quick Dispatch, demurrage, see notes to *Harrison v. Smith*, 14 C. C. A. 657; *Randall v. Sprague*, 21 C. C. A. 342.]

2. SET-OFF AND COUNTERCLAIM (§ 22*)—NATURE OF SET-OFF.

In a statutory action by a railway company for demurrage under a state law, defendant could not set off a claim for damages for plaintiff's failure to promptly furnish cars according to its duty as a carrier, under the state law, under which, to justify a set-off, the claims must not only be mutual, but must be of the same character of demand.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Dec. Dig. § 22.*]

At Law. Action by the Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Company against the Empire State

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Chemical Company. On demurrer to defendant's answer. Overruled in part and sustained in part.

Jos. B. & Bryan Cumming and Cobb & Erwin, for plaintiffs.
E. K. Lumpkin, for defendant.

NEWMAN, District Judge. This case is now being heard on a demurrer to the defendant's answer.

The suit is brought by the plaintiffs against the defendant to recover certain demurrage charges amounting to \$2,083 on several car loads of freight delivered on the defendant's spur tracks at its manufacturing plant.

The answer sets up, as amended: That the defendants entered into a contract with the plaintiffs which had in view the establishment, by the defendant company, of a plant on the line of the Georgia Railroad, near Athens, Ga., plaintiffs to build, maintain, and operate spur tracks, from the said railroad, over the lands of defendant to and along defendant's plant, and to give defendant good and prompt service in the transportation and delivery of freight to and from defendant's plant, in furnishing empty cars, when requested, at points where phosphate rock and other materials used by defendant were purchased or delivered to plaintiffs, and at defendant's plant to be loaded with defendant's products, and good and prompt service in receiving said cars, when loaded, and transporting same to their destinations, when notified by defendant of their readiness.

That, relying and acting on this agreement, defendant built and established its plant at the point agreed upon, and has since been operating and carrying on its business of manufacturing guanos and fertilizers. That plaintiffs, for the purpose of rendering defendant efficient and prompt service, built two spur tracks, for the use of defendant, over defendant's yards, and that defendant built a platform in front of its building, and another between said spur tracks, thus providing sufficient spur track and platform facilities for the expeditious and proper handling of all cars of freight delivered to or to be hauled from its plant, if delivered in a reasonable and proper time and manner, within the free time provided by law, and that defendant would have done so and plaintiffs would have had no cause of complaint on account thereof had it not been for the illegal conduct of plaintiffs and their violation of their agreement with defendants and their disregard of their duty as common carriers.

That, beginning with July, 1906, and constantly and continuously from that time until September 27, 1907, plaintiffs utterly failed to furnish empty cars promptly or in a reasonable time to transport the materials purchased by defendant and used by them in the manufacture of their product, as requested, throughout a number of months, but unreasonably concentrated and delivered them practically all at one time, during the months of September, October, and November, 1907. That by plaintiffs' action 340 cars of freight, which was all heavy and of a character requiring time to handle, were thrown, in this short period of time, on defendant. That on several occasions as many as

20 cars were delivered by plaintiffs in a single day, thus choking and overwhelming defendant's side tracks and capacity for handling. That such constant influx and delivery of cars by plaintiffs to defendant was unusual and abnormal, and unreasonable in manner of delivery, and in disregard of their duty as common carriers and of their agreement with defendant, and that plaintiffs knew that the necessary result of such action and delivery of said freight in such unreasonable manner would be delay in handling said cars, and that it would be impossible for defendant to handle and unload such a large and unreasonable number of cars thus suddenly thrown upon it by plaintiffs, and that said delays were the natural and necessary result of such conduct on the part of plaintiffs.

That defendant was further delayed and retarded in handling many of said cars by reason of plaintiffs having thus so congested defendant's spur tracks with such large number of cars that plaintiffs could not and did not place many of said cars close and convenient for defendant to unload them, in consequence of which defendant would have to truck and carry the contents of said cars a much longer distance than would otherwise have been necessary.

Defendant further alleges: That it manufactures its products during the summer, fall, and winter, to have them ready for sale and delivery in the late winter and spring, at which time its products are mostly in demand, their shipping season, beginning in February, being crowded into 80 or 90 days, which facts were well known to plaintiffs.

That during said shipping season it is necessary for defendant to have a large number of cars per day (except Sunday) to be loaded with its product, which was well known to plaintiffs and was in contemplation at the time of the making of their said agreement with defendant. That during the shipping season of 1907 defendant requested plaintiffs to furnish at its plant 15 cars per day, and during March 20 cars per day (except Sundays), but that plaintiffs utterly failed to do so, and never furnished but a small portion of the cars asked for.

That during said time it was necessary for defendant to have, and defendant did have, a superintendent and a large number of hands employed for the purpose of loading said cars, which were to be furnished by plaintiffs, but which were not delivered within a reasonable time. That the expense to defendants for such superintendent and hands was \$140 per day, and that said illegal conduct of plaintiffs in not delivering cars as they should, so they could be loaded, damaged and entailed a loss and expense to defendant of a large amount of money, which in three specified days amounted to \$452.

That during said time, not only frequently but constantly, even when said cars were furnished to defendant and loaded, and plaintiffs notified of their readiness for shipment, and, after the cars were turned over to plaintiffs as common carriers for transportation, plaintiffs did not haul them from defendant's spur tracks promptly or

within a reasonable time, but allowed said cars to stand and incumber defendant's said tracks for from two to seven days at a time.

Also that during said time, and on a number of specific occasions, without the consent and over the protest of defendant, plaintiffs shunted into and placed upon defendant's said spur tracks cars loaded with other people's freight, and on several occasions whole trains with which defendant had no connection whatever were placed on and over its said spur tracks, and by reason thereof defendant's spur tracks were obstructed and choked, pushing the empty cars which had been placed by plaintiffs to be loaded by defendant, and frequently while defendant was engaged in loading same, beyond the place of loading, that frequently during said time defendant's spur tracks were so choked and blocked with foreign freight cars and trains that defendant could not attend to its business of loading cars.

Defendant further states that said disregard of their legal duty as common carriers and disregard of their said agreement continued during all this time, notwithstanding plaintiffs well knew and were constantly informed by defendant of the disastrous effect and damage such conduct on their part would cause defendant and its business by causing defendant to lose the sale of hundreds of tons of its products, thereby damaging and losing to it thousands of dollars. That defendant frequently and constantly requested, urged, and implored plaintiffs not to continue such conduct, which would cause great damage and loss to it and its business, but such conduct was persistent and continuous, and did injure and damage defendant in the sum of \$9,629, which was the natural result of such breaches of duty on the part of the plaintiffs.

Defendant then gives the names of some of the parties for whom it had manufactured and assembled goods which could not be delivered on account of the acts of the plaintiff railroad companies, and prays judgment against plaintiffs for the amount of its counterclaim.

The foregoing is a synopsis or abbreviation of defendant's answer, but states what is deemed necessary for present purposes.

[1] That part of defendant's answer which claims that the plaintiffs delivered cars to them in such large quantities, and so unreasonably concentrated them as to prevent defendant from handling them promptly, choking and overwhelming defendant's side tracks with cars, when they knew that it was impossible for defendant to handle and unload them, constitutes, I think, a good defense, if properly proven. That is to say, if the plaintiffs, instead of delivering the cars on the defendant company's tracks at its plant in reasonable numbers and in a proper way, so that they could be handled by the defendant company, concentrated and delivered the same in such great numbers that, even with reasonable and proper effort on the part of defendant, they could not be handled and unloaded promptly, this would seem to be a good defense against plaintiffs' claim for demurrage, and the demurrer to that part of the answer setting up this defense will be overruled.

[2] That part of defendant's answer which claims a set-off against plaintiffs because of their failure to promptly furnish cars to it does

not seem to me to be a proper plea by way of set-off to this suit. This action, as I understand it, is one authorized by the statutes of Georgia and the railroad commission of this state. It is consequently a statutory cause of action. It is well settled in Georgia that in order to justify a set-off the claims must not only be mutual, but they must be the same character of demand, contract against contract, tort against tort, etc. Even if we concede that plaintiffs' claim for demurrage is not for a penalty strictly construed, but is partly compensatory and partly in the nature of a penalty, I am unable to see how the defendant's counterclaim is of the same character as the plaintiffs' demand. Assuming even that penalty could be set off against penalty, still the defendant, as I understand its answer, does not put its counterclaim in as one based on the statute at all. It is rather a general claim for damages caused to it by breach of duty growing out of the general arrangement and agreement between the parties when the fertilizer plant was established on the line of plaintiffs' road.

Without further discussion of the case, it is enough to say that I am satisfied, after a careful examination of the matter, that the claim of the plaintiffs and the counterclaim which is proposed to be set up by the defendant are not the same class of claims; consequently the latter cannot be pleaded as a set-off to the former.

An order may be taken overruling and sustaining the demurrer in accordance with what has been stated.

In re HOLMES LUMBER CO.

(District Court, N. D. Alabama, W. D. May 22, 1911.)

No. 146.

1. USURY (§ 57*)—USURIOUS TRANSACTIONS.

A company not being able to obtain a loan applied to a third person for a loan. He declined because he did not have the money, but agreed to procure the money from a bank and make himself liable for the debt on the company agreeing to pay him a specific sum per month for the trouble in procuring the money and for the sale of his credit. *Held*, that the transaction was not tainted with usury.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 128, 129; Dec. Dig. § 57.*]

2. BANKRUPTCY (§ 316*)—MORTGAGEE OF BANKRUPT—ATTORNEY'S FEES.

A mortgagee, in a mortgage providing for an attorney's fees in case legal services become necessary to protect his interest, filed a petition for leave to foreclose the mortgage after the bankruptcy of the mortgagor, and the trustee in bankruptcy filed a petition for leave to sell free from liens. *Held*, that the mortgagee was entitled to an allowance of an attorney's fee for the filing of his petition and for representation under the trustee's petition.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 316.*]

3. BANKRUPTCY (§§ 223, 368*)—SALE OF PROPERTY FREE FROM LIENS—COMMISSIONS—LIABILITY.

The bankruptcy act as amended, authorizing payment of commissions from the proceeds of the sale of incumbered property of a bankrupt, ap-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pplies only to cases in which the bankruptcy court rightfully exercised its jurisdiction to sell free from liens or where the lienholder consented to a sale, but where the unincumbered property brought largely less than the amount of the liens on it, the bankrupt estate must pay the commission of the referee and the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. §§ 223, 368.*]

4. BANKRUPTCY (§ 316*)—ATTORNEY'S FEES—COLLECTION OF INSURANCE MONEY.

Where insurance under the same policies was partly due a trustee in bankruptcy and partly due lienholders of the bankrupt, the trustee with the consent of the lienholders properly collected the insurance and it was proper to allow him an attorney's fee and to charge against the lienholders a pro rata part thereof.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 316.*]

5. BANKRUPTCY (§ 188*)—LIEN OF MORTGAGE.

A corporation engaged in the business of cutting and sawing timber, executed a mortgage to procure money to enable it to continue business and the mortgagee knew the facts. The mortgagor had the right under the mortgage of ingress and egress for the purpose of cutting timber. *Held*, that the mortgagee, as against the trustee in bankruptcy of the mortgagor, lost his lien on timber cut and sawed and commingled by the mortgagor with lumber manufactured from timber cut from unmortgaged premises.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 188.*]

6. BANKRUPTCY (§ 316*)—INSURANCE OF MORTGAGED PREMISES—RIGHTS OF MORTGAGEE.

A mortgagor engaging in the business of cutting and sawing timber, executed a mortgage to procure money to enable it to continue the business and the mortgagee knew it. The mortgagor had the right under the mortgage of ingress and egress for the purpose of cutting the timber, and the mortgage was required to insure the mortgaged property. The mortgagor obtained policies covering the mortgaged property and other property. *Held*, that the mortgagee was not entitled to insurance on property on which he had no lien as against the trustee in bankruptcy of the mortgagor.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 316.*]

In the matter of the bankruptcy of the Holmes Lumber Company, a bankrupt. Petitions of P. J. O'Leary and Jefferson County Savings Bank to review orders of the referee. Modified and confirmed.

G. W. Yancey, for petitioner O'Leary.

George Huddleston, for petitioner Jefferson County Savings Bank.

A. Leo Oberdorfer, for trustee in bankruptcy.

GRUBB, District Judge. This cause is heard upon a petition to review an order of the referee upon the petitions of one O'Leary, who had a second mortgage on certain assets of the bankrupt sold under an order of the bankruptcy court free from liens, and of the Jefferson County Savings Bank, which held a first mortgage upon the same property. The property sold for materially less than the amount due on both mortgages. Certain questions of priority and of allowance of costs and attorney's fees arose on distribution, and are presented by the petitions. The trustee has an interest in some of the questions and appeared in the hearing. The questions are enumerated in the certificate of the referee, and are decided here seriatim.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

First. Without reference to the agreement between the Jefferson County Savings Bank and E. V. Smith, attached to petitioner's attorney's brief, I am convinced from the evidence that the \$1,800 was a proper credit on the bank's mortgage debt, because the parties so intended.

[1] Second. I think it clear that the bank construed its loan to have been made to Smith & Kyser. However, in determining whether the agreement by bankrupt to pay Smith & Kyser \$75 a month to procure the loan, tainted the transaction with usury, the transaction between Farrior, representing the bankrupt, on the one hand, and Smith & Kyser, on the other, is the one to be construed. Upon examination, it appears to have been a loaning, to the bankrupt, of the credit of Smith & Kyser with the bank, to enable it to obtain the money it could not otherwise have obtained. The transaction between Farrior and Smith & Kyser is properly described in the language of the opinion in *Brown v. Harrison*, 17 Ala. 779, as follows:

"The transaction does not purport to be a loan. The contract is ostensibly a contract for compensation for the trouble and inconvenience of raising money to meet the debt of another."

The bankrupt could not obtain the money by itself, and Smith & Kyser, when applied to by Farrior to make it a loan, declined, assigning as a reason that they didn't have the money. When requested by Farrior to raise it from one of their banks they agreed to and did do so, by making themselves liable for the debt. The compensation was given them for their trouble in raising this money and for the sale of their credit to the bankrupt in order to secure the money from the bank, and not for the use of their own money loaned by them to the bankrupt. The cases cited in the referee's certificate are not to be restricted to commission merchants, but extend to all classes of persons who come within the principle laid down in those cases. The record fails to show that the agreement to pay \$75 per month was a device to evade the usury laws, or that the bank that made the loan was privy to it.

[2] Third. The bank filed a petition to be allowed to foreclose its mortgage. The trustee filed a petition to be allowed to sell free from liens. The mortgage provided for an attorney's fee to the mortgagee in case legal services became necessary to protect its interests. I think the bank is entitled to the allowance of an attorney's fee for filing its petition for leave to foreclose and for representation under the trustee's petition to sell free from liens. The litigation under the latter related to the allowance of the credit of \$1,800, and not to the issue as to whether there was an equity for the trustee. Under the facts, I do not think the bank entitled to any allowance for the litigation so far as it related to the allowance of the credit. I think \$75 would be a reasonable allowance for such other services as were necessarily incurred to protect the interests of the mortgagee, viz., the filing of the petition for leave to foreclose, and the services rendered under the petition of the trustee to sell free from liens, so far as they came within the scope of the character of services for which the mortgage, by its terms, provided for compensation.

[3] Fourth. The bankruptcy court has jurisdiction of all property in the possession of the bankrupt at the time of the filing of the petition, including that on which there are liens. It has the right to sell free from liens, to preserve the equity for the estate. It has the right to determine whether such equity exists for that purpose. If there is no equity, the property should be turned back to the lienholder. In that event, there is no reason for the administration of the property through the bankruptcy court, and for the charge against the lienholder of referee's and trustee's commissions for handling the proceeds of the sale of the property. It is difficult in many cases to determine the existence of an equity in advance of sale. However, in cases in which, upon a sale in the bankruptcy court, the property fails by a large sum to satisfy the liens upon it, it is at least prima facie evidence that the bankruptcy court should not have administered it, and in such cases it seems to me that the estate should pay the commissions of the referee and the trustee, and not the lienholder. I think the amendment to the act, so far as it may be construed to authorize payment of such commissions from the proceeds of the sale of the incumbered property, can only apply to cases in which the bankruptcy court rightfully exercised its jurisdiction to sell free from liens, or where the lienholder consents to such sale. In this case there was no consent, and the property brought largely less than the amount of the liens upon it. A contrary rule would not only be unjust to the lienholder, but would put a premium upon the taking possession of incumbered property by the officers of the bankruptcy court for the purposes of administration.

Fifth. The referee properly permitted the bank, which was the legal owner of the mortgage, to collect the entire balance due on it. Smith and Kyser are the only persons interested, and they make no objection to such payment.

[4] Sixth. As the insurance was partly due the trustee and partly due the lienholders, and, under the same policies, it was proper for the trustee to collect it, and the lienholders consented to it. It was therefore proper to allow the trustee's attorney a fee, and to charge against the lienholders a pro rata part thereof. Inasmuch as the trustee's attorney would have had the same work to undergo on behalf of the trustee in any event, I believe it fair not to increase the allowance so far as it is a charge against the lienholders. The referee may exercise his discretion to allow the attorney for the trustee the pro rata part of the increase, which he deemed reasonable, out of the assets of the estate.

[5] Seventh. I think it reasonably clear from the record that the mortgagee, O'Leary, was aware at the time he made the loan, secured by the mortgage in question, that the bankrupt was cutting and sawing the timber, which, while standing, constituted part of his security, and that it was contemplated by him that this should continue to be done after the execution of the mortgage. The mortgage was given by the bankrupt to raise money to enable it to continue its operations as a going concern; and the mortgagee, O'Leary, knew this. The recitals in the description of the lands conveyed in the mortgage state

that the mortgagor had the right of ingress and egress for the purpose of cutting the timber. This being true, it is clear the mortgagee would lose his lien upon timber cut and sawn and commingled by the mortgagor with lumber manufactured from timber cut from unmortgaged lands.

[6] The mortgagor's contract with mortgagee was to insure the property covered by the mortgage lien and no other. The inconvenience of separating his insurance in different policies probably induced him to insure in one policy property covered by the mortgage lien and property not so covered. His so doing could not avail to entitle the mortgagee to the insurance on property on which he had no lien as against the right of the trustee. The cases cited in the certificate of the referee support his conclusion in this respect. *Smith v. Continental Ins. Co.*, 108 Iowa, 382, 79 N. W. 126; *Palmer's Sav. Bank v. Ins. Co. of N. A.*, 166 Mass. 189, 44 N. E. 211, 32 L. R. A. 615, 55 Am. St. Rep. 387; *Wilcox v. Nat'l Ins. Co.*, 81 Minn. 478, 84 N. W. 334; *Washington Nat. Bank v. Smith*, 15 Wash. 160, 45 Pac. 736; *Walls v. Helfenstein*, 28 Wis. 632.

The order of the referee will be confirmed, except in relation to the amount of the attorney's fee allowed the bank, which will be reduced to \$75; and as to the deduction of commissions for the trustee and referee from the proceeds of the sale of the incumbered property.

SOUTHERN PAC. CO. et al. v. CAMPBELL et al.

(Circuit Court, D. Oregon. July 3, 1911.)

No. 3,675.

1. CARRIERS (§ 18*)—RATES—REGULATION BY RAILROAD COMMISSIONERS.

A complaint, seeking to enjoin rates fixed by the railroad commissioners of a state, should state facts which show that such rates do not afford a fair return on the value of the complainant's property devoted to the particular use, and, in the absence of such allegations, the presumption of law will prevail that the rates made are fair.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 18.*]

2. PLEADING (§ 8*)—CONCLUSIONS OF LAW—CHARGES—REGULATION BY RAILROAD COMMISSIONERS—INJUNCTION.

A complaint to enjoin rates fixed by the railroad commissioners of a state, alleging, in general terms, that the local rates of the company affected by the order were reasonable and just, and as low as the situation of the parties and the competitive condition of the business would permit, and that the said compensation charged on existing tariffs is reasonable and just and affords but slight compensation above the costs of the service, and that the reductions attempted to be made by the commission involve rates, which, if enforced, would deprive complainant of a large sum of annual revenue, and compel it to give the use of its property without reasonable or just compensation, and compel it to increase other rates on traffic not affected by the order, thus compelling discrimination, and that the order was unreasonable, unjust, and arbitrary, and that the rates sought to be prescribed are confiscatory, was insufficient as stating conclusions of law not supported by averments of fact.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Bill by the Southern Pacific Company and another against Thos. K. Campbell and others, constituting the Railroad Commission of Oregon, and A. M. Crawford, the Attorney General of the State of Oregon. Demurrer to bill sustained.

W. D. Fenton, Jas. E. Fenton, and Ben C. Dey, for complainants.
J. N. Teal and Clyde B. Aitchison, for defendants.

BEAN, District Judge. This suit has been submitted on a demurrer to a bill to enjoin the enforcement of an order of the State Railroad Commission fixing certain class rates from Portland south over the lines for the Oregon & California Railroad Company, operated by the Southern Pacific Company, as lessee.

In September, 1910, the commission upon due investigation, and after a hearing by the complainant company, found that certain enumerated class rates on freight from Portland south to various stations in Oregon, then in force on complainant's lines, were unjust, unreasonable, and excessive, and unjustly discriminatory as against the several stations and localities and as between various classes of commodities, and, by an order duly made and entered, fixed rates decided and found by it to be just, reasonable, and nondiscriminatory, in lieu thereof, expressly providing in the order that it should not be construed to apply to interstate commerce. It is alleged that the rates fixed by the commission, if enforced, will reduce the receipts of the complainant company, local and interstate, which for the year 1909 amounted to \$7,104,081, by the sum of \$276,931.80; but it is admitted by its counsel that this was an error in the footing, and that the actual estimated reduction will be \$156,072.48 annually.

Without referring to the allegations of the complaint at length, the objections made to the order sought to be enjoined may be summarized as follows:

First. The act of the Legislature creating the railroad commission is unconstitutional and void: (a) Because of the excessive penalties and burdens imposed for refusal to obey the orders of the commission; (b) because its provisions are not uniform and equal in their application; (c) because it confers upon the commission legislative, executive, and judicial powers; (d) because rate making is a legislative function, and a rate cannot be made to take effect upon the order of a subordinate commission; (e) because it requires a railroad company aggrieved by an order of the commission to prosecute any suit to review the same in the state courts; (f) because it provides for a judicial review of the orders of the commission.

Second. The order in question is violative of the Constitution of the United States because it directly and materially affects interstate commerce, since the rate on interstate traffic over complainant's lines in Oregon is made up by the through rate to Portland with the local rate out.

Third. The law under which the Oregon & California Railroad Company was incorporated provides that a corporation organized thereunder "shall have power to collect and receive such tolls and freights for transportation of persons and property as it may pre-

scribe," and thus deprives the state of the power to fix rates for transportation of freight or passengers.

Fourth. The rates fixed by the commission and sought to be enjoined in this suit are so unreasonably low as to amount to a confiscation pro tanto of complainant's property.

Fifth. The order of the commission was based upon an arbitrary approval of class 1 of rates then in force on complainant's line and an arbitrary spread between such class and other classes without any reference to the distance the traffic was to be carried, the character or nature of the service to be performed, or the compensation that should be paid therefor.

Seventh. That the rates prescribed by the commission are unreasonable, and this court should review the same under the provisions of the commission act.

These several questions have been elaborately argued orally and by printed briefs. A large part of the discussion herein is directed to the constitutionality of the railroad commission act, and the contention that the order sought to be enjoined directly and materially affects interstate commerce. Both of these questions were considered and decided by this court in the *Campbell Case* (O. R. N. v. Campbell, 173 Fed. 957). The opinion of Judge Wolverton in that case contains such an exhaustive, satisfactory, and full discussion of the subject as to leave nothing to be added. I fully concur in his views and am unable to distinguish this case in principle from the one decided by him. The averments in the bill that the order of the commission interferes with interstate commerce is but the conclusion of the pleader and is not in harmony with the facts alleged. Morrow, Circuit Judge, says:

"A rate fixed by a state railroad commission for intrastate traffic, if just and reasonable in and of itself, cannot be held to be unlawful and discriminatory because it may conflict with some rate fixed by the railroad company for interstate traffic. Upon adjustment the latter rate must yield." *Woodside v. Tonopah & G. R. Co.* (C. C.) 184 Fed. 360.

The next point is disposed of by this court and the state Supreme Court in *Ex parte Koehler, Receiver* (C. C.) 23 Fed. 529, and *State v. S. P.*, 23 Or. 424, 31 Pac. 960.

The remaining points may be considered together. Rate making is a legislative function, and, when rates are fixed by the Legislature or a subordinate body to which the power has been duly delegated, they will not be declared invalid by the federal courts unless they are so unreasonably low that their enforcement would amount to the taking of property for public use without compensation and therefore practically a confiscation thereof. *Willcox v. Cons. Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382. When it is shown that the prescribed rates will prevent the carrier from earning such compensation as under the circumstances is just, both to it and the public, their enforcement will be enjoined. *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819. But the rates now in controversy were made by the state commission in the light of the knowledge of the facts, and after a thorough investigation and a hearing of the party interested. They are made by law prima facie lawful, and are therefore presumed

to be reasonable, fair, and just. *A. C. L. R. R. v. Fla. ex rel. Ellis*, 203 U. S. 256, 27 Sup. Ct. 108, 51 L. Ed. 174; *Inter. Com. v. C., R. I. & P. R. R.*, 218 U. S. 88, 30 Sup. Ct. 651, 54 L. Ed. 946; *Ill. Cen. v. Inter. Com. Com.*, 206 U. S. 441, 27 Sup. Ct. 700, 51 L. Ed. 1128.

The burden is on the complainant to show by clear and satisfactory allegation and proof that, if enforced, they will necessarily be confiscatory. This court has no authority to fix rates, nor should it attempt to usurp the powers of the commission upon its conception as to whether such powers have been wisely exercised or not. It can review the findings of the commission only so far as to determine whether or not the rates promulgated by it will deprive the carrier of its property without just compensation. *T. & P. R. R. v. Interstate Com.*, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. Ed. 940; *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932; *San Diego L. & T. Co. v. Natl. City*, 174 U. S. 739, 19 Sup. Ct. 804, 43 L. Ed. 1154; *Knoxville v. K. Wtr. Co.*, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371; *San Diego L. & T. Co. v. Jasper*, 189 U. S. 439, 23 Sup. Ct. 571, 47 L. Ed. 892; *Interstate Com. Com. v. Ill. Cen.*, 215 U. S. 452, 30 Sup. Ct. 155, 54 L. Ed. 280; *B. & O. v. U. S.*, 215 U. S. 481, 30 Sup. Ct. 164, 54 L. Ed. 292.

Nor do I think its power, in this regard, is in any respect enlarged by the provisions of the state law for a review by the state courts of the acts of the commission. Whether rates prescribed by legislative authority to be charged by public service corporations are unreasonably low, within the doctrine stated, involves a determination of the value of the property of the complainant devoted to the particular public use to which the rates apply, the measure of a reasonable return thereon, and whether the rates allowed to be charged are sufficient to that end. These questions are complex, intricate, and often difficult of ascertainment, especially in the case of a carrier doing both local and interstate business. There is difficulty, in the first place, in determining the value of the property as a whole, whether it is to be taken as the market value of the stock and bonds, the original cost of construction with expenses of permanent improvements added, the cost of reproduction, the value of the property as a going concern, or whether all these matters are to be considered in fixing a fair value in a given case, and, after the entire value of the properties has been determined, how it shall be divided among the several states through which the road passes. It is substantially agreed that where a railroad is used in both local and interstate business, and the value of the property devoted to public use within a given state is ascertained, that it is fair to apportion such value among the different kinds and classes of business upon a revenue basis, but it is not always easy to ascertain the revenue from interstate traffic. The records of a company commonly show the gross revenue from local traffic wholly within the state, but much of the interstate business is often carried through the state, and in other instances the local haul within the state is only a small proportion of the entire haul, and it is therefore difficult to determine what should properly and rightfully be allowed for interstate traffic.

But even greater difficulty lies in the apportionment of the cost of the service, between local and interstate business, so as to determine whether the revenues from a particular class are sufficient to afford a fair return upon the value of the property devoted to such class. There are many items of cost that disclose the class of business on account of which they are incurred, and can therefore be properly placed; but there is a large percentage of cost of doing all the business, like the maintenance of ways and structures, equipment, superintendence, operation of trains carrying both local and interstate traffic, which are incurred for the common benefit of both, and there is no definite rule by which these items of common cost can be divided between the different classes with mathematical accuracy. *M., K. & T. R. R. v. Love* (C. C.) 177 Fed. 493.

[1] These matters are not referred to because particularly material in the case in hand, nor with a design to approve or disapprove any particular rule or doctrine in reference thereto, but only to emphasize the position that a complainant seeking to enjoin rates fixed by lawful authority should state facts and not conclusions, facts which, if true, show that such rates will not or do not afford a fair return upon the value of the complainant's property devoted to the particular use. In the absence of such allegations, the presumption of law that the rates as made are fair, just, and reasonable must prevail, and in my judgment the bill does not state facts sufficient to overcome this presumption.

[2] It is alleged in general terms that the local rates of the complainant company affected by the order of the commission were reasonable and just and as low as the situation of the properties and the competitive condition of the business, both intrastate and interstate, "will permit or allow, and the said compensation charged upon said existing tariffs is reasonable and just and affords to your orators but slight compensation above the cost of the service"; that the decreases attempted to be made by the commission involve the class rates referred to and, if enforced, will deprive the complainant of a large sum of annual revenue and compel it to give the use of its property without reasonable or just compensation, and will compel it to increase other rates upon traffic not affected by the order, and particularly upon products of the soil, forest, and farm, many of which receive and enjoy terminal rates, including such commodities to be sold and consumed in the markets of the world, thereby compelling the complainant to discriminate against such last-named products, to the great injury of the complainant and of the public; that the order of the commission is unreasonable, unjust and arbitrary and, if enforced, will deprive the complainant of earnings which it is entitled to collect and receive, in excess of the revenue that would be derived from the enforcement of the order; and "that said pretended order is void and of no force and effect, in this, that the rates sought to be prescribed by said order, in lieu of existing rates, are confiscatory of the property of your orators, and will deprive your orators of their property without compensation and without due process of law." These averments are not sufficient to raise an issue. *Central of Ga. R. R. v.*

McLendon (C. C.) 157 Fed. 961. They are but conclusions of law and are not supported by any averment of fact. Indeed, they are inconsistent with the facts alleged. The bill states that the receipts from all sources, local and interstate, for the year 1909, were \$7,104,081, and the gross expenditures during the year \$5,839,698, leaving a net balance for the year of \$1,264,383. The value of the property, based upon the capital stock, bonded, and floating indebtedness is put in the complaint at \$39,052,008. The bill is silent as to whether interest on the bonded and other indebtedness is included in the aggregate expenditures; but, since no segregation is made by complainant, it is fair to assume that they include the operating expenses, interest, and fixed charges, thus leaving a net balance of \$1,264,383, to be applied as dividends on complainant's stock of the par value of \$19,000,000. On this showing, it certainly cannot be consistently said that the earnings of the complainant, even after making the deductions alleged to be caused by the order complained of, "will afford but slight compensation above the cost of service," or that the order of the commission is confiscatory, or, in advance of actual experience, that the rates fixed by the commission will not afford a fair return upon the value of the property.

Again, the complainant does not state the amount of intrastate traffic which will be affected by the order, nor the cost of service, nor the value of the property devoted to such business. It sets out the value of the entire property, the gross receipts and disbursements for both state and interstate business for a number of years prior to the date of the order, the amounts received from state and interstate business, freight and passenger, during the year 1909, and approximate percentage of tonnage affected by the order sought to be enjoined, assuming, as I take it, that both local and interstate traffic are affected by such order. There is no allegation as to the cost of conducting state business as distinguished from interstate business, and no statement of the difference between passenger and freight expenses.

The demurrer should be sustained, and it is so ordered.

In re SCHAEFER.

(District Court, N. D. Ohio, W. D. December 2, 1910.)

No. 1,573.

1. INSURANCE (§ 146*)—LIFE INSURANCE—"POLICY."

The word "policy," in a life policy provision for payment to a beneficiary of a stated sum on insured's death during continuance of the policy, refers to the insurance contract.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 146.*

For other definitions, see Words and Phrases, vol. 6, pp. 5440-5442.]

2. BANKRUPTCY (§ 143*)—ASSETS—LIFE POLICY.

A paid-up policy insuring bankrupt's life, under agreement to pay him an annuity for life after 20 years, which have not expired, and to pay his widow a fixed sum on his death, vests in his trustee in bankruptcy

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

only as to the bankrupt's interest in the annuity and not as to the entire present value of the policy, under Bankr. Act July 1, 1898, c. 541, § 70a (5), 30 Stat. 566 (U. S. Comp. St. 1901, p. 3451), vesting in the trustee title to property which the bankrupt might have transferred; though the policy reserves an option to the bankrupt to surrender it at the end of the 20-year term.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 143.*]

In the matter of Joseph N. Schaefer, bankrupt. On petition to review a finding by the referee. Affirmed.

A. G. Fuller, for trustee.

John Sheridan, for bankrupt.

KILLITS, District Judge. This matter is before the court upon a petition for review of the finding of Hon. N. W. Bright, referee in bankruptcy for Hancock county, adjusting the rights of parties claiming an interest in a policy of insurance held by the bankrupt. The policy was issued on the 23d of November, 1897, and reads as follows:

"In consideration of the application for this policy, which is hereby made a part of this contract, the Mutual Life Insurance Company, of New York, promises to pay at its home office in the city of New York, unto Joseph N. Schaefer, of Findlay, in the county of Hancock, state of Ohio, an annuity for every year after twenty years from the date hereof during the remaining lifetime of the said Joseph N. Schaefer in equal annual payments of \$60.00 each, commencing the 23rd day of November in the year one thousand nine hundred and eighteen and terminating with the last annual payment preceding death; and likewise promises to pay unto his wife, Mary E. Schaefer, her executors, administrators or assigns, one thousand dollars upon acceptance of satisfactory proofs at its home office of the death of said Joseph N. Schaefer during the continuance of this policy, upon the following condition and subject to the provisions, requirements and benefits stated on the back of this policy which are hereby referred to and made a part hereof."

Then follow the provisions for the payment of the ten full premiums, and the customary provisions as to dividends, paid-up policy, surrender, and incontestability. The policy provides that it is to be credited with its distributive share of surplus apportioned at the expiration of 20 years, when it shall be treated as a tontine policy of that time of distribution, and that the surplus may be applied at the end of such period to purchase an increased annuity or may be drawn in cash, and that thereafter the distribution period shall be in terms of five years each during the continuance of the policy; surplus to be applied to the purchase of additional insurance without medical examination. The policy also provides as to surrender that at the end of the first period of 20 years the sum of \$1,211.80 and the surplus will be paid therefor in cash. Attached to the policy, in apparent explanation of the privileges under it, is a sheet entitled, "Adapted Illustrations Special Income Life Policy," computed for the principal sum, term and premium of the policy in question, from which it would appear that there is any one of six options available at the end of 20 years. This policy was fully paid up before proceedings in bankruptcy against Schaefer were instituted, and no question arises that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

such payments were in any respect in fraud of creditors, and the court is left to determine the rights of the trustee therein without the assistance of any evidence except the policy itself and its terms. The referee found that "only the annuity provided for in said policy and payable to said Joseph N. Schaefer should become assets in the hands of the said trustee," and ordered "that said Joseph N. Schaefer make and deliver to said trustee a proper assignment of all his interest in and to such annuity within ten days from the date of this entry."

The court is called upon to apply to the terms of this policy section 6 of the bankruptcy act: "This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition"—and classification (5) of paragraph "a" of section 70 of the bankruptcy act, vesting in the trustee the title of the bankrupt in "property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

Counsel for the trustee insist that by the terms of this policy the wife of the insured has no present interest therein, and that the entire present value of the policy is subject to the disposition of the trustee for the benefit of creditors. In taking this position, it is quite plain, from the citation of his authorities, if not otherwise, that trustee's counsel has failed to apprehend the significance of the language of the policy on the face thereof. He depends upon two cases particularly: *In re Slingoff* (D. C.) 106 Fed. 154, and *In re Steel* (D. C.) 98 Fed. 78; and also cites *In re Diack* (D. C.) 100 Fed. 770, and *In re Boardman* (D. C.) 103 Fed. 783. These authorities do not enlighten the court, for the reason that, as distinguished from the policy before us, they were respectively based upon pure endowment policies. In each case the policy provided that at the expiration of a certain time a fixed sum should be paid to the insured, but that in case he died before the arrival of that time the face of the policy should be paid to the wife. In this case there are two contracts in the policy, not in the alternative as in the case of an endowment policy, but separate and distinct provisions. The first is the contract with Schaefer that if he survives for more than 20 years from the date of the policy, during the remainder of his life he shall receive an annuity of \$60. Then the language of the contract proceeds, "and likewise promises to pay unto his wife * * * one thousand dollars upon acceptance of satisfactory proofs at its home office of the death of the said Joseph N. Schaefer during the continuance of this policy." Plainly, the effect of this language is that no matter when Joseph N. Schaefer dies, whether within the period extending for 20 years after the date of the policy or thereafter, his wife, or her representatives, shall receive \$1,000. The language of the policy is that this right in Mrs. Schaefer shall exist during the continuance of the policy.

[1] Now, the term "policy" means nothing more than contract here, and the effect of it is that Mrs. Schaefer's interest is a vested one until the contract is terminated, either by the death of the insured, or by the exercise of some option, which by the very terms of the policy cannot be entertained by either the insured or Mrs. Schaefer, or both of them, until on or after the 23d of November, 1917.

[2] The policy, then, is one which is clearly distinguishable from those which counsel for the trustee cites as authorities. It is more like that under consideration in the case of *In re Welling*, 113 Fed. 189, 51 C. C. A. 151. That case was decided in Illinois, whose law does not "exempt policies of insurance from judicial pursuit by creditors." In Ohio, however (sections 9393, 9394, and 9398, General Code [sections 3628, 3629, R. S.]), policies of insurance for the benefit of a wife although paid for by the husband are exempt from any claims of the husband's creditors.

This court can do no better than to adopt as its own the reasoning of the dissenting opinion by Judge Grosscup, on page 195 of 113 Fed., on page 157 of 51 C. C. A., in the case of *In re Welling*, supra, bearing in mind that no option may be exercised by the insured, Schaefer, under the policy at bar, until November 23, 1917, and assuming that at that time he, without the consent of the beneficiary, his wife, may exercise one of the six options set out in the rider to the policy (and it is by no means clear that he may do that without his wife's consent), and upon the assumption, which we think is compelled by the terms of this policy, that until that period, at least, Mrs. Schaefer has a vested interest in the policy, the reasoning of Judge Grosscup in this dissenting opinion, found on pages 196 and 197 of the report in the *Welling* Case, found in 113 Fed., pages 158 and 159, 51 C. C. A., seems to us to control this situation. Speaking of the date when only the options could be exercised by the husband, Judge Grosscup said:

"One of the terms is that it shall be exercised November 27, 1906. Time, here, so far as Mrs. Welling is concerned, is of the essence of the option. The interest of the wife, and the sense of obligation of the husband may be different on that day from that of any day preceding or following. It is, in my judgment, the wife's right that the election, affecting as it does her vital interests, shall be exercised only in view of the consideration that may influence the husband at that time; neither those before nor those after.

"Another term of the option is that the election shall be by the husband himself. No one else can stand in his place, or exercise the option under the circumstances and sense of obligation that will influence him. It is the wife's right to have the husband's judgment, not that of a stranger, the judgment of the man who presumably has an interest in her future, not that of a man whose interest in this respect is in conflict with hers. I am of the opinion that a fair interpretation of the spirit of the policy would disallow the exercise of the option of *Welling* until the day for its exercise had arrived, and would then disallow its exercise, unless it be by the judgment of *Welling* himself. Such an interpretation, of course, forbids the view that the option is transferable in advance, in this case six years in advance, or was subject to levy by creditors."

If we assume that the trustee's contention is correct, we must find that there is something in this policy independent of the provisions

for an annuity to Mr. Schaefer, and found in that portion of the policy which provides an interest for Mrs. Schaefer, which belongs to Schaefer and which ordinarily might be levied upon and sold under judicial process against him. And finding this right in Schaefer, there is no escape from the position that it is inconsistent and in conflict with the rights of Mrs. Schaefer, and, consequently, within the exemptions of the Ohio statutes just referred to. Schaefer's annuity has been paid for. That is a matter of value which he could have assigned, subject to the contingency of his death within the next seven years. Notwithstanding that, however, it has a present value. As the referee found, this unquestionably goes to his creditors for whatever it is worth.

We are very clear, also, that the referee was right in holding that the trustee had no interest in that portion of the policy which insured Schaefer's life for the benefit of his wife. The court finds among the papers in this case (apparently, not a part of the evidence) a letter from the company which is entirely in line with the court's interpretation of this policy. Its material parts are as follows:

"The insured could not surrender the policy for its cash value without the consent of the beneficiary; nor could he assign or transfer the policy without the beneficiary's consent; nor could the insured at or before the end of the twenty years change the status of the policy, under any of its conditions, without said beneficiary's consent. But the insured could surrender his rights in the annuity without disturbing the benefits provided in favor of his wife."

The things contended for by the trustee involve action independent of the consent of Mrs. Schaefer, and are in direct conflict with the interpretation of the policy placed upon it by the insurer, which is, we think, the only one of which the policy is fairly susceptible.

The finding of the referee in this matter is affirmed and made the order of the court.

UNITED STATES v. ST. LOUIS COFFEE & SPICE MILLS.

(District Court, E. D. Missouri, E. D. May 22, 1909.)

No. 15,399.

1. FOOD (§ 20*)—FOOD AND DRUGS ACT—ADULTERATION—"EXTRACT"—"FLAVOR."

An information charging that defendant sold in interstate commerce a liquid labeled "Flavor of Vanilla," which did not contain any extract of vanilla, does not state a case of adulteration or misbranding of vanilla extract in violation of Food and Drugs Act June 30, 1906, c. 3915, § 2, 34 Stat. 768 (U. S. Comp. St. Supp. 1909, p. 1188), the words "extract" and "flavor" not being synonymous terms.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 20.*

For other definitions, see Words and Phrases, vol. 3, p. 2625.]

2. FOOD (§ 12*)—FOOD AND DRUGS ACT—VIOLATION BY ADULTERATION.

Circular No. 19, issued by the Secretary of Agriculture under authority of Act March 3, 1903, c. 1008, 32 Stat. 1158, establishing standards of purity for food products and what are regarded as adulterations therein,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cannot be considered in determining what constitutes the offense of adulteration in violation of Food and Drugs Act June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1909, p. 1187).

[Ed. Note.—For other cases, see Food, Dec. Dig. § 12.*]

3. FOOD (§ 20*)—VIOLATION OF FOOD AND DRUGS ACT—INFORMATION.

An information charging a defendant with selling an adulterated or misbranded article of food in interstate commerce in violation of Food and Drugs Act June 30, 1906, c. 3915, § 2, 34 Stat. 768 (U. S. Comp. St. Supp. 1909, p. 1188), should specifically charge the manner of adulteration as defined in section 7 of the act, or of misbranding as defined in section 8.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 20.*]

What constitutes a violation of pure food regulations, see note to *Brina v. United States*, 105 C. C. A. 559.]

4. ADULTERATION (§ 4*)—DEFINITION.

The word "adulteration," as used in Food and Drugs Act June 30, 1906, c. 3915, § 2, 34 Stat. 768 (U. S. Comp. St. Supp. 1909, p. 1188), means to corrupt, debase, or make impure by an admixture of a foreign or a baser substance.

[Ed. Note.—For other cases, see Adulteration, Cent. Dig. §§ 4-9; Dec. Dig. § 4.*]

For other definitions, see Words and Phrases, vol. 1, pp. 210-212.]

Criminal prosecution by the United States against the St. Louis Coffee & Spice Mills. On demurrer to evidence. Sustained.

Truman Post Young, Asst. U. S. Atty.

Thos. G. Rutledge and Schnurmacher & Rassieur, for defendant.

DYER, District Judge. Since the adjournment of court on yesterday I have considered more fully the demurrer interposed by the defendant's counsel to the case as stated in the two counts of the information and the evidence offered by the government in support thereof. This is the first case arising under the act of June 30, 1906 (Act June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1909, p. 1187]), entitled "An act for preventing the manufacture, sale or transportation of adulterated or misbranded, or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes," that has been presented to this court for determination. For a violation of this statute penalties are imposed, and it is made the duty of the United States Attorney, when the Secretary of Agriculture shall report to him any violation of the act, to cause appropriate proceedings to be commenced and prosecuted without delay, for the enforcement of the penalties, etc. The Secretary reported this defendant to the district attorney, and as a result the information now under consideration was filed in this court. The proceeding is for the violation of a statute that imposes penalties, and by its terms declares each violation a misdemeanor. The information therefore should be as certain and definite as if the offense were charged in an indictment. Judging it by the well-recognized requirement of pleading in such cases, do the counts or either of them state clearly and with sufficient certainty any offense against the statute under which the proceeding was commenced and is now pros-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ecuted? The importance of and the great good to the public that will follow the enforcement of this act can hardly be measured, and the delay taken by the order of adjournment on yesterday was for the purpose of enabling the court to determine (with proper regard to the contention of the district attorney on the one side and of defendant's counsel on the other) its decision.

[1] The first count of the information charges in substance: "That by circular No. 19 of the United States Department of Agriculture, dated *June 26th, 1906*, the Secretary established certain standards of purity for food products as authorized by the act of Congress of March 3, 1903" (Act March 3, 1903, c. 1008, 32 Stat. 1158). That said order No. 19 provided that "vanilla extract is a flavoring extract prepared from vanilla bean, etc." The count then states "that in trade and commerce and the science of food chemistry, the words 'vanilla extract' signify an extract prepared from the 'vanilla bean, etc.,' and in trade and commerce the words 'vanilla extract' are synonymous with the words 'vanilla flavor' when placed on bottles containing a liquid to be used for flavoring purposes."

The information (after making the foregoing recitals) charges that the defendant on the 26th of October, 1907, unlawfully and knowingly shipped by the Missouri Pacific Railroad from St. Louis, Mo., to Kansas City, for sale in interstate commerce, a certain bottle labeled "*Nectar Choice Flavor of Vanilla*, sugar colored, for flavoring ice cream, etc.;" that the contents of the bottle were *adulterated* in violation of the act of June, 1906, in that said bottle contained a liquid which did not contain any extract of vanilla as defined by circular No. 19, and by the usages of trade and commerce, and was in fact an imitation and substitute therefor, etc.

By the word "adulteration," as used in the act, it is understood to mean "to corrupt, debase, or make impure by an admixture of a foreign or a baser substance." How can it be successfully claimed that because the liquid in the bottle offered in evidence did not contain extract of vanilla that it was therefore adulterated within the meaning of the statute?

[2] The circular No. 19 issued by the Secretary of Agriculture was issued long before the enactment of the statute under which this proceeding is had, and for that reason, if for no other, cannot be considered in determining the question of the guilt or innocence of the defendant in this case.

By section 2 of the act of June 30, 1906, it is made an offense to introduce into any state, etc., any food or drugs *adulterated* or *misbranded*.

The first count charges that the bottle sent from St. Louis to Kansas City contained "adulterated liquid extract or flavor." It also charges that the liquid did not contain any extract from the "vanilla bean," but did have a vanilla *flavor*. The court is now asked to say that "Vanilla Extract" and "Vanilla Flavor," as known to the trade, is one and the same thing, and that in dealing with the defendant in this case "extract" and "flavor" are synonymous in meaning, and that, therefore, if the defendant shipped a liquid which had the flavor

of vanilla it was guilty of *adulteration* of the extract of vanilla, within the meaning of the statute. Neither the Secretary of Agriculture nor the public generally can change the meaning of the words "extract" and "flavor." Without reference to the dictionaries and the definitions of the words contained therein, it is known that "extract" is one thing and "flavor" another. The evidence in this case has failed to convince the court that even among dealers the words "extract" and "flavor" are considered synonymous terms.

[3] The information charges that there was an adulteration of the article, but fails to state in what particular and how it was adulterated. It states a conclusion without making the necessary averments from which the conclusion could be fairly reached. Section 7 of the act of June, 1906, provides that an article shall be deemed to be adulterated when:

"In case of food:

"First: If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

"Second: If any substance has been substituted wholly or in part for the article."

"Third: If any valuable constituent of the article has been wholly or in part abstracted.

"Fourth: If it be mixed, colored, powdered, coated or stained in a manner whereby damage or inferiority is concealed.

"Fifth: If it contain any added poisonous or other deleterious ingredient which may render such article injurious to health."

The information fails to charge that the article sold and delivered to the grocer in Kansas was mixed or packed in such a manner as to reduce or lower or injuriously affect its quality or strength, nor does it charge that any substance was substituted for the article; nor does it charge that any valuable constituent was abstracted; nor does it charge that the article was colored in a manner whereby inferiority was concealed; nor does it charge that the article contained any added poisonous or other deleterious ingredient that would render it injurious to health. It would seem that one or more of these things should be specifically charged in the information, and that the charge should be made with such particularity as to fairly inform the defendant of the act of violation complained of, and for which it is to answer. The conclusion reached by the court is that the first count does not sufficiently charge an offense under the statute, and that the evidence offered by the government does not aid the defect.

The second count is similar in all respects to the first, as far as the recitals are concerned. This count seeks to charge "misbranding" under section 8 of the act. That section is as follows:

"Sec. 8. That the term 'misbranded,' as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the state, territory, or country in which it is manufactured or produced.

"That for the purposes of this act an article shall also be deemed to be misbranded * * * in case of food:

"First: If it be an imitation of or offered for sale under the distinctive name of another article.

"Second: If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so, or if the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package, or if it fail to bear a statement on the label of the quantity or proportion of any morphine, opium, cocaine, heroin, alpha or beta, eucaïne, chloroform, cannabis indica, chloral, hydrate, or acetanilide, or any derivative or preparation of any of such substances contained therein.

"Third: If in package form, and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package.

"Fourth: If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular; provided, that any article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

"First: In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

"Second: In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word 'compound,' 'imitation' or 'blend,' as the case may be, is plainly stated on the package in which it is offered for sale; provided, that the term 'blend' as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only."

It will thus be seen that this count does not follow the words of the statute in charging the offense, but repeats the facts contained in the first count.

The charge in this, as in the first count, should be specific enough to fairly inform the defendant of the charge it is to meet. In my opinion the count is insufficient.

There is nothing left for the court to do on this information but to direct a verdict of not guilty.

UNITED STATES v. FRANK et al.

(District Court, S. D. Ohio, W. D. January 21, 1911.)

No. 747.

1. Food (§ 20*)—FOOD AND DRUGS ACT—VIOLATION—INFORMATION.

An information alleging that defendants shipped in interstate commerce an article of food labeled as "Extract Terpeneless Lemon" in which a dilute solution of alcohol and water was substituted in part for said terpeneless lemon extract so that the same contained no more than .05 per cent of citral derived from the oil of lemon whereas, as recognized in the trade generally and by the standard of purity established by the Secretary of Agriculture in circular No. 19, issued by authority of Act March 3, 1903, c. 1008, 32 Stat. 1158, such extract should contain at least

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

.2 per cent by weight of such citral, states facts which will sustain counts for both adulteration and misbranding in violation of Food and Drugs Act June 30, 1906, c. 3915, § 2, 34 Stat. 768 (U. S. Comp. St. Supp. 1909, p. 1188).

[Ed. Note.—For other cases, see Food, Dec. Dig. § 20.*]

2. Food (§ 12*)—FOOD AND DRUGS ACT—VIOLATION BY ADULTERATION.

The standards of purity for food products established by the Secretary of Agriculture in circular No. 19 of the department, issued by authority of Act March 3, 1903, c. 1008, 32 Stat. 1158, governs in determining what constitute adulterations of such products under Food and Drugs Act of June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1909, p. 1187).

[Ed. Note.—For other cases, see Food, Dec. Dig. § 12.*]

What constitutes a violation of pure food regulations, see note to Brina

v. United States, 105 C. C. A. 539.]

Criminal prosecution by the United States against Jacob Frank, Charles Frank, and Emil Frank, trading as the Frank Tea & Spice Company. Judgment on plea of guilty.

On or about March 21, 1909, Jacob Frank, Charles Frank, and Emil Frank, trading under the firm name and style of the Frank Tea & Spice Company, shipped from the state of Ohio into the state of Kentucky a quantity of so-called lemon extract labeled, "P. & S. Brand Extract Terpeneless Lemon—Artificially Colored. The Frank Tea & Spice Co., Cincinnati, O." An analysis of a sample of this product by the Bureau of Chemistry, United States Department of Agriculture, was made with the following results: "Polarization, 0.0; lemon oil by precipitation, none; lemon oil by polarization, none; color, naphthol yellow S, artificial; citral, 0.05 per cent; and alcohol, 49.1 per cent." As the finding of the analyst and report made showed that the product was adulterated and misbranded within the meaning of Food and Drugs Act June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1909, p. 1187), the said Jacob Frank, Charles Frank, and Emil Frank, and the parties from whom the samples were procured were afforded opportunities for hearings. As it appeared after hearings held that the said shipment was made in violation of the act, the Secretary of Agriculture reported the facts to the Attorney General with a statement of the evidence upon which to base a prosecution. In due course a criminal information was filed in the District Court of the United States for the Southern District of Ohio against said Jacob, Charles, and Emil Frank, charging the above shipment and alleging that the product so shipped was adulterated in the following particulars, to wit:

First. That another substance, to wit, a dilute solution of alcohol and water, was substituted in part for the terpeneless lemon extract, in that said article, represented to be terpeneless lemon extract, contained no more than 0.05 per cent of citral derived from the oil of lemon, whereas terpeneless lemon extract should contain 0.2 per cent of citral derived from oil of lemon, according to the standards of purity for food products, established by the Secretary of Agriculture of the United States, in accordance with the provisions of the act of Congress approved March 3, 1903, c. 1008, 32 Stat. 1158.

Second. That a dilute solution of alcohol and water was mixed and packed with said article of food so as to reduce and lower and injuriously affect its quality and strength. The information further alleged that the aforesaid product was misbranded in that the statement, to wit, "extract terpeneless lemon," was false, misleading, and deceptive, as said article of food did not contain 0.2 per cent of citral derived from lemon, but contained only 0.05 per cent of said citral, and therefore was not terpeneless lemon extract as recognized in the trade generally and in the standards

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of purity for food products established by the Secretary of Agriculture of the United States in collaboration with the Association of Official Agricultural Chemists.

On October 11, 1910, the above-named defendants pleaded guilty to the above information, and to the allegations of adulteration and misbranding in manner and form as alleged therein, whereupon the court imposed a fine of \$200 and costs.

On a motion of counsel for defendants the court took its decision under reconsideration and briefs were filed by the defendants' counsel and by the United States attorney.

Sherman T. McPherson, U. S. Atty., and E. P. Moulinier, Asst. U. S. Atty.

A. W. Goldsmith, Jr., for defendants.

HOLLISTER, District Judge (after stating the facts as above). The United States filed an information against Jacob Frank, Charles Frank, Emil Frank, doing business under the firm name and style of the Frank Tea & Spice Company, charging them with having unlawfully shipped and delivered for shipment from Cincinnati to a firm at Mt. Sterling in Kentucky, one gross bottles of a certain article of food purporting to be terpeneless lemon extract, marked "P. & S. Brand Extract Terpeneless Lemon—Artificially Colored. The Frank Tea & Spice Co., Cincinnati, O.," and that same was adulterated in that a dilute solution of alcohol and water was substituted in part for said terpeneless lemon extract so that the same contained no more than .05 per cent of citral derived from the oil of lemon; whereas, it should contain at least .2 per cent by weight of citral derived from the oil of lemons, as required by the standards of purity for food products, established by the Secretary of Agriculture in accordance with the provisions of the Act of Congress, approved March 3, 1903, c. 1008, 32 Stat. 1158. The information also charged that the dilute solution of alcohol and water was mixed and packed as and with said article of food so as to reduce and lower and injuriously affect the quality and strength of the article of food purporting to be terpeneless lemon extract. For a second count the information charges that the article of food called "terpeneless lemon extract" was misbranded in that the statement on the bottles that the article contained therein was extract terpeneless lemon was false and misleading in that the article did not contain at least .2 per cent of oil product by weight of citral derived from the oil of lemon, and did in fact contain only .05 per cent of citral, and that the same was not terpeneless lemon extract as recognized in the trade generally and in the standards of purity of food products established by the Secretary of Agriculture in collaboration with the Association of Official Agricultural Chemists, approved by Act of Congress, March 3, 1903, c. 1008, 32 Stat. 1158. The defendants, believing, as admitted in open court, that only a nominal fine would be imposed upon a plea of guilty as for a technical violation of the pure food law, pleaded guilty. The defendants having within some six or seven months prior to the filing of this information pleaded guilty to two so-called technical violations of the pure food law, and being thereupon fined only in nominal amounts, the court on this plea imposed a fine of \$200. Thereupon the defend-

ants deeming themselves aggrieved, and upon the urgent solicitation of their counsel, the court permitted counsel to file a brief in support of the proposition that no offense in fact had been committed under the laws of the United States. Counsel for the defendants submitted an elaborate brief to which the District Attorney filed a brief in answer.

[1] Upon consideration of these the court is of opinion that there is an offense against the laws of the United States charged in this information, and sees no reason why, under the circumstances of the case, the fine imposed was too large.

On March 3, 1903, the Congress appropriated a sum of money to the Department of Agriculture for the fiscal year ending June 30, 1904, for the purpose, among others, "to enable the Secretary of Agriculture, in collaboration with the Association of Official Agricultural Chemists, and such other experts as he may deem necessary, to establish standards of purity for food products and to determine what are regarded as adulterations therein, for the guidance of the officials of the various states and of the courts of justice. * * *" The information alleges that the standard of purity for terpeneless lemon extract was established by the Secretary of Agriculture and it appears aliunde that in the publication of Department of Agriculture, Circular No. 19, the following:

"Terpeneless extract of lemon is the flavoring extract prepared by shaking the oil of lemon with dilute alcohol, or by dissolving terpeneless oil of lemon in dilute alcohol, and contains not less than two-tenths (0.2) per cent by weight of citral derived from oil of lemon."

[2] That the Secretary of Agriculture had the constitutional power under the act of 1903 to establish standards for purity of food products is not disputed, nor could it be under the decisions of the Supreme Court of the United States. He adopted the standard for the article of food in question as alleged in the information. The allegation of the information is that the standard so established was existent at the time of the filing of the information. On June 30, 1906 (Act June 30, 1906, c. 3915, § 2, 34 Stat. 768 [U. S. Comp. St. Supp. 1909, p. 1188]). the Congress provided:

"That the introduction into any state * * * from any other state * * * any article of food * * * which is adulterated or misbranded" (within the meaning of this act) "is hereby prohibited." And the offender, "shall be guilty of a misdemeanor and for such offense be fined not exceeding two hundred dollars for the first offense, and upon conviction for each subsequent offense not exceeding three hundred dollars or be imprisoned not exceeding one year, or both, in the discretion of the court."

The act further provides that an article shall be deemed to be adulterated in the case of food, "if any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality and strength," and shall be deemed to be misbranded, "if the package containing it or its label shall bear any statement, design, or device regarding such article or the ingredients or substances contained therein which shall be false or misleading in any particular."

The claim of the defendants is that the statute does not distinctly

incorporate the standards fixed by the Secretary of Agriculture within the provisions of the food law, and it does not therefore define a criminal offense. The answer to this is that if the Secretary of Agriculture had the power to fix standards and did fix a standard of this food product, which standard was in existence at the time the food law was passed, and the information charges wherein the article was adulterated and misbranded with respect to this standard, there seems to be no room for doubt that if upon proof that the article did not conform to the requirements of the standard of purity established by the Secretary of Agriculture, then an offense has been charged under the laws of the United States.

The defendants claim that the act of 1903 was a mere appropriation law, but it would seem that a law appropriating a certain sum of money to the Secretary of Agriculture for the purpose of doing certain things which he could constitutionally do for the purpose of fixing standards of purity of food and that he did so fix them, carries with it a necessary implication that he could do that for which the money was appropriated to him for the purpose of doing, and when he fixed the standards then those standards prevailed unless they have been changed since. It does not appear that they have been changed.

The defendants claim that as the act of 1906 does not incorporate the standards fixed by the Secretary of Agriculture, the act of the Secretary was legislative in character, and hence no criminal offense could be predicated upon it. It is also claimed that since the act of 1906, in describing drugs, refers to the Pharmacopœia or National Formulary, and in describing what food is, refers to no standard at all, Congress has not fixed any standard for food. Both of these claims are based on a misapprehension. Section 6 of the act of 1906 provides:

"That the term 'drug,' as used in this act, shall include all medicines and preparations recognized in the United States Pharmacopœia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of diseases of either man or other animals. The term 'food,' as used herein, shall include all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed, or compound."

These are mere terms of description. If the Pharmacopœia or National Formulary says something is a drug, it is a drug under the meaning of the act. Or if it comes under the other description of what a drug is, it is a drug, and so food also is described. There are no standards fixed in either case, for, if any substance or mixture is intended to be used for the cure, mitigation, or prevention of disease of either man or other animals, it is nevertheless a drug whether it is recognized in the Pharmacopœia or National Formulary or not. The standard for food was fixed by the Department of Agriculture under the act of 1903. If one in the business of making food products would look for the standard he would find it in the promulgations of the Secretary of Agriculture made under direct authority of Congress. The act of 1903 does not describe any offense, but the act of 1906 says that if any article of food adulterated or misbranded is manu-

factured or transported so as to become the subject of interstate commerce, the maker, transporter, etc., shall be guilty of an offense. How shall it be known whether he is guilty of an offense or not? The answer is clear, by referring to the standards which have been established under the authority of Congress. The Secretary of Agriculture, under authority of Congress, fixed the standards of purity for certain foods. This is a fact upon which the law of 1906 operates. It is not a law. The law of 1906 under which the offense is charged to have been committed says what food is. The offense charged is that the defendant transported a food and that it was adulterated and misbranded. How is this to be ascertained? By looking to the standard as a fact.

The question is dealt with in *Coopersville Co-operative Creamery Co. v. Lemon*, 163 Fed. 145, 89 C. C. A. 595. It appears that the Oleomargarine Act May 9, 1902, c. 784, § 4, 32 Stat. 194 (U. S. Comp. St. Supp. 1907, p. 637), provides that "any butter in the manufacture or manipulation of which any process or material is used with intent or effect of causing the absorption of abnormal quantities of water, milk or cream" shall be deemed "adulterated butter," and authorizes the Commissioner of Internal Revenue to decide what substances are taxable thereunder. It also authorizes him, with the approval of the Secretary of the Treasury, to make all needful regulations for carrying the act into effect. It was held that such a regulation, providing that butter containing 16 per cent. or more of water, milk or cream should be classified as "adulterated butter" under the act, was within the authority so granted, and was valid, being neither an exercise of legislative or judicial power, but merely a determination as a question of fact of what constitutes an "abnormal" quantity of water, etc., upon which the application of the statute is made to depend.

Judge Lurton, speaking for the Circuit Court of Appeals says:

"The contention that the delegation of authority to promulgate, such a regulation is to delegate either legislative or judicial power to an executive officer is founded upon a misapprehension of the character of the authority delegated. That Congress cannot delegate legislative authority or power to any executive official or board of officials is elementary. To do so would be destructive to our whole system and scheme of government. *Field v. Clark*, 143 U. S. 649, 691, 12 Sup. Ct. 495, 36 L. Ed. 294. That the delegation of authority to add to or take from a law would be to delegate legislative power must also be conceded. But that Congress may enact a law and delegate the power of finding some fact or state of things upon which the operation of the law is made to depend is equally clear. *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294; *In re Kollock*, 165 U. S. 526, 17 Sup. Ct. 444, 41 L. Ed. 813; *Union Bridge Co. v. United States*, 204 U. S. 364, 386, 27 Sup. Ct. 367, 51 L. Ed. 523. The authority to make all needful regulations not inconsistent with law is not a delegation of power to add something to an incomplete law nor a grant of judicial power. It is only an authority to determine the fact upon which the operation of the law is made to depend. Congress might have made the necessary tests and might have acquired the knowledge of the butter-making art to enable it to have enacted that adulterated butter should consist of butter having a moisture content of 16 per cent. or more. But that would have been an unnecessary detail, for it was altogether competent to declare that butter which contained

an abnormal quantity of water, milk, or cream should be classified as adulterated butter, and that the fact as to what was, in dairy butter, an abnormal proportion of water, milk, or cream should be determined by a regulation of the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury."

It surely can make no difference that the authority to establish the standard was not in the act itself creating the offense as in the oleo-margarine law. It may be well said that the food and drugs act of 1906 was made with special reference to the standards of food fixed by the Secretary of Agriculture under prior authority of Congress.

It is true that the case of *United States v. St. Louis Coffee & Spice Mills*, 189 Fed. 191, decided May 22, 1909, in the District Court for the Eastern District of Missouri, bears out the contention of the defendant, but in a subsequent case, *United States v. Edward Weston Tea & Spice Company*, decided November 30, 1909, the same court submitted to the jury a case necessarily involving the same question. If he at that time entertained the opinion expressed in the other case he would not have permitted the case to go to the jury. The court is of opinion that the information charges an offense. There is some doubt in the court's mind as to the propriety of passing upon this question of law at all. The defendant before pleading guilty had the opportunity to demur to the information, and, having many months in which to make up his mind what to do, pleaded guilty. Not until the imposition of a fine unexpectedly large did he raise the question here discussed. It is probable that the fine having been imposed on the plea of guilty the matter has passed from the power of the court to the pardoning power. The court has no intention of making this case a precedent which may be followed in similar cases. If persons charged with an offense against the laws of the United States with ample time to prepare their defense, assisted by able counsel, nevertheless pleaded guilty and a fine was imposed, it is difficult to see upon what ground they have right to appeal to the court by an attack upon the legality of the proceeding.

The court has only looked into the subject lest some injury has come to the defendants through their own plea of guilty.

The food and drugs act is one of the most beneficent legislative enactments of recent times and its provisions must be observed.

UNITED STATES v. CLEIN.

(District Court, E. D. Washington, E. D. June 7, 1911.)

No. 1,458.

CRIMINAL LAW (§ 564*)—EVIDENCE—VENUE.

Evidence in a homicide case *held*, on a motion for a new trial, on the ground of the insufficiency of the evidence to prove that the crime was committed within the jurisdiction of the court, sufficient to sustain the conclusion of the jury.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 564.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Paul Clein was convicted of murder, and moves for a new trial. Motion denied.

Oscar Cain, U. S. Atty.

Alex M. Winston and E. V. Tustin, for defendant.

RUDKIN, District Judge. The prisoner, Clein, was convicted of the crime of murder, committed within the Ft. George Wright military reservation in the Eastern district of Washington, under section 5,339 of the Revised Statutes (U. S. Comp. St. 1901, p. 3627), and now interposes a motion for a new trial. The sole question presented by the motion is the sufficiency of the evidence to prove that the crime was committed within the jurisdiction of this court, and I will advert briefly to so much of the testimony as bears upon that issue.

The deceased was last seen alive in company with the prisoner in the city of Spokane, about 8 o'clock on the evening of March 1, 1909. About nine o'clock of that evening the prisoner hired a rig at one of the livery stables in the city, stating that he had lost his money at gambling, and was going to his home near the military reservation to procure funds. The rig was returned to the stable at about 2:30 o'clock on the following morning. About 6:30 o'clock on the same morning the prisoner hired a second rig at another stable, returning it to the stable about two hours later. A rig answering the description of that last mentioned was seen by one of the government witnesses between the hours of 7 and 8 o'clock on the morning of March 2d, standing at the western boundary line of the military reservation, a few hundred yards from the place where the body of the deceased was later found. Another witness for the government, a Mrs. Newkirk, saw the same rig passing her home between the city of Spokane and the military reservation, at about the same hour, and identified the prisoner as the occupant of the rig. The last-named witness further testified that she was aroused from her sleep some time during the night of March 1st and heard screams and the report of two gun shots, after which all was silent. The witness was in bed at the time, in her home, with the windows closed down. She did not know who uttered the screams, or who fired the shots, or even the direction from which the sounds came. She only knew that she heard the screams and the shots, and that they seemed near by, or at least not very far distant from her house. On the afternoon of March 21, 1909, the body of the deceased was found on the Ft. George Wright military reservation, four miles northwesterly from the city of Spokane, at a point about 150 yards from its southern boundary, and perhaps double that distance from its western boundary, where the rig was seen standing some three weeks before. The overcoat of the deceased, stained with blood, was found about 50 yards in a westerly direction from the body. His hat was found about 50 yards from the overcoat, likewise in a westerly direction. When found, the body was lying face downward on a small knoll in an open space in the timber with the legs crossed, and the hands or arms folded underneath the body. The autopsy disclosed a gunshot wound in the mouth through the upper lip, a second gunshot wound in the mouth through the lower

lip, a third gunshot wound in the neck, a wound inflicted by some blunt instrument on the cheek, and an abrasion about one inch in diameter on the back of one of the hands. But while the surgeons found only three bullets in the body, the undertaker found a fourth, which would seem to indicate that the wound in the cheek was probably inflicted by a gunshot. That fact, however, has no bearing upon the question now under consideration, and is immaterial.

The foregoing are all the facts bearing directly, or even remotely, on the questions presented by the motion, namely, where did the deceased meet his death?

"The venue need not be proved by direct and positive evidence. It is sufficient if it may be reasonably inferred from the facts and circumstances which are proven and are involved in the criminal transaction. It is enough if it may be inferred from the circumstances by the jury that the crime was committed in the county alleged in the indictment.

"The venue need not be proved beyond a reasonable doubt. If the only rational conclusion from the facts and evidence is that the crime was committed in the county alleged, the proof is sufficient." Underhill, *Crim. Evidence* (2d Ed.) § 36.

In *Commonwealth v. Costley*, 118 Mass. 2, 26, the court, speaking through Gray, C. J., said:

"The finding of the body, with the marks upon it of injuries sufficient to cause death, in a river in the heart of the county of Norfolk, in such a situation and condition as to show that it must have been thrown there by the hand of man, and not drifted there by the force of the tide or current, was sufficient to warrant the jury in concluding that the homicide was committed in that county."

In that case the body was found from $2\frac{1}{2}$ to 3 miles from the county line. See, also, *Carter v. Ross*, 40 Tex. Cr. R. 225, 47 S. W. 979, 49 S. W. 74, 619; *Wharton's Crim. Evidence* (9th Ed.) § 108.

So, in this case, the finding of the body on the military reservation, with the marks upon it of injuries sufficient to cause death, showing that it must have been placed there by the hand of man, was sufficient to warrant the jury in concluding that the homicide was committed on the military reservation, and therefore within the jurisdiction of this court. I do not understand that counsel for the prisoner deny the correctness of this proposition, but they do contend that any inference or presumption that might arise from the finding of the dead body and wearing apparel of the deceased on the reservation is overcome and explained away, first, by testimony tending to show that the body was moved after death, and second, by the testimony of the witness Mrs. Newkirk. Physicians expressed the opinion that the deceased did not fall or die in the position in which his body was found, and that the body was placed in that position after death; but conceding such to be the case, the testimony proved nothing beyond the fact that the body was moved after death. How far it was moved, or from what direction does not appear, and the fact of removal, if conceded, carries with it no presumption that it was removed from some point beyond the reservation boundaries.

Before the testimony of Mrs. Newkirk can have any bearing upon the question of venue, the court must be satisfied, first, that her tes-

timony was true; second, that the shots heard by her were the shots that caused the death of the deceased; and, third, that the shots were not fired on the military reservation, at or near the place where the body was found. The testimony of this witness was not indispensable to the government's case, and her credibility, as well as the inferences to be drawn from her testimony, were exclusively for the jury. It does not appear that the witness related the somewhat extraordinary circumstances to any person until near the close of a long trial of the prisoner for this same homicide in the superior court of Spokane county, during the month of May following, although she attended that trial as an interested spectator almost daily. The jury may have concluded that her testimony was the product of an overwrought imagination and discredited it entirely, and in my opinion they would have been warranted in so doing. But if her statement is true, there is nothing to connect her testimony with the homicide, except the mere coincidence of time and place. The deceased was undoubtedly shot and killed some time during the night of March 1st, and his dead body was found on the military reservation about three weeks later. The witness heard two gunshots and a scream some time during the night of March 1st, about three-quarters of a mile from the place where the dead body was found. These facts alone would seem to furnish very inconclusive evidence that the shots heard by Mrs. Newkirk were the shots that killed the deceased. But conceding that the shots heard by her were the shots that caused the death of the deceased, it does not follow that they could not have been heard from the point on the military reservation where the body was found. The distance is only 1,600 or 1,700 yards, and shots and screams might well be heard at that distance. Three witnesses for the prisoner made an experiment, and one of them stationed in the room occupied by Mrs. Newkirk on the night in question was unable to hear either shots or screams from the point where the body was found. Witnesses for the government made another experiment, and the shots could be heard quite distinctly outside the Newkirk residence, but no screams were uttered and no experiment was made from within the building. Some voices are more penetrating than others; some shots are louder than others, and you can hear much more distinctly and much farther in the stillness of the night than at other times. We have all heard similar sounds at fully as great a distance, under circumstances fully as adverse, and for these reasons the verdict of the jury should stand. The dead body with the discarded wearing apparel was found on the military reservation, without any apparent attempt at concealment; no reason is offered or suggested why the body should be carried to that place after death from off the reservation; the jury heard the testimony and viewed the premises, and I must accept their verdict as a finality.

It was admitted in argument that a verdict of guilty of murder in the first degree, returned in the superior court of Spokane county, where the prisoner was tried for the same homicide, was set aside by the court, for the reason that the proof showed that the crime was committed on the military reservation and without the jurisdiction of the

state court, and I am now asked to determine the question the other way as a matter of law. If I were convinced that such were the fact I would not hesitate to so rule, but the testimony makes no such impression upon me. I cannot agree with the judge of the state court that the testimony is so conclusive either way as to render the question of venue or jurisdiction one of law for the court, but that question is immaterial here.

The motion for new trial is denied.

HOOD et al. v. McGEHEE et al.

(Circuit Court, N. D. Alabama, S. D. June 20, 1911.)

No. 214.

1. COURTS (§ 367*)—DECISION—CONCLUSIVENESS.

The decision of the Alabama Supreme Court that children adopted according to the laws of foreign states are not entitled to take property by descent in Alabama from their adopting parents, being a fixed rule of property in Alabama, is conclusive on the federal courts in determining the devolution of property in Alabama unless in violation of the federal Constitution.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 958, 959; Dec. Dig. § 367.*]

Conclusiveness of judgment between federal and state courts, see notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478; *Union & Planters' Bank v. City of Memphis*, 49 C. C. A. 468.]

2. ADOPTION (§ 25*)—FOREIGN ADOPTION—FULL FAITH AND CREDIT.

Since each state has exclusive jurisdiction to regulate the transfer of real estate within its limits, the Alabama rule that children adopted under the laws of foreign states are not entitled to take property in Alabama by descent from their adopting parents is not in violation of the constitutional provision, requiring each state to give full faith and credit to the judicial proceedings of every other state.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 6, 37; Dec. Dig. § 25.*]

3. SPECIFIC PERFORMANCE (§ 86*)—CONTRACT TO DEVISE.

When adoption proceedings are ineffective in themselves or are accompanied by a definite promise by the adopting parents to leave all or a part of their property to the adopted child on the parents' death, such proceedings and promise may amount to a contract which, though made for the children by a third person, may, when fully performed by the children, be specifically enforced against the heirs of the adopting parents.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 223, 224; Dec. Dig. § 86.*]

4. ADOPTION (§ 25*)—FOREIGN PROCEEDINGS—VALIDITY—EFFECT.

Where complainants were adopted in Louisiana by an act fully complying with the Louisiana law, it would be presumed, after the death of the adopting parents, that they intended such proceedings to have only the effect legally attached thereto, so that, on its being determined that the proceedings were ineffectual to entitle complainants to inherit from their adopting parents lands acquired by them in Alabama after the act of adoption, such adoption proceedings could not be regarded as a prom-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ise by the adopting parents to leave such property to complainants and specifically enforced as against the parents' heirs.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 6, 37; Dec. Dig. § 25.*]

In Equity. Bill by Ida Richardson Hood and others against J. B. McGehee and others. On demurrer to amended bill. Sustained.

Percy, Benners & Burr, for complainants.

Tillman, Bradley & Morrow, for defendants.

GRUBB, District Judge. The bill of complaint in this cause was filed to determine the title to real estate in Alabama of which the plaintiffs are in possession through a tenant. The common source of title is George T. McGehee. The plaintiffs are his adoptive children by proceedings had under the laws of Louisiana. The defendants are the next of kin, who would inherit his real estate in Alabama, under its statute of descents, McGehee having died intestate, unless the plaintiffs are entitled to it.

The plaintiffs support their right (1) under the statute of descents of Alabama, claiming to be children of intestate, and (2) by virtue of a contract claimed to have arisen from the Louisiana adoption proceedings, though ineffective in Alabama, between McGehee and wife, on the one hand, and the plaintiffs and their tutrix, on the other hand; they being, at the time, minors of tender years, the effect of which is alleged to have been to vest title in them in all the property of McGehee and his wife upon their deaths. The defendants deny that title to the lands in Alabama passes to plaintiffs under either theory.

1. The Supreme Court of Alabama, in the case of *Brown v. Finley*, 157 Ala. 424, 47 South. 577, 21 L. R. A. (N. S.) 679, 131 Am. St. Rep. 68, construed the Alabama statute of descents so as to exclude adopted children, by proceedings in other states, from the term "children" as used in subdivision 1 of section 3754 of the Alabama Code, 1907, which provides for the descent of real estate in this state, holding that foreign adoption statutes had no extraterritorial force.

[1] The Supreme Court, also, in the same case, declared this construction to be a fixed rule of property in Alabama. This concludes the federal court, unless by reason of the violation of some of the provisions of the federal Constitution, even though the Alabama rule is, as appears to be the case, contrary to the current of authority. *Dickson v. Wildman*, 183 Fed. 398, 105 C. C. A. 618; *Clarke v. Clarke*, 178 U. S. 186, 20 Sup. Ct. 873, 44 L. Ed. 1028; *Simpson v. Wisner-Cox Lumber Co.*, 170 Fed. 52, 95 C. C. A. 227.

[2] The plaintiffs claim that the "full faith and credit" clause of the Constitution requires the Alabama court, not only to recognize the Louisiana adoption proceedings as valid to confer on the plaintiffs the status of adopted children, but to confer on them the same rights of inheritance to real estate in Alabama as are conferred on natural children. Conceding that the Louisiana adoption proceedings come within the meaning of public acts, records, or judicial proceedings, and are entitled to full faith in the sense of compelling recognition by other

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

states of the adoptive filial relation created by them, it does not follow that the right of inheritance to real property follows such status, when recognized. Each state has exclusive jurisdiction of the regulation of the transfer and descent of real estate within its limits. It would be competent for the Legislature of Alabama to deny the right to inherit real property to children adopted in its own courts by its own procedure. It would be competent for it to confer such rights on children of its own adoption and deny it to those of the adoption of foreign states. This is what Alabama legislation, as construed by its court of last resort, has accomplished. Section 5202, Alabama Code of 1907, provides a procedure to be followed for the adoption of children so as to make them capable of inheriting in Alabama real and personal property of the adoptive parent. The child adopted in Alabama under this section is given the right by the terms of section 5202 and without necessity of resort to the statute of descents. No right to inherit is conferred on children of foreign adoption by section 5202. The Supreme Court construed the word "children" in the statute of descents (subdivision 1, § 3754, Code 1907) as not including children of foreign adoption. It was competent for the Legislature to so enact and for the court to so construe its enactment, the state being absolutely free to regulate the descent of real estate within its limits as it sees fit. For these reasons the plaintiffs cannot claim the lands described in the bill under the Alabama statute of descents. *Olmsted v. Olmsted*, 216 U. S. 386, 30 Sup. Ct. 292, 54 L. Ed. 530, 25 L. R. A. (N. S.) 1272; *Fall v. Eastin*, 215 U. S. 1, 30 Sup. Ct. 3, 54 L. Ed. 65, 23 L. R. A. (N. S.) 924.

2. The plaintiffs contend, further, that Louisiana adoption proceedings have the effect of a contract between the adopting parents and the adopted children, to give them the same rights in the parents' real estate upon their death as if they were the natural children of the parents, and that this contract will be decreed to be specifically performed by a court of equity, after full performance by the parties. The act of adoption contains a declaration of adoption by McGehee and wife, a provision obligating them to support, maintain, and educate the adopted children, and an agreement investing "them with all the rights and benefits of legitimate children in their estate, in the same manner and to the same extent" as if they "had been the daughters of said George T. McGehee and Elizabeth B. McGehee." It also contains an agreement on the part of their tutrix to surrender the entire parental authority over them to McGehee and wife. The bill avers that the adopting parents, "after their adoption and through many years of association that followed," not only tenderly reared, educated, and carefully guarded them from all harm, but, in truth and fact, they were beloved and cherished by said adopting parents "as if they were their own children." The bill avers the performance of the children also in these words:

"That your orators on their part performed all the duties of children towards their adopting parents."

[3] The weight of authority seems to hold that ineffective adoption proceedings in themselves, or when accompanied by a sufficiently

definite promise to leave all or a certain part of the adopting parents' property to the adopted child upon the death of the parents, may amount to a contract, which though made for the children by a third person may, when fully performed by the children, be specifically enforced against the heirs of the adopting parents. This has been held to be the rule in a state (New Jersey) in which there was no statute authorizing adoption, and also in a state (Michigan) in which such a statute had been declared unconstitutional. In all cases, certainty in terms, fairness and full performance by the children are held to be requisite. The cases supporting the doctrine are: *Jaffee v. Jacobson*, 48 Fed. 21, 1 C. C. A. 11, 14 L. R. A. 352, and cases cited; *Winne v. Winne*, 166 N. Y. 263, 59 N. E. 832, 82 Am. St. Rep. 647; *Wright v. Wright*, 99 Mich. 170, 58 N. W. 54, 23 L. R. A. 196; *Sharkey v. McDermott*, 91 Mo. 647, 4 S. W. 107, 60 Am. Rep. 270; *Van Dyne v. Vreeland*, 11 N. J. Eq. 370; *Teats v. Flanders*, 118 Mo. 660, 24 S. W. 126; *Healy v. Simpson*, 113 Mo. 340, 20 S. W. 881; *Van Tine v. Van Tine*, 15 Atl. (N. J.) 249, 1 L. R. A. 155; *Chehak v. Battles*, 133 Iowa, 107, 110 N. W. 330, 8 L. R. A. (N. S.) 1130; 1 Cyc. p. 936, and cases cited in note; 1 Am. & Eng. Enc. of Law (2d Ed.) p. 728, and note; *Fusilier v. Masse*, 4 La. 424. Contra: *Wallace v. Rappleye*, 103 Ill. 229; *Wallace v. Long*, 105 Ind. 522, 5 N. E. 666, 55 Am. Rep. 222; *Shearer v. Weaver*, 56 Iowa, 578, 9 N. W. 907; *Albring v. Ward*, 137 Mich. 352, 100 N. W. 609; *Bowins v. English*, 138 Mich. 178, 101 N. W. 204.

[4] The question, then, is whether in this case the notarial act of adoption can be construed as a contract to leave the plaintiffs an interest in intestate's property, wherever situated and whenever acquired, owned by him at the time of his death, for it is conceded that no such contract exists in this case apart from the notarial act.

The language of the notarial act, with reference to the rights of inheritance conferred by it on the plaintiffs, is substantially that of the Louisiana adoption statute. Its use in the notarial act has, therefore, no significance other than to express what the law would imply. If it had been omitted, the legal meaning of the notarial act would have been unchanged. The adoption proceedings clearly show that the parties were proceeding under the Louisiana act, and with no purpose to confer rights on the adopted children, other than those conferred by adoption under that law.

If, then, any such contract exists, it must be one that is implied from the proceedings of adoption, as distinguished from any peculiar language in which they are couched. The principle of giving contractual effect to defective adoption proceedings, in order that the intention of the parties may not fail of accomplishment by reason of such defect, has no application to the facts of this case; for here, the proceedings are valid and sufficient to create the relation of adopted children with all their incidental personal and property rights. The intention of the parties was in no way disappointed either as to the fact of adoption or as to the rights conferred by it on plaintiffs. They accomplished all they expected. This is especially true since, when the adoption proceedings were had the adopting parents owned no prop-

erty in Alabama, and could at that time have had no disappointed expectations as to the effect of the Louisiana adoption upon the transmission of such property; and the Louisiana proceedings were fully recognized in Mississippi, in which state the adopting parents were then domiciled and presumably owned property. So there was no intention in the minds of the adopting parents or of the tutrix at the time of the adoption that failed of accomplishment as a result of the Louisiana proceeding. It accomplished all the parties then had in mind or desired, and if the parents had never acquired property in Alabama, thereafter, no question of its sufficiency would have been presented. No unexecuted intention would have remained for enforcement by a decree.

The original sufficiency of the adoption to answer the intentions of the parties was turned into its present insufficiency by reason of the subsequent acquisition by the adopting parent of real estate in Alabama, a state which did not recognize the Louisiana proceedings as effective to transmit property under its statute of descents. This subsequently occurring fact cannot affect the intention of the parties at the time of the adoption or change the transaction, then entered into by them, nor can it justify the implication of an agreement to do what the parties then had no intention of doing, viz., of effecting a transfer of property by a method other than the adoption proceedings. The Louisiana proceeding was effective, in view of the location of the property then owned by the adopting parent, to do all the parties intended and for that reason it was resorted to. The inference is irresistible, from its adequacy to the then needs of the parties, that nothing more was intended by them than adoption. If nothing more than an adoption under the Louisiana law, with its incident property and personal rights, was then intended, there is no room for more to be implied, even though a change of ownership thereafter might make it desirable. The law by implication will not add a feature to the transaction, the occasion for the significance of which did not arise until long after the transaction was completed. The acts and contracts of parties are to be construed by their intentions when the acts were performed or the contracts made, and not by intentions which could have first been entertained only long after the commission of the acts or the making of the contracts.

The parties contented themselves with the adoption of plaintiffs under the Louisiana law because that method at that time answered completely their exigency. The plaintiffs therefore were vested by the adoption proceedings with the rights, and only the rights, of adopted children under the Louisiana law, for this was all the parties to the adoption thought necessary, at that time, to confer on them.

The situation, effected by the adoption, only becoming inadequate when the adopting parent, long afterwards, purchased property in Alabama, the remedy for the situation lay in measures then to be taken to transmit the title to such newly acquired property. This is the general rule that prevails as to subsequently acquired property, not legally affected by a previously executed instrument, though the parties may desire it to be so affected.

If there had been an agreement to leave plaintiffs a share in the adopting parent's estate on his death, separate from and independent of the adoption, and the means selected by the parties to accomplish the agreement had failed to do so, equity might enforce the agreement by supplying a method in lieu of the ineffective one, selected by the parties. In this case, however, the purpose of the parties was merely to effect the adoption of plaintiffs. They selected the Louisiana law to accomplish the adoption and it did accomplish it. There was no agreement as to property, other than was implied in the adoption, which conferred on plaintiffs the rights of inheritance of adopted children under the Louisiana law. This was all they were entitled to by virtue of the agreement to adopt them, and this they obtained. Even if the adopting parent had owned the Alabama property at the time of the adoption, this would be true. Much more is it true, in view of the fact that the Louisiana adoption proceeding was competent to vest in plaintiffs all the property rights that were then in contemplation of the parties to it.

If the purpose had been to leave to plaintiffs an interest in the estate of the adopting parent, and the adoption under the Louisiana law had been unadvisedly selected as a proper means of accomplishing this, a different case would be presented. In this case the controlling purpose was the adoption of the plaintiffs. The devolution of the property of the adopting parent to them was secondary and merely incidental to the relation established by the adoption (petition for adoption, Complainants' Exhibit B). Plaintiffs were only entitled to the property rights of adopted children in Louisiana, and they were acquired by them by the adoption.

The only theory, therefore, on which the plaintiffs' rights can prevail is that there was an agreement, independent of the adoption, to leave to the plaintiffs shares in intestate's property. The moment plaintiffs' rights in the Alabama property are attempted to be worked out through the Louisiana adoption proceedings or the agreement to adopt, effectuated under the Louisiana law, we are confronted with the proposition that parties adopting that method, without further agreement, must intend to confer only such rights as it availed to confer. When it is conceded, as it is, that there is no agreement shown by the record, other than the adoption act, and when it appears that the Louisiana adoption is not recognized in Alabama as effectual to transmit real estate under its law of descents, the plaintiffs' case fails.

The cases asserting the principle that enforces a defective adoption proceeding as a contract to adopt, and confers on the child the same property rights as the law would have conferred if the adoption had been valid, do not control this case, in which the adoption did not fail from invalidity. That line of cases, in which a contract to devise and bequeath, separate and apart from the ineffectual means selected for its accomplishment, is found to exist, and in which the separate contract is specifically enforced, as in case of a defectively executed will, is to be distinguished from this case, in that in this case the agreement was solely to adopt and the rights of inheritance claimed were a mere incident to the adoption. The agreement to adopt was validly

carried out, and the plaintiffs' rights to the property in question failed, not because of any failure to legally carry out the agreement of adoption, but because the specific rights claimed were not legally incident to the adoption agreed upon.

The case is that of parties intending to do a specific thing and being mistaken as to its legal effect. If the mutual intent is to do a specific thing, only, mistake as to the effect of the thing intended to be done cannot affect the rights of the parties. If there is a failure to validly do what parties intend to do, equity may remedy the invalid act and treat as done that which the parties intended to do. Equity, however, never interferes to accomplish that which the parties themselves never intended to do, because either originally or subsequently it appears to be more equitable than what the parties intended and did. Equity never makes agreements for parties which it then enforces.

There are subsequent declarations of the adopting parent found in the record, which tend to indicate his belief that his adopted children would acquire at his death all his property through the adoption proceedings. Those declarations were based on a mistaken conception of the legal effect of the adoption on the transmission of title to the after-acquired Alabama property. They do not reflect light on what the parties intended to accomplish, at the time of the adoption, at which time the adopting parent had no property in Alabama. They may indicate a general purpose or desire on the part of the adopting parent that his adopted children should by virtue of the adoption inherit all his property. Such an ineffectual purpose or desire can neither confer or divest property rights.

The demurrer to the bill as amended is sustained.

MORRIS v. TRAVELERS' INS. CO. et al.

(Circuit Court, D. Vermont. June 21, 1911.)

1. INSURANCE (§ 624*)—EMPLOYERS' INDEMNITY INSURANCE—RELATION BETWEEN INSURER AND EMPLOYÉ.

An employé has no contractual relation with an insurer of the employer against damages for injuries to the employés, and he has no right of action at law against the insurer.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 624.*]

2. JUDGMENT (§ 511*)—VACATION—GROUNDS—FRAUD.

Extrinsic fraud may vitiate a judgment of a court of competent jurisdiction under proper proceedings brought for that purpose, but not by collateral proceedings.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 951, 954; Dec. Dig. § 511.*]

3. JUDGMENT (§ 511*)—VACATION—FRAUD—COLLATERAL ATTACK.

A declaration in an action by an employé against the employer and its insurer against liability for injuries to employés, which alleges that the employé sustained a personal injury, that the employer and insurer fraudulently procured the entry of a judgment for plaintiff in a court of competent jurisdiction, based on a stipulation signed by the employé and his next friend by reason of fraudulent representations, and which de-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

mands damages for the fraud and for the injuries, is an attempt to collaterally attack the judgment and to recover for the injuries, and is demurrable on the ground that the judgment is not subject to collateral attack.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 951, 954; Dec. Dig. § 511.*]

4. PLEADING (§ 18*)—CERTAINTY.

A declaration in an action by an employé against the employer and its insurer against liability for injuries to employes, which alleges that the employer and insurer fraudulently procured the entry of a judgment for plaintiff for a personal injury, pursuant to a stipulation signed by the employé in consequence of fraudulent representations, but which does not set forth any particular act as having been performed by any particular person acting for the employer or insurer, is subject to a demurrer interposed by insurer because the allegations are too indefinite to require insurer to plead the merits.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 39; Dec. Dig. § 18.*]

At Law. Action by David M. Morris against the Travelers' Insurance Company and the Union Soapstone Company. Demurrer to declaration sustained.

An action on the case. The declaration, briefly stated, alleges, in the first count: That the defendant Union Soapstone Company, a corporation organized under the laws of the state of New Hampshire and doing business in Chester, in the state of Vermont, engaged the plaintiff in its employ, and on March 11, 1902, the plaintiff, without fault on his part, was seriously injured through the negligence of the said company, to the damage of the plaintiff \$20,000. That at the time of said injuries the Travelers' Insurance Company, a corporation duly licensed to transact business in Vermont, had insured the said Union Soapstone Company against liability for injuries to its employes, and said policy of insurance was in force at the time of the injuries to the plaintiff, whereby the Travelers' Insurance Company was liable for all damages and costs resulting from injuries to the employes of the said Union Soapstone Company. That soon after the injuries aforesaid "the Union Soapstone Company and the Travelers' Insurance Company, fraudulently and deceitfully contriving to cheat and defraud the plaintiff, caused to be brought and entered upon the docket of the Windsor county court, in the said state of Vermont, an action in the name of said plaintiff and said Sabin Morris as his next friend, and without the knowledge, consent, or direction of said plaintiff, and without the knowledge, consent, or direction of said Sabin Morris, and thereafterwards, on, to wit, the 1st day of August, 1902, said defendants did fraudulently represent to the plaintiff and said Sabin Morris that it was necessary and for the plaintiff's interest to execute a document then and there, by and at the instigation of said defendants presented to said plaintiff and the said Sabin Morris, which said document was in the words and figures following: 'Windsor County Court, June Term, 1902. David M. Morris, by Sabin Morris, His Next Friend, of Rockingham. County of Windham v. Union Soapstone Company, a Corporation Duly Formed under the Laws of the State of New Hampshire and Doing Business at Chester, County of Windsor and State of Vermont. It is hereby agreed by and between the parties in the above-entitled cause that judgment may be entered for the plaintiff in the sum of four hundred dollars (\$400) without costs. We, David M. Morris, a minor, 19 years of age, who sues in the above-entitled cause by his next friend, Sabin Morris, have this day received the above-named sum in judgment rendered by Windsor county court of four hundred dollars, as above stated, in full satisfaction and discharge of said judgment and hereby

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

agree to enter on the docket of said county court full satisfaction received in payment of above judgment. [Signed] David M. Morris. [L. S.]

his
[Signed] Sabin X Morris, Next Friend of David M. Morris. [L. S.] Wit-
mark

ness: Chas. A. Burns. Mary T. Bouker. Witness to mark: Chas. A. Burns. Mary T. Bouker.' And said defendants did fraudulently conceal the nature of said document and the existence of said suit at law, and, with the intent to cheat and deceive the plaintiff by said fraudulent representations and concealments, procured the said plaintiff and said Sabin Morris to sign said document, thereby releasing the said defendants the Union Soapstone Company and the Travelers' Insurance Company from all claim for damages for the negligence of the said Union Soapstone Company as hereinbefore set forth for a small sum of money, to wit, the sum of four hundred dollars, which said sum was entirely inadequate and was only a small part, to wit, $\frac{1}{50}$ of the damages to which said plaintiff was by the premises entitled, and no part of which has plaintiff ever received, and thereafterwards said defendants procured judgment to be entered in said county court upon said document or stipulation. And the plaintiff avers that he and the said Sabin Morris then and there believed and were deceived by the representations of said defendants and were then and there ignorant of the facts so fraudulently concealed by said defendants and did not know or have reason to know of said suit and judgment until, to wit, the 1st day of February, 1906, and by reason of their belief and reliance upon said representations and their ignorance of the facts so fraudulently concealed said plaintiff and said Sabin Morris signed and executed said document or release. And that thereby, and by reason of the premises, plaintiff has been deprived of his day in court, and his right to recover adequate damages for his injuries, so caused by the negligence of the said Soapstone Company, all by the fraud and deceit of the defendants as above set forth. All of which is to damage of the plaintiff twenty thousand dollars." The second and third counts set up the injuries and cause of accident in somewhat different language from the first, but are followed by the same allegations as to fraud relative to the suit and judgment.

This suit was originally brought in the state court, and by petition of the Travelers' Insurance Company was removed to this court. The defendant Travelers' Insurance Company seasonably demurred to the plaintiff's declaration and assigned as grounds for the demurrer: First. That the plaintiff's declaration seeks to impeach the judgment of the Windsor county court for the state of Vermont which had jurisdiction of the subject-matter thereof and of the parties thereto by a collateral attack upon said judgment. Second. That the allegations of fraud relative to said judgment set forth no specific act on the part of the demurring defendant and name no particular person who participated in any act which may have constituted the alleged fraud, wherefore the defendant should not be called upon to make answer. The third reason is substantially the same as the second, differently stated.

C. C. Fitts and H. E. Eddy, for plaintiff.

R. C. Bacon and Stickney, Sargent & Skeels, for defendants.

MARTIN, District Judge (after stating the facts as above). This is clearly an attempt to attack collaterally a judgment of a court of competent jurisdiction and to try the validity of such judgment by jury, and at the same time to try by the same jury the original cause of action upon which that judgment was rendered.

[1] The plaintiff has no right of action at law against the Travelers' Insurance Company, as he had no contractual relations with said

company. True it is that he has alleged that the two companies colluded to defraud him by the bringing of the suit that he now seeks to avoid. The plaintiff alleges that he was 19 years of age at the time of his injury and he brings this suit nearly eight years thereafter. The records of Windsor county court show the judgment and stipulation as set forth in this declaration, and that the original suit was brought for the plaintiff by George L. Fletcher, Esq., of Chester, Vt., and that C. H. Burns, Esq., was counsel for the defendant. (Said Fletcher and said Burns have since deceased.) No person is named as having committed any fraudulent act. Neither is there any allegation that the Union Soapstone Company is still in existence. The records show that it was dissolved in 1904, according to law, and has ever since been out of business. I am unable to see how the defendant can answer to the plaintiff's allegation of fraud by the Union Soapstone Company without some person being named who acted for and in behalf of the company, whereby that person can be inquired of as to the facts relating thereto. No person is named who acted for and in behalf of the defendant, Travelers' Insurance Company, whether agent, adjustor, or some one of its attorneys. That company should not be called upon to make inquiry of every attorney, agent, or other person who may have been acting for it some nine years ago that it may plead to such general allegations as this declaration contains.

[2] I recognize the principle of law that fraud may vitiate a contract, and extrinsic fraud may vitiate even a judgment of a court of competent jurisdiction under proper proceedings brought for that purpose, but not by collateral proceedings. *U. S. v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93; *French v. Raymond*, 82 Vt. 156, 72 Atl. 324, 137 Am. St. Rep. 994. This principle of law is too familiar to require the citation of further authorities.

[3] The serious question presented is whether or no this is a collateral proceeding. The gist of this declaration is the defendant's alleged negligence and the plaintiff's damages. This old judgment seems to stand in the plaintiff's way of obtaining a new judgment for a larger sum, so he asks that in some form the facts relating to that old judgment be tried out, and, if found to be fraudulent, that he may then proceed with the trial of the main issue. This seems to me a collateral attack upon the old judgment.

[4] I think the defendant should not be called upon to answer to the plaintiff's allegation of fraud by the Union Soapstone Company, as no particular act is set forth as having been performed by any particular person acting for and in behalf of said Union Soapstone Company, and for and in behalf of said Travelers' Insurance Company. The only specific act brought to the attention of the court is the stipulation upon which judgment was rendered, and the declaration is silent as to the persons, officers, or counsel of either corporation who had to do with the deceit claimed to have been practiced upon the plaintiff. *Harris v. Bottoum*, 81 Vt. 346, 70 Atl. 560, and cases there cited. *Fogg v. Blair*, 139 U. S. 118, 11 Sup. Ct. 476, 35 L. Ed. 104.

I hold: First. That this is not a proper proceeding to attack the judgment referred to in the declaration. Second. That the allegations are too indefinite to require the defendant to plead further.

Let entry be made "Demurrer sustained," and judgment accordingly.

NATIONAL CLOAK & SUIT CO. v. KAUFMAN.

(Circuit Court, M. D. Pennsylvania. July 17, 1911.)

1. COPYRIGHTS (§ 82*)—REGISTRATION—VESTING OF PRIVILEGE.

Since copyright vests on the publication of the book or publication with notice of copyright as provided by Act March 4, 1909, c. 320, § 9, 35 Stat. 1077 (U. S. Comp. St. Supp. 1909, p. 1292), a bill for infringement was not demurrable for failure to allege registration or entry, in form or manner provided by law, of the title of the book, or volume of the publication.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 72, 73; Dec. Dig. § 82.*]

2. COPYRIGHTS (§ 82*)—RIGHT TO PRIVILEGE—CORPORATIONS—PLEADING.

Under Act March 4, 1909, c. 320, 35 Stat. 1075 (U. S. Comp. St. Supp. 1909, p. 1289), conferring copyright on the author or proprietor, and providing that the word "author," shall include an employer in the case of works made for hire, an allegation in a bill by a corporation for infringement that complainant was a corporation created under the laws of New York, and that it wrote, designed, and compiled, and caused to be written, designed and compiled by those employed by it for such purpose, all of them citizens and residents of the United States, or aliens domiciled within the United States at the time of the first publication of the book in question of which it was the proprietor, sufficiently showed that complainant corporation was entitled to the copyright.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 72, 73; Dec. Dig. § 82.*]

3. COPYRIGHTS (§ 9*)—MATTER SUBJECT OF COPYRIGHT—PICTORIAL ILLUSTRATIONS—ADVERTISING MATTER.

Under Act March 4, 1909, c. 320, 35 Stat. 1075 (U. S. Comp. St. Supp. 1909, p. 1289), relating to copyrights, section 5 (k) expressly authorizing the copyright of pictorial illustrations, where a corporation engaged in the manufacture of feminine attire issued a book containing pictorial illustrations, being pictures of women attired in the latest up-to-date styles depicting the fashions in dress, supplemented by information concerning the materials which plaintiff offered to make up in accordance therewith and the prices at which it would do so, such illustrations, though used entirely for advertising purposes and not essentially works of fine art, were proper subjects of copyright.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 7; Dec. Dig. § 9.*]

Matter subject to copyright, see note to Cleland v. Thayer, 58 C. C. A. 273.*]

4. COPYRIGHTS (§ 9*)—PICTURES—CATALOGUE.

It was no objection to a copyright of pictures representing women attired in up-to-date costumes in a cloak and suit catalogue that the pictures represented visible actual persons and things, and that complainant could not monopolize the right to picture them, under the rule that, while others are free to copy the original, they may not copy the copy.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 7; Dec. Dig. § 9.*]

In Equity. Suit by the National Cloak & Suit Company against David Kaufman for copyright infringement. On demurrer to bill. Overruled.

Archibald Cox and Walter Briggs, for complainant.

John C. Nissley and Charles W. Bacon, for defendant.

WITMER, District Judge. This is a demurrer to a bill of complaint in a suit in equity brought by the National Cloak & Suit Company of New York against David Kaufman of Harrisburg, Pa., to restrain an alleged infringement of copyright.

The bill charges, in substance, that the complainant, a New York corporation, doing business in the borough of Manhattan, city of New York, had secured a copyright, in compliance with the law governing in such cases, of a certain book constituting a volume of a periodical publication which having been for many years issued by the complainant in connection with its business of which it was then the proprietor, said book being entitled, "New York Fashions, Vol. 14, No. 4"; that in the preparation of said book it exercised the most careful supervision and discrimination and made large outlays and expenditures employing in the preparation of its various component parts artists and authors of peculiar skill and ability in the particular matters to which such parts relate, and that the illustrations forming component parts of said book were the work and embodied the personal reaction of artists of recognized skill in their calling, and were pictures of artistic merit; and, in addition to their merit as artistic productions, were of peculiar value as portraying original conceptions and creations relating to wearing apparel, of great interest to a large proportion of the public on account of the originality and exercise of trained aesthetic faculties displayed in said illustrations; that, notwithstanding the notice of copyright required by law having been printed on the title page of each number of such publication, the defendant afterward, intending to appropriate the fruits of the complainant's efforts, did, without the consent of the complainant, make, print, publish, and distribute, and caused to be made, printed, published, and distributed, copies of copyrightable component parts copied from the complainant's said book, which is made a part of the bill of complaint, to wit, illustrations No. 1422 on page 22, No. 1903 on page 112, No. 11458 on page 189, No. 1402 on page 10, No. 9408 on page 100, No. 1413 on page 16, No. 1405 on page 13, No. 9426 on page 109, and No. 1401 on page 9, whereby the complainant claims the defendant infringed its said copyright and threatens to continue, wherefore he prays for relief.

The demurrer contains several counts, all of which, under the allegations of the bill, aim at the validity of the copyright, challenging (1) those allegations which deal with the steps taken in compliance with the statutory formalities to vest copyright, and (2) the allegation concerning the subject matter as being of character copyrightable.

[1] Taking up these subjects in their order, it is noted that the first count of the demurrer questions the copyright because of the

failure to register or enter, in form and manner provided by law, the title of the book or volume of the publication. Such formality as was necessary under the former law is not now required by Act March 4, 1909, c. 320, 35 Stat. 1075 (U. S. Comp. St. Supp. 1909, p. 1289), under which the copyright for consideration was acquired. Copyright vests upon the publication of the book or publication with the notice of copyright under section 9 of the act. The allegations in the bill are full and sufficient showing that the necessary steps of the statute were observed in securing the right and certificate of copyright.

[2] The second count questions the character of the person of the complainant as entitled to copyright. The complainant is a corporation created by the laws of New York, which, according to the bill, "wrote, designed and compiled and caused to be written, designed and compiled by those employed by it for the purpose, all of them citizens and residents of the United States, or aliens domiciled within the United States at the time of the first publication" the book of which it was the proprietor. The present act of Congress confers copyright on "the author or proprietor" (section 8), and provides that "the word 'author' shall include an employer in the case of works made for hire" (section 62).

Under the old law which did not recognize or contemplate in its provisions our modern conditions, as the present law, corporations were even regarded as proper persons to secure copyright (*Mutual Advertising Company v. Refo* [C. C.] 76 Fed. 961; *Edward Thompson Co. v. American Law Book Co.* [C. C.] 119 Fed. 217; *Schumacher v. Schwencke* [C. C.] 25 Fed. 466); and then, as well as now, the employer had the right to the copyright in the literary product of a salaried employé (*Collier Engineer Co. v. United Correspondence School Co.* [C. C.] 94 Fed. 152; *Atwill v. Ferrett*, 2 Blatchf. 39, Fed. Cas. No. 640).

All of the remaining counts deserving notice may be considered in connection with the other (2) allegations concerning the subject-matter as being copyrightable.

[3] The illustrations which the defendant is alleged to have copied from the complainant's copyrighted book are so called pictorial illustrations, being pictures of ladies attired in the latest or up-to-date styles, depicting the fashions in dress, supplemented by information concerning the materials which the complainant offers to make up in accordance therewith, and the prices at which it will do so. Are these so called illustrations copyrightable component parts of the complainant's book? The act (section 5 [k]) expressly mentions "pictorial illustrations" as the proper subject of copyright, and they are now considered the "writing of an author" as contemplated by section 8, art. 1, of the constitution, wherein it is provided that:

"Congress shall have power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their writings and discoveries."

"The act in question was passed in execution of the power here given, and the object thereof was the promotion of science and the useful arts." *Baker v. Selden*, 101 U. S. 99, 25 L. Ed. 841. This

act no doubt should be liberally construed to give effect to its tenor and true intent. In keeping pace with the growth of the subject of this constitutional provision, many statutes have been enacted, extending and enlarging its protection, covering not only maps, charts and books, as originally, but comprehending now as well all the writings of an author including, as set forth in the act of March 4, 1909: (a) Books, including composite and cyclopaedic works, directories, gazeteers, and other compilations; (b) periodicals, including newspapers; (c) lectures, sermons, addresses, prepared for oral delivery; (d) dramatic or dramatico-musical compositions; (e) musical compositions; (f) maps; (g) works of art; models or designs for works of art; (h) reproductions of a work of art; (i) drawings or plastic works of a scientific or technical character; (j) photographs; (k) prints and pictorial illustrations.

The protection of the law is not confined to pictorial illustrations known as works of fine arts. This was not so even under the preceding act. In the case of *Bleistein v. Donaldson Lithographing Company*, 188 U. S. 239, 23 Sup. Ct. 298, 47 L. Ed. 460, Justice Holmes, delivering the opinion of the court, said:

"We see no reason for taking the words connected with 'the fine arts' as qualifying anything except the word 'works,' but it would not change our decision if we should assume further that they also qualified 'pictorial illustrations,' as the defendant contends."

If there is any limitation whatever to this term, it must be found in the words of the Constitution confining pictorial illustration to the "useful arts."

The contention of the defendant that if a picture has no other use than that of a mere advertisement, and no value aside from this function, it would not be promotive of the useful arts within the meaning of the constitutional provisions entitling the author to protection in the exclusive use thereof, was denied in the *Bleistein Case*; the court saying that "a picture is none the less a picture and none the less a subject of copyright that it is used for an advertisement." The complainant's pictures or illustrations are more than mere advertisements of wearing apparel. They are, on their face, exceptionally excellent pictures, having value as compositions. They are no doubt the work embodying the personal reaction of artists of recognized skill in their calling, and, furthermore, admittedly, aside from their artistic merit as productions of peculiar value, they portray original conceptions and creations relating to wearing apparel of great interest to a large portion of the public. In their ensemble, their details, designs and general particulars they contain the something that appeals to the taste of an admiring public. It is this secret portrayed by the artist differing from other pictures of this kind in which lies their value and which apparently caught the eye of the defendant and furnishes the reason for protecting the fruits of the artist's labors by copyright.

[4] Nor does it matter that the pictures represent visible actual persons and things. Of course, the complainant cannot monopolize the right to picture these. "Others are free to copy the original. They are not free to copy the copy. *Blunt v. Patten*, 2 Paine, 397, 400, Fed.

Cas. No. 1,580. See *Kelly v. Morris*, L. R. 1 Eq. 697; *Morris v. Wright*, L. R. 5 Ch. 279. The copy is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright unless there is a restriction in the words of the act." *Bleistein v. Donaldson Lithographing Co.*, supra.

Since it did appear to the court that the restrictions in the law as contained in the act, then in vogue, is not to be found in the limited pretensions of the chromolithographs used as advertisements of Wallace's show, and as was further said, the least pretentious picture has more originality in it than directories and the like which may be copyrighted, I see no reason why copyright should be withheld from the complainant's pictures of ladies showing to advantage wearing apparel of the latest styles and its manufacture under another and later act even more favorable than the former. In this conclusion I am furthermore strengthened by remembering, also, that courts will not undertake to assume the functions of critics or to measure carefully the degree of originality, or literary skill or training involved (*Drury v. Ewing*, 1 Bond, 540, Fed. Cas. No. 4,095; *Henderson v. Tompkins* [C. C.] 60 Fed. 758), that pictures commanding public interest and having commercial value as well shall not thereby be deprived from privacy, and that the taste of the admiring public is not to be treated with contempt.

This case has nothing to do with cases involving attempts to copyright mere catalogues or price lists, or labels, sometimes containing pictures, reproduced by photographic or other mechanical processes, of articles intended for sale, but which obviously have no artistic merit or originality. These decisions, whether condemning or upholding such copyrights, do not touch the question involved in the case at bar, many of which having been overruled in the decision of the *Bleistein Case*—distinguishing *Mott Iron Works v. Clow*, 82 Fed. 316, 27 C. C. A. 250; also citing *Yuengling v. Schile* (C. C.) 12 Fed. 97; *Schumacher v. Schwencke* (C. C.) 25 Fed. 466; *Lamb v. Grand Rapids School Furniture Co.* (C. C.) 39 Fed. 474.

The fallacy in the argument that the complainant cannot copyright "productions of the industrial arts" lies in the confusion of the pictures with the things they depict in a particular way; that is, the wearing apparel which appears in the illustration as part of the pictures. As said by Mr. Justice Bradley in *Baker v. Selden*, supra:

"There is a clear distinction between the book as such and the article which it is intended to illustrate. The object of the one is illustration; of the other it is the use thereof. The former may be secured by copyright, the latter by patent."

The complainant does not claim to monopolize the manufacture and sale of the wearing apparel depicted by reason of its copyright. It does, however, claim the right thereby to prevent others from copying and appropriating its exclusive property in such pictures and to this it is entitled by reason of its copyright which appears to be valid.

The demurrer is therefore overruled.

SAGARA v. CHICAGO, R. I. & P. RY. CO.

(Circuit Court, D. Colorado. June 12, 1911.)

No. 5,682.

1. REMOVAL OF CAUSES (§ 94*)—JURISDICTION—WAIVER.

By removing the action from a state court to the federal Circuit Court, defendant waived its right to insist upon being sued in the district of which it was an inhabitant.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 203; Dec. Dig. § 94.*]

2. REMOVAL OF CAUSES (§ 102*)—REMAND—GROUND.

Under Act Cong. March 3, 1875, c. 137, §§ 1, 2, 18 Stat. 470, as amended by Act March 3, 1887, c. 373, 24 Stat. 552, corrected by Act Aug. 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, pp. 508, 509), fixing the jurisdiction of federal Circuit Courts, and authorizing removal of causes from state courts, a personal injury suit brought in a state court in Colorado by an alien against a corporation residing in Illinois and Iowa, and removed to the Colorado federal Circuit Court, must be remanded if he objects to the Circuit Court taking jurisdiction.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 218; Dec. Dig. § 102.*]

At Law. Action by Y. Sagara against the Chicago, Rock Island & Pacific Railway Company. On motion to remand to state court. Motion sustained.

Stark & Martin, for plaintiff.

Chas. W. Waterman and Caldwell Martin, for defendant.

LEWIS, District Judge. The plaintiff, an alien and a subject and citizen of the Empire of Japan, brought this action in the state court against the defendant, a resident and citizen of the states of Illinois and Iowa, to recover damages for personal injuries resulting from being struck by one of defendant's engines while he was at work on the railway track over which the engine was being operated. His right foot was so crushed as to render amputation necessary above the ankle, his left arm was broken, and for these injuries, physical pain suffered, and reduced earning capacity he asks judgment against the defendant in the sum of \$10,000.

In due time the defendant caused the suit to be removed to this court on the ground that the action involved a controversy between a citizen of a state and a foreign citizen in which the matter in dispute exceeded, exclusive of interest and costs, the sum or value of \$2,000. The transcript was filed in this court on May 1st last and on the third day thereafter the plaintiff first appeared in the action here and moved for an order remanding it to the state court.

It cannot be doubted that the circuit courts of the United States have jurisdiction of this action. Act March 3, 1875, c. 137, 18 Stat. 470, as amended by Act March 3, 1887, c. 373, 24 Stat. 552, corrected by Act Aug. 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508). The sole inquiry on the motion to remand is whether or not that part of section 1 of said act which "distributes among the par-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ticular districts the general jurisdiction fully and clearly granted in the earlier part of the section". (In re Hohorst, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211), considered in connection with section 2 of the act, prohibits the exercise of that jurisdiction by this particular court unless both of the parties to the action give their consent. The circuit court of the district either in Illinois or Iowa of which the defendant is an inhabitant is the court designated in the "distributive part" of section 1 in which the action could have been brought by original process. It is likewise established that if plaintiff had instituted the action in a circuit court in any other district the defendant might have waived its right to be sued in the district of which it is an inhabitant, and have submitted itself to the jurisdiction of such court (Central Trust Co. v. McGeorge, 152 U. S. 129, 14 Sup. Ct. 286, 38 L. Ed. 98; In re Moore, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904), or it could have prevented the exercise of jurisdiction by such court by claiming the right to be sued only in the Circuit Court sitting in the district of which it is an inhabitant (G. H. & S. A. Ry. Co. v. Gonzales, 151 U. S. 497, 14 Sup. Ct. 401, 38 L. Ed. 248; Ex parte Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264; In re Moore, *supra*).

[1] By removing the action from the state court to this court the defendant has waived its right to insist here upon being sued in the district of which it is an inhabitant, is thereby precluded from claiming that privilege and has submitted this controversy on its part to the jurisdiction of this court for final determination. Cowley v. N. P. Co., 159 U. S. 569, 16 Sup. Ct. 127, 40 L. Ed. 263; In re Moore, *supra*; Western L. & S. Assn. v. B. M. Co., 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101.

[2] The cause stated in the complaint is within the concurrent jurisdiction of this court and the state court in which the action was brought, and the defendant having, by removal, submitted itself to the jurisdiction of this court the inquiry remains, Has the alien plaintiff the option to consent or not to consent to the exercise of the jurisdiction of this court over the cause which by section 1 of the act is given to all circuit courts?

Prior to the action of the Supreme Court in the Wisner and Moore Cases the decisions answered the question in the negative: Iowa, etc. Co. v. Bliss (C. C.) 144 Fed. 446; Morris v. Clark Const. Co. (C. C.) 140 Fed. 756; Whitworth v. Ry. Co. (C. C.) 107 Fed. 557; Creagh v. Assurance Soc. (C. C.) 83 Fed. 849; Stalker v. Pullman's Co. (C. C.) 81 Fed. 989; Sherwood v. Newport N. & M. V. Co. (C. C.) 55 Fed. 1; Uhle & Fischl v. Burnham (C. C.) 42 Fed. 1; Kansas City Co. v. Lumber Co. (C. C.) 37 Fed. 3; Burck v. Taylor (C. C.) 39 Fed. 581—although Harold v. Iron Co. (C. C.) 33 Fed. 529, is to the contrary, but from which Circuit Judge Brewer later withdrew his assent there given, as appears in 37 Fed., *supra*. Since, however, the opinions in the Wisner and Moore Cases were delivered, District Judge Pollock in Mahopoulus v. C., R. I. & P. Ry. (C. C.) 167 Fed. 165, and District Judge Marshall in Zerba v. Gilson Asphaltum Co., (opinion not published), have answered the question

in the affirmative, and District Judge Reed in *Barlow v. C. & N. W. Ry. Co.* (C. C.) 164 Fed. 765, and 172 Fed. 513, in the negative. I concur in the conclusions reached by Judges Pollock and Marshall, and believe they are sustained by *Ex parte Wisner* and *In re Moore*, supra. Of course it appears in the *Wisner* and *Moore* Cases that the jurisdiction of the circuit court was "founded only on the fact that the actions were between citizens of different states," and section 1 of the act provides, under such conditions, that "suits shall be brought only in the district of the residence of either the plaintiff or defendant," but it is held in both of those cases that where an action between citizens of different states is brought into a circuit court on removal from a state court it should be remanded, where the circuit court is not one of the two particular circuit courts designated, unless both plaintiff and defendant consent that it should be retained. No reason has been assigned which justifies the conclusion that an alien plaintiff should not have the same right to give or withhold consent that a non-resident has who sues in a district of which neither he nor the defendant is an inhabitant.

The designation of the particular Circuit Court in which the suit shall be brought found in section 1 of the act is as clearly stated in the one instance as in the other. The only discoverable difference is that there are two districts in either one of which a suit between citizens of different states may be brought, by original process, whereas if the plaintiff be an alien there is only one district in which such suit may be brought. Section 2 of the act adopts the limitations in section 1 as to the Circuit Court into which a case can be properly removed. *Cochran v. Montgomery Co.*, 199 U. S. 260, 26 Sup. Ct. 58, 50 L. Ed. 182. Under the *Wisner* and *Moore* Cases the non-resident plaintiff may withhold his consent to the determination of his controversy with his non-resident defendant by the federal courts on removal of the cause to that court which he had instituted in the state court, and thereby the non-resident defendant is compelled to submit to a determination of the controversy by the state court. In the *Moore* Case the non-resident defendant had removed the case to the Circuit Court, and on considering the motion of the non-resident plaintiff to remand it was said (209 U. S. 506, 508, 28 Sup. Ct. 591, 52 L. Ed. 904):

"It is true that in most of the cases the waiver was by the defendant, but the reasoning by which the defendant is precluded by the waiver from insisting upon any objection to the particular Circuit Court in which the action was brought compels the same conclusion as to the effect of a waiver by the plaintiff of his right to challenge that jurisdiction in case of a removal. * * * So long as diverse citizenship exists the Circuit Courts of the United States have a general jurisdiction. That jurisdiction may be invoked in an action originally brought in a Circuit Court or one subsequently removed from a state court, and if any objection arises as to the particular court which does not run to the Circuit Courts as a class that objection may be waived by the party entitled to make it. As we have seen in this case, the defendant applied for a removal of the case to the federal court. Thereby he is foreclosed from objecting to its jurisdiction. In like manner, after the removal had been ordered, the plaintiff elected to remain in that court, and he is, equally with the defendant, precluded from making objection to its jurisdiction. * * * The jurisdiction of the Circuit Court

of the United States for the Eastern Division of the Eastern District of Missouri was settled by the proceedings had by the two parties."

Mr. Justice Brewer had, in the preceding part of this opinion, carefully pointed out the facts which constituted a waiver by the plaintiff of his right to challenge the jurisdiction of that particular court.

It must be held that the same right and privilege given to a non-resident plaintiff belongs equally to an alien where his suit has been removed from state to federal court.

But it is earnestly insisted that the *Tobin Case*, 214 U. S. 506, 29 Sup. Ct. 702, 53 L. Ed. 1061, and *Nicola's Case*, 218 U. S. 668, 31 Sup. Ct. 228, 54 L. Ed. 1203, must be taken as an approval of the contrary view. I do not so regard them. To do so would, in effect, be to say that the mere fact that the Supreme Court declines to take jurisdiction on a petition for the writ of mandamus is equivalent to an express approval by that court of the correctness of the acts complained of. It would seem that the correct interpretation of the action of that court in those cases is that it but followed the principle announced in *Ex parte Hoard*, 105 U. S. 578, 26 L. Ed. 1176, wherein it is said "jurisdiction has been given to the Circuit Court to determine whether the cause is one that ought to be remanded," and "no case can be found in which a mandamus has been used to compel a court to remand a cause after it has once refused a motion to that effect;" which principle was reannounced and adhered to in *Re James Pollitz*, 206 U. S. 323, 27 Sup. Ct. 729, 51 L. Ed. 1081: "Mandamus cannot be issued to compel the court below to decide the matter before it in a particular way or to review its judicial action had in exercise of legitimate jurisdiction, nor can the writ be used to perform the office of an appeal or writ of error;" in *Ex parte Nebraska*, 209 U. S. 436, 28 Sup. Ct. 581, 52 L. Ed. 876: "The remedy is not by a writ of mandamus, which cannot be used to perform the office of an appeal or writ of error;" and in *Ex parte Greutter*, 217 U. S. 586, 30 Sup. Ct. 690, 54 L. Ed. 892: "Inasmuch as we are of opinion that the Circuit Court of the United States had jurisdiction to determine the questions presented we hold that mandamus will not lie. The final order of the Circuit Court cannot be reviewed on this writ." That this is the proper construction to be placed upon the action of the Supreme Court in the matters of *Tobin* and *Nicola* is made clear by the opinion of that court in *Ex parte Harding* (219 U. S. 363, 31 Sup. Ct. 324, 55 L. Ed. 252), rendered at its last October term, wherein its views on this point, and as expressed in the foregoing cases, are again clearly stated, and the cases which might be thought to be in conflict with them are elucidated.

The plaintiff's motion to remand must be sustained, with costs against the defendant.

H. J. DECKER, JR., & CO. v. SOUTHERN RY. CO.

(Circuit Court, N. D. Alabama, Northeastern Division. May 20, 1911.)

No. 1,804.

1. REMOVAL OF CAUSES (§ 26*)—CITIZENSHIP—CONSENT OF PARTIES.

An action in a state court by one nonresident citizen against another, relating to a matter of venue rather than of general jurisdiction, may be removed to the federal court for the district, only with the consent of both parties.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 26.*]

2. COURTS (§ 272*)—FEDERAL COURTS—JURISDICTION—DIVERSITY OF CITIZENSHIP.

Where jurisdiction by a federal court depends on the diversity of state citizenship alone, the action may be instituted in the district of the residence of either party at the option of plaintiff, the provision limiting venue as applicable to the district of defendant's residence being for his benefit so that he may waive it.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 811; Dec. Dig. § 272.*]

3. COURTS (§ 276*)—FEDERAL COURTS—JURISDICTION—DIVERSITY OF CITIZENSHIP.

A plaintiff instituting a suit in the federal court of a district other than that of the residence of either of the parties, waives thereby the wrong venue and the provision authorizing venue in the district of his residence.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 815; Dec. Dig. § 276.*]

Diverse citizenship as a ground of federal jurisdiction, see notes to Shipp v. Williams, 10 C. C. A. 249; Mason v. Dullaghan, 27 C. C. A. 298.]

4. REMOVAL OF CAUSES (§ 105*)—ACT TO REMOVE INTO FEDERAL COURT—REMANDED TO STATE COURT—CONSENT OF PARTIES.

Where a plaintiff sues in a state court in a district other than the residence of either of the parties and defendant attempts to remove the case into the federal court for that district, he thereby consents to be sued in the federal court for that district, but plaintiff is entitled to remand to the state court unless he consents to the removal.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 215; Dec. Dig. § 105.*]

5. REMOVAL OF CAUSES (§ 12*)—ACTIONS BY ALIENS—RIGHTS OF DEFENDANT.

The provision requiring an action by an alien against a citizen to be brought in the court of the district where defendant is an inhabitant, is for the benefit of defendant alone, and an alien instituting a suit in a state court in a district in which defendant does not reside, may not complain because defendant removed the cause into the federal court for that district.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 32, 33; Dec. Dig. § 12.*]

6. COURTS (§ 321*)—JURISDICTION—CITIZENSHIP.

The grant of jurisdiction to the federal courts by Const. art. 3, § 2, and the judiciary act (Act March 3, 1911, c. 231, § 256, 36 Stat. 1160), of controversies between citizens of the United States and citizens and subjects of foreign states, includes suits against, as well as suits by, aliens.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 847-849; Dec. Dig. § 321.*]

7. REMOVAL OF CAUSES (§ 11*)—GROUNDS—DIVERSITY OF CITIZENSHIP.

Where an alien sues a citizen in a state court in the district of the citizen's residence, the citizen may not remove the cause to the federal court, unless a federal question is presented.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 29-31; Dec. Dig. § 11.*]

8. REMOVAL OF CAUSES (§ 27*)—GROUNDS—DIVERSITY OF CITIZENSHIP.

Where an alien sues a foreign corporation in a state court the corporation may remove the action to the federal court, the basis of removal being the existence of a controversy between an alien and a citizen.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 64-68; Dec. Dig. § 27.*]

Action by H. J. Decker, Jr., & Co. against the Southern Railway Company. On motion to remand to state court. Motion denied.

Percy, Benners & Burr, for plaintiff.

L. E. Jeffries, for defendant.

GRUBB, District Judge. This cause comes on to be heard upon a motion to remand to the state court. The plaintiffs are nonresident aliens, subjects of Great Britain, and the defendant, a corporation, organized under the laws of Virginia, doing business in Alabama. The suit was originally brought in a state court in Alabama. The basis of removal is the existence of a controversy between a citizen of this country and of a foreign state. The inquiry is whether a corporation organized under the laws of a state other than that of the forum can remove a cause brought against it by an alien from a state into a federal court.

[1] The Supreme Court's decisions have settled the rule that a cause instituted in a state court by a citizen of a state of the United States other than that of the forum against a citizen of such a state other than that of the forum, relating to a matter of venue rather than of general jurisdiction, can be removed with the consent of both parties, and only with such consent, into the federal court for that district. *Ex parte Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, as qualified by *In re Moore*, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904; *Western Loan Co. v. Butte Co.*, 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101; *Kreigh v. Westinghouse*, 214 U. S. 249, 29 Sup. Ct. 619, 53 L. Ed. 984.

[2] In cases where jurisdiction depends upon diversity of state citizenship alone, the cause may be instituted in the district of the residence of either the plaintiff or defendant, at the option of the plaintiff. The provision limiting venue, so far as it applies to the district of the defendant's residence, is for the benefit of the defendant, and may, therefore, be waived by defendant, alone.

[3] There is also a restrictive provision which was intended for the benefit of the plaintiff, viz., that authorizing venue in the district of the residence of the plaintiff. In causes instituted by a plaintiff in a federal court of a district other than that of either plaintiff or defendant's residence, the plaintiff, of course, waives the wrong venue by there instituting suit.

*For other cases see same topic & § NUMBER in Dec. & Ann. Digs. 1907 to date, & Rep'r Indexes
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[4] In removal cases, however, this is not the case. If the plaintiff sues in a state court in a district other than that of his residence or that of his defendant's residence, and the defendant attempts to remove into the federal court for that district, while the defendant, by so doing, consents to be sued in the federal court of the wrong district, the plaintiff, unless by subsequent appearance, does not so consent, and is entitled to a remand into the state court. Choosing the venue of the state court in that district is held not to be a consent to the jurisdiction of the federal court of that district on removal, and, consequently, the plaintiff's consent, as well as that of defendant, is essential to jurisdiction.

[5] In cases where jurisdiction depends upon the fact that the plaintiff is an alien and defendant a citizen of a state of the United States, the provision as to venue is merely that the suit must be brought in the district in which the defendant is an inhabitant. This provision is clearly for the benefit of the defendant alone. The plaintiff, an alien, is presumed to have no interest in having venue laid in the district of the residence of the defendant, and the plaintiff's waiver is not necessary to give proper venue in a district other than that of the residence of defendant. The defendant's consent is alone essential for this purpose. An alien has no district of inhabitancy and an alien plaintiff is given no option as to venue as between the district of residence of plaintiff and that of the defendant as in cases where jurisdiction depends upon diversity of citizenship as between the states. An alien plaintiff is presumed to have no choice as to districts and no provision is therefore made in his favor as to venue in that respect. Consequently, an alien plaintiff who institutes a suit in a state court in a district in which defendant does not reside has no complaint because the defendant removes the cause into the federal court of that district; since the law confers on the alien plaintiff no privilege of selection as to districts. In cases of alien plaintiff, consent of the defendant to the venue is alone requisite, and such consent is implied in the institution by the defendant of the removal proceedings.

[6] Again, the grant of jurisdiction both by the Constitution article 3, § 2, and the present Judiciary Act (Act March 3, 1911, c. 231, § 256, 36 Stat. 1160) to the federal courts is of controversies between citizens of the United States and citizens and subjects of foreign states. The grant includes suits against as well as those instituted by aliens. If the restrictive provision as to venue applies to suits in which aliens are defendants, the jurisdiction of the federal courts in cases where aliens are defendants is destroyed, since it is not possible to institute a suit against an alien in the district of which he is an inhabitant. If the federal courts are thus deprived of jurisdiction in cases in which aliens are defendants, the result would be to open the doors of the federal courts to aliens, when suing, and to close them to our own citizens, when suing aliens. In order to prevent such a construction, the Supreme Court has held that the restriction as to venue has no application to cases in which aliens are defendants. *In re Hohorst*, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211.

[7] Applying this principle by analogy to removal cases, the right

of removal, except in cases presenting a federal question, is confined to nonresident defendants. If an alien sues a citizen in a state court in the district of the citizen's residence, the citizen cannot remove the case, not being a nonresident defendant.

[8] So, if the alien sues the citizen in a state court in a district other than that of his residence, if the restriction applies to the case of an alien plaintiff, the citizen cannot remove, without the consent of the alien plaintiff, because, it would not, in that case, be a suit that could be originally instituted in the federal court of that district. There would consequently be no case in which a citizen defendant could remove a suit brought against him by a nonresident alien, except with the consent of the alien. On the other hand, such an alien defendant, sued by a citizen in the state court of the district of the citizen's residence, could remove the suit into the federal court of that district, being a nonresident defendant and the suit being one that could properly be instituted in the federal court of that district, upon authority of the Hohorst Case. Thus the effect would be to open the courts for removal purposes to the alien defendant, sued by a citizen in the state court, and close them to the citizen defendant, when sued by an alien. The argument of the Supreme Court in the Hohorst Case, by analogy, forbids such a conclusion. In *re Hohorst*, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211; *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964; *Barlow v. Chicago Ry. Co. (C. C.)* 164 Fed. 766; *Id.*, 172 Fed. 513; *Iowa Gold Mining Co. (C. C.) v. Bliss*, 144 Fed. 446.

The per curiam decision of the Supreme Court in the case entitled *Matter of Tobin*, Petitioner, 214 U. S. 506, 29 Sup. Ct. 702, 53 L. Ed. 1061 (memorandum opinion, without reasons assigned), seems conclusive, in view of its facts, of this question. This is the construction given this decision in other circuits. *Fribourg v. Pullman Co. (C. C.)* 176 Fed. 985; *Bagenas v. Southern Pac. Co. (C. C.)* 180 Fed. 891; *Rones v. Katalla Co. (C. C.)* 182 Fed. 947.

The motion to remand is denied, at cost of movant.

SHOE v. CRAIG et al.

(District Court, E. D. Pennsylvania. February 20, 1911.)

No. 46.

1. SHIPPING (§ 194*)—GENERAL AVERAGE—EXPENSES WHICH MAY BE INCLUDED.

A vessel's expenses from the time of disability to proceed on her voyage, together with the cost of temporary repairs which enable her to finish the voyage, are a proper charge in general average.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 613-617; Dec. Dig. § 194.*]

2. SHIPPING (§ 194*)—GENERAL AVERAGE—EXPENSES WHICH MAY BE INCLUDED—SUBSTITUTED EXPENSE.

A vessel during voyage was disabled in a storm, and her condition compelled the master to seek refuge at the nearest port. Temporary repairs

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

could not there be made, but could be made at a point 90 miles away, whence she might then have completed her voyage under sail. The master communicated with the owner and acted under his orders, but neither of them gave any notice to a consignee of freight, though his offices were only a few blocks from the offices of the owner. *Held*, that the cost of towage from the port of refuge to the port of destination, and cost of securing the tug and charges for wages and provisions, were not a charge in general average.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 613-617; Dec. Dig. § 194.*]

3. SHIPPING (§ 199*)—GENERAL AVERAGE—VALUE OF CARGO FOR PURPOSES OF CONTRIBUTION.

The value of the cargo for purposes of contribution in general average is properly reckoned as of the port of destination, in the absence of any custom to reckon it at the invoice value.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 625-630; Dec. Dig. § 199.*]

General average, see notes to *Pacific Mail Steamship Co. v. New York, N. & R. Min. Co.*, 20 C. C. A. 357; *The Santa Ana*, 84 C. C. A. 316; *British & Foreign M. Ins. Co. v. Maldona & Co.*, 106 C. C. A. 133.]

In Admiralty. Suit by Bonaparte Shoe, managing owner of the *Matilda D. Borda*, against George F. Craig and another. Decree for libellant.

John F. Lewis and Francis C. Adler, for libellant.

Howard M. Long and Theodore M. Etting, for respondents.

J. B. McPHERSON, District Judge. This is a suit to enforce contribution in general average. The following facts are either conceded or established by the evidence:

The wooden schooner *Matilda D. Borda*—165 feet long, 39 feet beam, 1,200 tons gross, drawing about 19 feet when loaded—sailed from Fernandina, Fla., on February 5, 1906, bound for Philadelphia. Her only cargo was 541,900 feet of lumber, consigned to the respondents, on which the freight was \$5.25 per 1,000 feet, or \$2,844.93. The lumber has been delivered, and the freight has been paid, but \$1,045.15 is also claimed from the consignees as a general average contribution, and a large part of this amount is in dispute. A few days after leaving Fernandina the schooner encountered a violent storm, and on February 12th she broke her tiller and loosened her rudder post to such an extent that she soon began to leak badly, and her condition compelled the master to bear away for Charleston, which was the nearest port of refuge. She arrived on February 14th and remained until March 9th, when she started for Philadelphia in tow of the tug *North America* which the libellant had sent from this city for that purpose. A diver had been employed at Charleston to examine the vessel and stop the leaks, but his efforts were only partly successful. After some delay, for which I think the master was not to blame, the tiller was repaired at the Riverside Iron Works, but proper temporary repairs to the rudder post could not be made without hauling the schooner out, and no dock or railway adequate to such work on so large a vessel existed at Charleston. She could have been hauled out

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and temporarily repaired at Savannah, about 90 miles distant, and might then have completed her voyage under sail, but such repairs could not be made at Charleston, although the work done there by the diver sufficed to allow her to be towed to Philadelphia. There was, however, some risk even about proceeding under tow, but fortunately the weather was fine and the voyage was successfully accomplished. The master communicated frequently with the libelant, and acted substantially under his orders; but neither of them gave any information to the respondents until the arrival of the vessel at Philadelphia, although the libelant and the respondents both live in this city, and have offices only a few blocks apart. No survey was held at Charleston, and the master made no effort to ascertain the cost of unloading and storing the cargo, and of repairing at Savannah. When the schooner arrived at Philadelphia the respondents gave a general average bond conditioned, *inter alia*, to pay their proportion of the loss and damage, "Provided such losses and expenses aforementioned be stated and apportioned by Philip Justus, adjuster of marine losses, conformably to law and the usages of this port in similar cases." The adjustment was made by Mr. Justus, and several items are now disputed, on the ground that they were included contrary to "law and the usages of this port in similar cases."

The principal item is \$1,200 for the tug. This amount is reasonable, but the respondents seek to raise the preliminary question, whether the cost of towing from a port of refuge to the port of destination is a general average expense in any case. I shall not decide the broad proposition, but shall consider only the facts now presented. Undoubtedly the vessel was disabled from proceeding upon her voyage under sail, and was justified in seeking a port of refuge.

[1] This is conceded, and it follows that the vessel's expenses from the time she bore away, and the cost of such temporary repairs as would have enabled her to finish the voyage under sail, would have been a proper charge in general average. *Hobson v. Lord*, 92 U. S. 407, 408, 23 L. Ed. 613; *Star of Hope*, 76 U. S. 236, 19 L. Ed. 638. If no other course had been reasonably open, the master might have unloaded the cargo, have had the schooner towed to Savannah, temporarily repaired, have returned to Charleston and reloaded the lumber—all at the cost of the various interests concerned. But this would undoubtedly have been expensive; it would probably have cost more than was paid for the towage to Philadelphia, and the question may therefore be stated in this form: Was the master justified in towing, in view of the probable saving in cost? This depends upon whether the towing was a general average act, or was undertaken for the benefit of only one interest, namely, the freight. As it seems to me, the evidence shows clearly that the master and the managing owner were acting solely in the interest of the freight, and were mainly anxious that the ship should finish her voyage in order to earn the full amount. They declined to have the ship surveyed, which would have been the usual course under the circumstances, evidently because they were unwilling to risk a recommendation with which they might not find it convenient or advantageous to comply. The

master declared that he did not consider himself to be agent for the consignees, and neither he nor the libelant notified the consignees, nor had any conference with them, although they were easily accessible, at least to the libelant, and had a direct and considerable interest in the situation. The master did not even ask what the cost of unloading at Charleston would be; did not inquire of "anybody in particular" what wharves were available there for unloading the lumber; made no inquiries about lighters, so far as appears, or about the cost of towing to Savannah, or about the facilities at that port; and made no effort to hire a tug at the neighboring ports of Savannah or Wilmington, although he may perhaps have inquired in Charleston without success. He seems to have been content to transfer the responsibility largely to the libelant in Philadelphia, and the libelant did what he thought best for the interest of the freight without conference with the consignees or the underwriters.

[2] Of course the cost of towage from Charleston to Philadelphia would not in any event be a general average charge, strictly so called, but in a proper case it might be what is known as "a substituted expense." The rules governing the allowance of such expenses are not yet definitely settled, as may be seen by consulting *Gourlie on General Average*, p. 239 et seq., and page 337; *Lowndes on General Average* (4th Ed) p. 225 et seq.; *Hugg v. Baltimore, etc., Co.*, 35 Md. 414, 6 Am. Rep. 425; *Swan v. Chandler*, 36 Hun (N. Y.) 192; *Goodwillie v. McCarthy*, 45 Ill. 186; *Wilson v. Bank of Victoria*, Law Reports, 2 Queen's Bench, 202; *Re 928 Barrels of Salt*, Fed. Cas. No. 10,272; 36 Cyc. 391, 392, note 85; and 14 *American & English Encyclopedia of Law*, pp. 977-979.

The tendency is apparently toward the allowance of substituted expenses, but the subject needs cautious treatment. In the existing condition of the law I do not believe that a substituted expense is ever allowable in general average unless all parties in interest have first agreed to it. The master's power to bind all interests may properly support such charges, if he has acted in good faith and without the opportunity of consulting those who may be affected by his act. It may easily be impracticable to confer with all the consignees of a general cargo, for example; and circumstances may also be such that he must act promptly on his own judgment without consulting any interest—either ship, freight or cargo; but in these days of easy communication by telegraph and telephone, there is usually no difficulty about consultation, and where this is true I think good faith requires, *prima facie* at least, that notice should be given. In such a situation the lack of any effort to communicate may well furnish ground for the inference that the course actually taken was intended to advance a particular interest, and not the interest of all. In the present case I think this inference should be drawn. As already stated, the course adopted by the master (which was evidently dictated by the managing owner) seems to have been taken in the interest of the freight alone, and therefore the cost cannot be brought into general average.

The charge of \$25 for securing the tug must fall with the cost of towing, and a part also of the charge for wages and provisions. It

is a little difficult to fix a day after which this charge should cease, but I think it is probably fair to say, February 26th. The items of interest and commissions must also be proportionately reduced.

[3] In my opinion, the value of the cargo for purposes of contribution was properly reckoned as of the port of destination. No custom to reckon it at the invoice value was proved to prevail in Philadelphia, and the other method is supported by ample, although not by universal, authority. *Girard v. Ware*, Pet. (C. C.) 142, Fed. Cas. No. 5,460; *Barnard v. Adams*, 10 How. 270, 306, 13 L. Ed. 417; *Bradley v. Cargo* (D. C.) 29 Fed. 648; *Wheaton v. Insurance Co.* (D. C.) 39 Fed. 879; 14 *American & English Encyclopedia of Law* (2d Ed.) 991, and cases cited in notes; 36 Cyc. 400, and note 38.

The costs should be apportioned, and the libellant should pay three-fourths of the total, and the respondents one-fourth.

The adjustment must be modified in accordance with this opinion, and a reduced decree in the proper amount may then be entered in favor of the libellant.

WAYT v. STANDARD NITROGEN CO. et al.

(Circuit Court, N. D. Georgia. May 10, 1911.)

No. 1,328.

REMOVAL OF CAUSES (§ 79*)—APPLICATION—TIME TO MAKE.

Under Act Cong. March 3, 1875, c. 137, § 3, 18 Stat. 470, as amended by Act March 3, 1887, c. 373, § 1, 24 Stat. 552, and corrected by Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 (U. S. Comp. St. 1901, p. 510), providing that the petition for removal from a state court to the federal court must be filed at or before the time defendant is required by the laws of the state, or the rule of the state court in which the suit is brought to plead, an application to remove must be made at or before the time defenses are due under the laws of the state or rules of the state court, and not when, by reason of some extension of time or failure to enter default in the state court, defenses may thereafter be filed, though the decisions of the state Supreme Court permit the entry of defenses where by order of court, or stipulation of the parties, default has not been entered.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 141-146; Dec. Dig. § 79.*]

In Equity. Action by J. C. Wayt against the Standard Nitrogen Company and another. Motion to remand case to the state court. Granted.

E. L. Douglas, for complainant.

Anderson, Felder, Rountree & Wilson, for respondents.

NEWMAN, District Judge. This is a motion to remand. The written motion to remand sets up two grounds why the case should be remanded. The first, viz., that the necessary diverse citizenship does not exist, was abandoned on the argument. The other ground is that the removal papers were not filed in the state court in time, under the removal act of Congress.

The law of the state requires that defenses shall be filed at the first

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

term. The rule of the court from which this case was removed requires that pleadings shall be filed at or before the time when the appearance docket is called by the judge.

At the time this case was called on the appearance docket, a stipulation was entered into by the parties, and approved by the court, to the effect that no default should be entered in the case until the Saturday after the first Monday in December, 1910. On December 8th, which was before the Saturday after the first Monday, the petition for removal was filed, and the order for removal granted.

The question argued here, and the one for determination, is: Did the stipulation of counsel have the effect of extending the time within which the defendants might file their proceeding to remove the case to this court, under the act of Congress?

The act of 1887, as corrected in 1888, provides that the petition for removal must be filed "at the time, or at any time before the defendant is required by the laws of the state, or the rule of the state court in which the suit is brought, to answer or plead to the declaration of the plaintiff."

This act has been frequently before the courts of the United States for construction as to the time when the removal proceedings must be filed in the state court, and the decisions are to the effect that the application to remove must be made when defenses of any kind, dilatory or in bar, are due. The requisite practice is stated in *Kansas City, etc., Railroad Co. v. Daughtry*, 138 U. S. 298, 11 Sup. Ct. 306, 34 L. Ed. 963, as follows:

"The statutes of the United States imperatively require that application to remove a case from a state court to a federal court should be made before the plea is due under the laws and practice of the state; and, if the plaintiff does not take advantage of his right to take judgment by default for want of such plea, he does not thereby extend the time for application for removal."

In *Daugherty v. W. U. Tel. Co.* (C. C.) 61 Fed. 138, Judge Baker, after citing *Railroad Co. v. Daughtry*, supra, says:

"The right of removal is created and regulated by the act of Congress, and its enjoyment cannot be claimed except within the time and in the manner prescribed by the statute. It is firmly settled that the time within which the removal may be had cannot be enlarged by continuances, demurrers, motions to set aside service of process, pleas in abatement, or by stipulations of the parties, or by orders of the court extending the time to answer. This doctrine rests upon the solid foundation that the statute is mandatory, and that the right of removal ceases to exist when the time limit therefor has elapsed. The limitation of time within which a removal may be had is not a floating one, to be regulated by stipulations, motions, dilatory pleas, or orders of the court bottomed upon considerations of diligence or unavoidable accident. The right of removal is fixed and stable, measured in regard to the time of its exercise by the statute of the state when it fixes the time to answer or plead, or by rule of the court where the time of pleading is so determined in the absence of state law. The act of Congress limiting the time of removal would cease to be mandatory if federal courts are invested with power to relieve from its operation because of the intervention of the vis major or the act of God. The court is clothed with no such dispensing power. The time within which the right of removal may be exercised is a subject for legislative, and not for judicial, discretion. If the court may enlarge the time because the making of the application to remove has been prevented by the act of God, it can do so only because it is clothed with discretionary power to

extend the time prescribed by the act of Congress. If it possesses such discretionary power, it may enlarge the time to apply for removal whenever, for any cause, the court might be of the opinion that the delay was without fault on the part of the party asking a removal. Under such a construction the time within which the application to remove must be made would not be prescribed by law, but would be determined by the discretion of the court, to be exercised upon the facts of each case. In my judgment, an inflexible rule of law determines the time within which an application to remove must be made, and the court possesses no discretionary power to enlarge it. This construction of the statute may at times operate with harshness, but any other would defeat is plain language and manifest intent."

In *Bank v. Appleyard & Co.* (C. C.) 138 Fed. 939, 940, Judge Holland quotes from this opinion with approval.

It appears, therefore, that the time fixed by the removal act of Congress cannot be extended by order of the court, by stipulation of the parties, or otherwise. The rule here is imperative, and the removal proceeding must be brought before the state court at or before the time that the defendants are required to answer or plead.

In *Martin v. Railroad Co.*, 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311, Mr. Justice Gray, speaking for the Supreme Court, says:

"Judiciary Act Sept. 24, 1789, c. 20, § 12, required a petition for removal of a cause from a state court into the Circuit Court of the United States to be filed by the defendant 'at the time for entering his appearance in such state court.' 1 Stat. 79. The recent acts of Congress have tended more and more to contract the jurisdiction of the courts of the United States, which had been enlarged by intermediate acts, and to restrict it more nearly within the limits of the earliest statutes."

After citing certain cases, Mr. Justice Gray proceeds:

"Construing the provisions now in question, having regard for the natural meaning of its language, and to the history of the legislation upon this subject, the only reasonable inference is that Congress contemplated that the petition for removal should be filed in the state court as soon as the defendant was required to make any defense whatever in that court, so that, if the case should be removed, the validity of any and all of his defenses should be tried and determined in the Circuit Court of the United States."

The contention of counsel for defendants is that, inasmuch as by the decisions of the Supreme Court of the state defenses may be filed at any time before default is entered, therefore the removal act of Congress is complied with if the application for removal is filed before default has been entered. Counsel rely on *Neal v. Davis Foundry & Machine Works*, 131 Ga. 701, 63 S. E. 221, and the cases therein cited.

While it is true that under the state practice defenses may be entered if, by order of the court, stipulation of the parties, or probably if by inadvertence of the judge, default has not been entered, this does not alter the fact that the defense was due when the appearance docket was called. The very fact that a stipulation of the parties was necessary shows that the defense was due.

The ruling of the courts of the United States therefore that neither order of the court nor stipulation of the parties can extend the time within which removal proceedings must be filed must control, and that ruling, as I understand it, is to the effect that the application for removal must be made at or before the time defenses are due, and not

when, by reason of some extension of time, or failure to enter default in the state court, defenses might still there be filed.

Applying the foregoing views to this case, the application for removal was made too late, and consequently the case must be remanded to the state court. An order to that effect may be taken.

DUFF v. UNITED STATES GYPSUM CO.

(Circuit Court, N. D. Ohio, W. D. January 4, 1911.)

No. 2,184.

1. MINES AND MINERALS (§ 123*)—INJURIES BY FLOWAGE—OPERATION OF MINE.

Though the owner of a gypsum mine which is operated in a natural and reasonable way is not liable to an adjoining mineowner for injuries from water percolating from the former mine into the latter, a petition alleging that the defendant mineowner carelessly and negligently excavated its tunnels in the direction of a bay, that it struck the waters of the bay, and the waters rushed in and completely flooded the mine, and, percolating into plaintiff's mine, caused the injuries complained of, is not subject to general demurrer.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 245; Dec. Dig. § 123.*]

2. LIMITATION OF ACTIONS (§ 55*)—COMPUTATION OF PERIOD—ACCRUAL OF CAUSE OF ACTION.

A cause of action for injury to a gypsum mine from water percolating from an adjoining mine, the owner of which had extended his excavations to a bay so that the mine became flooded, accrued at the date of such flooding.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 299-306; Dec. Dig. § 55.*]

Action by John Duff, receiver of the Consumers' Gypsum Company, against the United States Gypsum Company. Heard on demurrer to petition. Sustained.

John Duff, in pro. per.

King & Ramsey and Scott, Bancroft & Stephens, for defendant.

KILLITS, District Judge. The defendant demurs to the petition upon the grounds: (1) That the petition states no cause of action. (2) That the cause of action, if any, is barred by the statute of limitations. The facts briefly are as follows: The parties owned gypsum mines adjacent to each other and near Sandusky Bay. The defendant, in mining its property, broke into the waters of Sandusky Bay, which fact caused its mine to flood, and the waters thereafter, slowly percolating between the partition between its mine and the mine of the Consumers' Company, flowed into and destroyed the latter property.

[1] We have no doubt, following the authorities cited by the defendant, that, if the facts showed that the bringing of the waters of Sandusky Bay into the mine of the defendant was the result of a natural and reasonable course of mining, there could be no com-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

plaint against the defendant by the plaintiff. This proposition seems obvious when we consider that no duty devolved upon the defendant to maintain its mine as a barrier between the waters of the bay and the mine of the plaintiff, for the reason that a controversy otherwise would always remain as to how much of the mine of the defendant should remain untouched and be left as a barrier, depending upon the character of the fissures and natural courses of percolation between the bay and the excavation the defendant might make. If it had a duty to maintain a barrier of any kind of gypsum between its excavation and the bay, so that the waters of the bay might not flow through its excavation into the mine of the plaintiff, how wide should that barrier be? It seems to us that the mere putting of the question suggests that no such duty existed, and that it had the right, under the authorities, to which the court has been referred, in England and in this country, to mine all of its property profitable to be mined, provided it operated in a reasonable and natural way, no matter what the consequences might be to its neighbor.

But the form of the allegation in the petition in this case does not permit us to assume that the mining of the defendant, resulting in the intrusion of the waters of the bay, was of this character. To be sure, the averment is not directly that defendant carelessly and negligently excavated its tunnels in the direction of Sandusky Bay, but the whole averment in that behalf, namely, "On or about the 24th day of March, A. D. 1904, said defendant so carelessly and negligently extended said tunnels in the direction of said Sandusky Bay that it struck the waters of said bay, and thereupon said waters rushed in and completely flooded said mine," leads inevitably to the conclusion that the act was the result of want of reasonable foresight. In so deciding, we are not moved so much by the terms in which the averment is couched as by the fact which the averment sets forth, namely, that, as a result of the tunneling, the waters rushed in, for it would seem that common prudence and ordinary intelligence in driving a tunnel would have arrived at a warning of such catastrophe in ample time to have ceased operations and so to have avoided it. Therefore, without commending the pleading in that behalf, we feel that, as against a general demurrer, it is sufficient.

[2] Upon the second ground of the demurrer, it is the opinion of the court that the merits are with the defendant. If the mining of the defendant was without negligence, and the resultant flooding was but the effect of mining in a prudent and natural way in an attempt to exhaust the resources of the mine, then, under the authorities to which we have referred, there is no cause of action. It is only where some active negligence intervenes, either of commission or omission, that a cause of action arises, and, inevitably, from the facts of this case as pleaded in the petition, that active negligence is of the date of March 24, 1904. Then, and then only, it seems to us a cause of action accrued to the Consumers' Gypsum Company, and, under the statute of limitations of the state of Ohio applicable to this sort of case, suit must have been brought within four years from such date. It was not brought until the 29th of November, 1909, or more than five years thereafter.

We think that the cases of *National Copper Company v. Minnesota Mining Co.*, 57 Mich. 83, 23 N. W. 781, 58 Am. Rep. 333, *Williams v. Pomeroy*, 37 Ohio St. 583, and *Gillette v. Tucker*, 67 Ohio St. 106, 65 N. E. 865, 93 Am. St. Rep. 639, the dissenting opinion of which has become the law of the state (see *McArthur v. Bowers*, 72 Ohio St. 656, 76 N. E. 1128), compel this view which we entertain of the operation of the statute of limitations.

The demurrer on the second ground is sustained with exceptions to the plaintiff.

In re BAZEMORE.

(District Court, N. D. Alabama, S. D. May 12, 1911.)

No. 10,946.

1. BANKRUPTCY (§ 279*)—ACTIONS—STATUTES—RIGHTS OF TRUSTEE.

Act June 25, 1910, c. 412, § 8, 36 Stat. 840, amending Bankr. Act July 1, 1898, c. 541, § 47a (2), 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), provides that trustees in bankruptcy as to all property in the custody or coming into the custody of the bankruptcy court shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by a legal or equitable proceeding thereon. *Held*, that such amendment confers on the trustee an absolute right to attack the unrecorded lien of a conditional seller without reference to whether the trustee represents creditors who have in fact acquired liens by legal or equitable proceedings against the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 419-424; Dec. Dig. § 279.*]

2. BANKRUPTCY (§ 345*)—LIENS—PREFERENCE—PAYMENT—STATUTES.

Under the state law a conditional vendor, holding under an unrecorded conditional sale, has no priority over judgment debtors of the vendee without notice, and under Bankruptcy Act July 1, 1898, c. 541, § 47a (2), 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), as amended by Act June 25, 1910, c. 412, 36 Stat. 840, conferring on the bankrupt's trustee the rights of a lien creditor, the trustee acquires the same rights as judgment creditors without notice, such conditional seller has no priority, and the order of payment provided for by section 64 is not therefore interfered with by refusing to allow priority of payment to such conditional seller.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 531-540; Dec. Dig. § 345.*]

3. SALES (§ 465*)—CONDITIONAL SALES—RECORD—SEPARATE PAPERS.

Where a conditional sale contract was contained in two separate papers, only one of which was filed for record, and the legal effect of the recorded instrument was materially different in several respects from that of the contract, evidenced by both instruments construed together, the contract was unrecorded.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1353; Dec. Dig. § 465.*]

4. SALES (§ 472*)—CONDITIONAL SALES—FAILURE TO RECORD—CONSTRUCTIVE NOTICE.

Failure to record a material part of a conditional sale contract prevented the record of the part from operating as constructive notice to creditors.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1366-1376; Dec. Dig. § 472.*]

5. BANKRUPTCY (§ 188*)—CONDITIONAL SALES—UNRECORDED CONTRACT—NOTICE—BURDEN OF PROOF.

Where a conditional vendor under an unrecorded contract of sale claims a lien thereunder against the buyer's trustee, the burden is on such vendor to show actual notice of the conditional sale on the part of the bankrupt's creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 270, 286-295; Dec. Dig. § 188.*]

In Bankruptcy. In the matter of bankruptcy proceedings of B. B. Bazemore. On petition to review referee's order disallowing petitioner's application to reclaim certain goods. Affirmed.

Order reversed *Cable Co. of Alabama v. Stewart*, 191 Fed. 699, 112 C.C.A. 289.

Bondurant & Smith, for petitioner.

D. D. Trimble, for trustee in bankruptcy.

GRUBB, District Judge. This matter comes on for hearing upon a petition to review the decision of the referee disallowing the petition of the Cable Company to reclaim a piano sold the bankrupt, the vendor retaining title until the purchase money was fully paid. The law of Alabama (section 3394, Code 1907) requires all contracts of this character for the conditional sale of personal property to be recorded, and avoids the contract so far as the condition is concerned, as to purchasers for a valuable consideration, mortgagees and judgment creditors without notice, when not recorded. The referee declared the conditional retention of title void as to the trustee because of non-compliance with the recording statute. Three questions are presented by petition for review: [1] First. Does the amendment to the bankrupt act (Act June 25, 1910, c. 412, 36 Stat. 838) vest in the trustee the right of a judgment creditor without notice to hold the property sold as against the conditional vendor? Second. Was there a compliance with the record laws of Alabama in the instant case? Third. Is the burden on the trustee to show that he represented a class of creditors having no actual notice of the conditional sale?

(1) Before the amendment to the bankruptcy act, the trustee's title as against a claim under an unrecorded conditional sale, though the state law required record, did not prevail. *Crucible Steel Co. v. Holt*, 174 Fed. 127, 98 C. C. A. 101. It was to obviate this, among other things, that section 47, cl. 2, subd. "a," of Act July 1, 1898, c. 541, 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), was amended by inserting the words "And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon" (statement of Representative Shirley to the House of Representatives, Congressional Record, Sixty-First Congress, 2d Session, pp. 2552-2554 [36 Stat. 840]), and to vest in the trustee the same right to attack secret unrecorded liens, where record was required by the state law, as was given to the judgment creditors and others under that law. It seems to me that the language of the amendment should be construed to effectuate this result if it fairly admits of such construction. If the operation of the amendment is restricted to cases in which a creditor has in fact acquir-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

ed a lien by legal or equitable proceedings, then it adds nothing to the law as it was under the original act. By virtue of section 67 of the original act the trustee was subrogated to such a lien, if created within four months, and could enforce it for the benefit of the estate. If created beyond four months from the filing of the petition, it was, of course, valid as against the trustee, under both the original and amended acts. The class of cases, unprovided for, by the original act, and intended to be reached by the amendment, were those in which no creditors had acquired liens by legal or equitable proceedings and to vest in the trustee for the interest of all creditors the potential rights of creditors of that class. The language is readily susceptible of this construction. It recites that such trustees "shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon." This language aptly refers to such rights, remedies, and powers as a creditor holding such a lien is entitled to under the law, rather than to the rights, remedies and powers of a creditor who had actually fastened a lien on the property of the bankrupt estate. It is true that the case of *In re Lausman* (D. C.) 183 Fed. 647, conflicts with this view. The construction, necessary to effectuate the intention of Congress, does not seem to me to make the amended section conflict with section 64b, cl. 5.

[2] Under the state law the conditional vendor has no priority over judgment creditors without notice, and the amendment to the bankruptcy act places the trustee in that category. As against his right as conferred by the amended section of the act, the conditional vendor has no priority, and the order of payment provided for by section 64 is not therefore interfered with by not allowing the conditional vendor priority of payment.

[3] (2) In this case the petitioner's conditional sale contract was contained in two separate papers, one was filed for record, as required by law, the other was not. The one recorded referred to the unrecorded instrument as part of the sale contract. The legal effect of the recorded instrument was materially different in several respects from that of the contract evidenced by both the recorded and unrecorded instruments when taken together. The purchase money was payable in monthly installments. The original contract contained no provision for the maturing of the whole indebtedness upon the default in one payment. The unrecorded instrument vested the vendor with the option upon default in one payment to declare all due and payable and to reclaim the property sold to redeem which the purchaser would then have to pay the whole unpaid purchase money though a large part of it was not yet due. One extending credit to or purchasing the property sold from the original purchaser, without actual notice of the additional stipulation contained in the unrecorded portion of the contract, would clearly be prejudiced thereby. Section 3394, Code Alabama 1907, requires the contract to be in writing and recorded. Recording a part only of the contract, and leaving unrecorded a part which materially altered the legal effect, is not a compliance with the statute, and in such case the unrecorded contract

would as to the condition be void as to purchasers for a valuable consideration, mortgagees, and judgment creditors, without notice.

[4] (3) Failure to record the whole contract prevents the record of part from operating as constructive notice to creditors. If all the creditors of the bankrupt had actual notice of the conditional sale, the trustee would represent no class as to which the condition would be void, since actual notice removes the necessity of showing constructive notice.

[5] The burden, however, is on the petitioner to show that creditors who had parted with value to the bankrupt had actual notice of the conditional sale when they did so. The record contains no evidence tending to show actual notice on the part of any or all creditors. *Ely v. Pace*, 139 Ala. 293, 35 South. 877; *Hodges v. Winston*, 94 Ala. 578, 10 South. 535; *Bynum v. Gold*, 106 Ala. 434, 17 South. 667.

The action of the referee in dismissing petitioner's petition is confirmed, and the petition for review is dismissed at petitioner's cost.

In re DAUGHERTY et al.

(District Court, W. D. Kentucky, at Bowling Green. July 5, 1911.)

BANKRUPTCY (§ 413*)—DISCHARGE—REFERENCE—PROCEEDINGS.

Under General Order in Bankruptcy No. 12 (18 Sup. Ct. vi) providing that applications for discharge shall be heard and decided by the judge, but he may refer the application or any specific issue to the referee, it has been the practice to refer the case to a referee when specifications of objections to the discharge have been filed, and a demurrer or other formal proceeding is not in conformity to the practice; the better practice is to let the referee ascertain the facts, and it is desirable that the proceedings should be conducted in a direct and simple manner.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 413.*]

In the matter of W. G. & E. W. S. Daugherty, trading under the firm name of W. G. Daugherty & Son, bankrupts. On demurrer to specifications of objections to bankrupt's discharge.

John B. Baskin, C. P. Johnson, and Bradburn & Basham, for bankrupts.

W. R. Manier, Jr., T. W. & R. C. P. Thomas, and Byron Renfrew, for objecting creditors.

EVANS, District Judge. It has not been the practice in this jurisdiction when specifications of objections to a bankrupt's discharge have been filed to do more than refer the case to the referee under the third clause of General Order in Bankruptcy No. 12 (18 Sup. Ct. vi) to ascertain and report the facts. That clause is as follows:

"Applications for a discharge, or for the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United States or of a state, shall be heard and decided by the judge. But he may refer such an application, or any specific issue arising thereon, to the referee to ascertain and report the facts."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[1] This being all that the Supreme Court deemed it necessary to say or to do in respect to such a situation, we have not thought it necessary, even if it were allowable, to make any additional rule or to pursue any other course in this district, and it has been the uniform practice here to pursue the course already taken in this case. Upon due notice to all parties in interest the case was set down for hearing upon the bankrupts' petition for a discharge on June 7, 1911, at which time certain creditors presented their specifications of objections thereto. On the 13th the objections were referred to the referee to ascertain and report the facts. The bankrupts were either actually or potentially in court at both of those times, but said nothing. Pending the reference and 11 days thereafter, viz., on June 24th, they filed a demurrer to the specifications of objection to the discharge. This was not in harmony with our practice, and besides was unnecessary. In a few other jurisdictions somewhat different courses have been pursued, but we think ours is the better one, and more in harmony with the intention of the act to require promptness and expedition in all bankruptcy cases. When the referee has acted upon the reference, and has made his report, the whole question comes before the court, which has no power to do otherwise than grant the discharge, unless the objections come within section 14 of Act July 1, 1898, c. 541, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 797 (U. S. Comp. St. Supp. 1909, p. 1310), as amended by Act June 25, 1910, c. 412, 36 Stat. 838, and section 29 of the act of July 1, 1898, c. 541, 30 Stat. 554 (U. S. Comp. St. 1901, p. 3433). At last, in all cases we must get down to the facts, and we think the easy and the best way to do it is to let the referee promptly ascertain them. We may suppose that this course was in the mind of the Supreme Court when it omitted any rule which required or allowed a complete series of pleadings on mere objections to a discharge. We think it plain that the Supreme Court intended that proceedings thereon should be conducted in a less formal way and in a much more direct and simple manner. In this way in many cases the matter can be finally disposed of in less time than it would take to complete the pleadings.

Some of the grounds urged in the demurrer in this instance are not appropriate to that sort of pleading. If specifications of objections are not sworn to, or if, though set forth in the language of the act, they are not quite specific in details, objections to those matters, if taken in time and in another way, might be available to bring about verification and definiteness. Nothing of that sort was done when the objections were presented on June 7th, nor when the reference was made on the 13th, and the delay of 17 days shows that it was an afterthought. We by no means say that any valid grounds of objection, even if taken in the form of a demurrer, should be disregarded by the court. On the contrary, the court must grant the discharge unless the statutory grounds of objection thereto are sustained by the testimony, and in effect a demurrer to the specifications inheres in all of them. That is to say, the court, at the hearing, must disregard all objections which are not covered by the act, whether or not they

are called in question by the bankrupt. If frivolous objections are filed, the court will always know how to treat them, and the expense of such objections must necessarily be borne by those who make them. Objections, if manifestly not within sections 14 and 29, may be disregarded, and the order of reference when made may so direct. This could always be done when the bankrupt attends at the hearing and calls attention to the defect, or on his motion made then or later the referee might be directed to disregard objections which do not come within the act. To my mind there are no difficulties about the subject, and I do not agree with the view taken in some cases that the filing of objections starts a new case. I think the Supreme Court, when it made the General Orders, intended to direct a much simpler mode of procedure. If there is any force in the suggestions made in the attempted demurrer, the court will not overlook them when we come to finally dispose of the question of discharge.

Exceptions to the specifications of objections were also filed by the bankrupts on June 24th, though they had neglected to do this before or at the time the order of reference was made. We think such exceptions should be filed promptly and before the order of reference is entered. Otherwise they should be regarded as waived. This view may be emphasized in this instance by the fact that the exceptions are quite as vague as the specifications.

For the present the only order will be to postpone to the final hearing all the questions raised, and to direct the referee to proceed promptly in executing the order of reference.

HITCHINGS V. COBALT CENTRAL MINES CO. et al.

(Circuit Court, S. D. New York. December 31, 1910.)

1. CORPORATIONS (§ 189*)—STOCKHOLDER'S BILL—EQUITY RULE.

Under the express provisions of equity rule 94, a stockholder's bill against the corporation and its officers was not maintainable where complainant was not a stockholder when the acts complained of were committed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 706-722, Dec. Dig. § 189.*]

2. REMOVAL OF CAUSES (§ 111*)—EFFECT—STOCKHOLDER'S SUIT—EQUITY RULES.

Where a stockholder's suit was commenced in the state court and removed to the federal court, it immediately became subject to the rules governing the practice in that court, including equity rule 94, providing that the complainant, in order to maintain the bill, must have been a stockholder at the time of the transaction complained of, and that he must set forth with particularity the efforts made to secure relief from the managing officers of the corporation.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 111.*]

Action by Hector M. Hitchings, on behalf of himself and all other stockholders of the Cobalt Central Mines Company, against the Co-

balt Central Mines Company and others. On demurrer to bill. Sustained.

Hector M. Hitchings, for complainant.

Louis Marshall, for defendants.

COXE, Circuit Judge. This controversy was submitted upon the second amended bill and the demurrers of the several defendants, which appear to be identical in form. The brief of the complainant states that 32 exceptions, filed against this bill, were referred to a master, who overruled the same except a few formal matters which were subsequently cured by amendment. As the papers relating to these exceptions have not been submitted to me, I am unable to determine what, if any, relevancy they have to the present controversy. The bill contains 47 printed pages and the counsel for the defendant insists that:

"It is an extraordinary specimen of prolixity, vagueness and indefiniteness. It is confusing and full of inconsistencies. It is replete with repetition and adjectives, and instead of being a concise and logical presentation of a cause of action, it is made up entirely of invective which has no materiality or relevancy to any cause of action."

That the bill is prolix may almost be assumed from its length. A cause of action which requires 47 printed pages to make the meaning plain is, or should be, an anomaly in equity jurisprudence. However, a bill may be open to all these criticisms and still may not be demurrable. It may be difficult to discover what the cause of action is, but if it exists the bill cannot be held bad on demurrer. I am not prepared to say that the bill does not state facts sufficient to constitute a cause of action.

[1] The fifth ground of demurrer is that it appears upon the face of the bill that the complainant has not complied with Equity Rule 94, which provides, among other things, that in a stockholder's suit, like the one in hand, the bill must contain an allegation:

First. "That the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law."

Second. "That the suit is not a collusive one."

Third. "It must set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action."

That this action is within the provision of the rule cannot be doubted. It is a suit by a shareholder against the corporation, and others, founded upon rights which may properly be asserted by the corporation. The only allegation of the complainant's stock ownership is found in paragraph 14 of the bill where he alleges that at the time of the commencement of the action in the Supreme Court of New York, which subsequently was removed to this court, to wit, on April 25, 1910, he was and now is "the registered owner of 8,000 shares of the capital stock of Cobalt Central Mines Company. He is also owner of 5,000 shares of said stock which has not yet been

transferred into his name or registered on the books of the defendant, Cobalt Central Mines Company."

It therefore appears that the complainant was a shareholder on April 25, 1910; no other date is mentioned, so far as I am able to discover. That "the transaction of which he complains" was prior to April 25, 1910, is manifest from the fact that this was the date the suit was commenced in the state court, and the cause of action could not well arise after the action was commenced. There is, therefore, no compliance with the provision of the rule that the bill must contain an allegation that the complainant was a shareholder when the fraudulent acts complained of were committed. It is argued that because the bill alleges that the complainant is a "registered shareholder" he became a shareholder "by operation of law." I confess that I am unable to comprehend this contention. The registration of stock is precisely what the complainant states it to be in paragraph 14 of the bill, namely, "registered on the books of the defendant." How it can be said that the title of one who buys stock in the open market devolves upon him "by operation of law" because he has it entered on the books of the corporation, is beyond my comprehension. In his brief the complainant says:

"When it becomes necessary to offer proof, plaintiff will show and establish that he bought his stock at the market price from parties owning the same since the original transactions outlined in the bill and that he paid cash therefor, relying upon the false and fraudulent statement of ownership of properties as stated in his original complaint."

How will such proof, assuming it to be admissible under the present bill, qualify the complainant under rule 94? The rule says he must allege that he was a shareholder "*at the time of the transaction.*" How is this met by proof that he *purchased his stock "since the transaction"*?

I think, too, that the bill fails to comply with the other provision of the rule which requires that it must set forth with *particularity* the efforts of the plaintiff to secure the desired action on the part of the managing directors or trustees.

[2] It is argued that rule 94 is inapplicable because the action was originally commenced in the state court. I do not so understand the law; if it were so, we would have presented the strange spectacle of two suitors, the one succeeding and the other defeated, upon identical complaints. The court is not concerned with the manner in which the suit reached this court; it is enough that it is here. Being here, it must be governed by the rules and practice of this court. The fact that it might be maintained in some other jurisdiction is of no importance when it is evident that it cannot be maintained here.

The precise question has been decided in this court in *Venner v. Great Northern Ry. Co.*, 153 Fed. 408, where the question is fully discussed and the authorities cited.

The fifth ground of demurrer is sustained.

UNITED STATES v. DAVIN et al.

(District Court, E. D. Washington, E. D. June 3. 1911.)

No. 1,065.

1. ALIENS (§ 59*)—IMMIGRATION—HARBORING OF ALIEN PROSTITUTES—STATUTES—OFFENSES.

Act June 25, 1910, c. 395, § 6, 36 Stat. 826, requiring every person harboring, for immoral purposes, any alien female within three years after entry into the United States from any country which is a party to an arrangement for the suppression of the white slave traffic, to file within 30 days a statement with the Commissioner General of Immigration giving certain facts, requires only persons harboring alien females from the countries which are parties to the arrangement to file such statement, and an indictment charging a violation of the act which fails to show that a female so harbored is from one of such countries is fatally defective.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 59.*]

2. ALIENS (§ 40*)—IMMIGRATION—HARBORING ALIEN PROSTITUTES—STATUTES—OFFENSES.

Act June 25, 1910, c. 395, § 6, 36 Stat. 826, requiring every person harboring, for immoral purposes, any female alien, to file a statement with the Commissioner General of Immigration containing enumerated facts, does not apply to those harboring alien women at the date of the passage of the act, at least where such harboring had already continued for more than 30 days.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 100; Dec. Dig. § 40.*]

3. ALIENS (§ 56*)—IMMIGRATION—HARBORING ALIEN PROSTITUTES—STATUTES—OFFENSES.

A person harboring, for immoral purposes, an alien female without filing with the Commissioner General of Immigration the statement required by Act June 25, 1910, c. 395, § 6, 36 Stat. 826, violates the act, though he is not also guilty of procuring the entry of the female into the United States.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 56.*]

G. V. Davin and another were indicted for violating the white slave traffic act. Demurrer to both counts of the indictment sustained.

Oscar Cain, U. S. Atty.

Herbert C. Bryson, for defendants.

RUDKIN, District Judge. The indictment in this case was returned under section 6 of the act of June 25, 1910 (Stat. 1909-10, p. 826), commonly known as the "White Slave Traffic Act," which reads as follows:

"That for the purpose of regulating and preventing the transportation in foreign commerce of alien women and girls for purposes of prostitution and debauchery, and in pursuance of and for the purpose of carrying out the terms of the agreement or project of arrangement for the suppression of the white slave traffic, adopted July twenty-fifth, nineteen hundred and two, for submission to their respective governments by the delegates of various powers represented at the Paris conference and confirmed by a formal agreement signed at Paris on May eighteenth, nineteen hundred and four, and adhered to by the United States on June sixth, nineteen hundred and eight,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

as shown by the proclamation of the President of the United States, dated June fifteenth, nineteen hundred and eight, the Commissioner General of Immigration is hereby designated as the authority of the United States to receive and centralize information concerning the procurement of alien women and girls with a view to their debauchery, and to exercise supervision over such women and girls, receive their declarations, establish their identity, and ascertain from them who induced them to leave their native countries, respectively; and it shall be the duty of said Commissioner General of Immigration to receive and keep on file in his office the statements and declarations which may be made by such alien women and girls, and those which are hereinafter required pertaining to such alien women and girls engaged in prostitution or debauchery in this country, and to furnish receipts for such statements and declarations provided for in this act to the persons, respectively, making and filing them.

"Every person who shall keep, maintain, control, support, or harbor in any house or place for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl within three years after she shall have entered the United States from any country, party to the said arrangement for the suppression of the white slave traffic, shall file with the Commissioner General of Immigration a statement in writing setting forth the name of such alien woman or girl, the place at which she is kept, and all facts as to the date of her entry into the United States, the port through which she entered, her age, nationality, and parentage, and concerning her procurement to come to this country within the knowledge of such person, and any person who shall fail within thirty days after such person shall commence to keep, maintain, control, support, or harbor in any house or place for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl within three years after she shall have entered the United States from any of the countries, party to the said arrangement for the suppression of the white slave traffic, to file such statement concerning such alien woman or girl with the Commissioner General of Immigration, or who shall knowingly and willfully state falsely or fail to disclose in such statement any fact within his knowledge or belief with reference to the age, nationality, or parentage of any such alien woman or girl, or concerning her procurement to come to this country, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not more than two thousand dollars, or by imprisonment for a term not exceeding two years, or by both such fine and imprisonment, in the discretion of the court.

"In any prosecution brought under this section, if it appear that any such statement required is not on file in the office of the Commissioner General of Immigration, the person whose duty it shall be to file such statement shall be presumed to have failed to file said statement, as herein required, unless such person or persons shall prove otherwise. No person shall be excused from furnishing the statement, as required by this section, on the ground or for the reason that the statement so required by him, or the information therein contained, might tend to criminate him or subject him to a penalty or forfeiture, but no person shall be prosecuted or subjected to any penalty or forfeiture under any law of the United States for or on account of any transaction, matter, or thing concerning which he may truthfully report in such statement, as required by the provisions of this section."

The first count of the indictment charges that the defendants "in the Eastern district of Washington, and within the jurisdiction of this court, did heretofore, to wit, on or about the 1st day of March, one thousand nine hundred and ten, and for about nine months thereafter, keep, maintain, control and harbor, at a certain house of prostitution known as the 'Idle Hour,' which house is located in Walla Walla, Washington, in the Eastern district of Washington, and within the jurisdiction of this court, a certain woman, to wit, Lizzie Bishop,

an alien prostitute who had entered the United States within three years prior to that date, for the purpose of prostitution, and did fail within thirty days after commencing to keep, maintain, control and harbor said Lizzie Bishop as aforesaid, to file with the Commissioner General of Immigration a statement, in writing, setting forth the name of such alien, the place at which she was kept, and all facts as to the date of her entry into the United States, the port through which she entered; her age, nationality and parentage, and the facts concerning her procurement to come to the United States, or any other statement in writing giving any facts whatever concerning said Lizzie Bishop."

The second count of the indictment is in all respects similar to the first except it charges that the defendants did, "on or about the 1st day of January, one thousand nine hundred and eleven, and for about three months thereafter, keep, maintain, control and harbor," etc.

The sufficiency of the two counts in the indictment is challenged by demurrer on three several grounds: First, because it does not appear that the woman Lizzie Bishop entered the United States from any country which was a party to the agreement or arrangement for the suppression of the white slave traffic; second, because it appears from the indictment that the defendants commenced to keep, maintain, control, support, and harbor the said Lizzie Bishop more than 30 days prior to the passage of the act of June 25, 1910; and, third, because it does not appear that the defendants or either of them procured or induced the said alien woman to enter the United States. The first and third objections go to both counts in the indictment, and the second objection to the first count only.

[1] A reference to the proclamation of the President of June 15, 1908 (35 Stat. L. p. 1979), will show that the following foreign countries are parties to the project of arrangement for the suppression of the white slave traffic, viz., Germany, Belgium, Denmark, Spain, France, Great Britain, Italy, the Netherlands, Portugal, Russia, Sweden, Norway, and the Swiss Federal Council. It is only persons harboring alien women or girls from these countries, or such other countries as may adhere to such project of arrangement, that are required to file the statement in writing with the Commissioner General of Immigration, and an indictment failing to show that a woman or girl so harbored is from one of such countries is fatally defective. The first objection is therefore well taken as to both counts.

[2] The first count of the indictment further charges that the defendants commenced to harbor the alien woman in question on or about March 1, 1910, and failed to file the required statement within 30 days thereafter, whereas the act was not passed until June 25th of that year. It will thus be seen that the time for filing the statement had expired long before the passage of the act requiring or authorizing it, and it was therefore impossible for the defendants to comply with the statute. It would perhaps have been competent for Congress to have required the filing of a statement by persons harboring alien women or girls at the time of the passage of the act, within a time

to be fixed by Congress, but the act in question contains no such provision. It is therefore apparent that the act was not intended to apply to those who were harboring alien women at the date of its passage, at least where such harboring had already continued for a period of more than 30 days. The second objection to the first count is also well taken.

[3] The contention that the persons harboring women or girls within the meaning of the statute must also be procurers in their entry into the United States is not well taken. The requirement of the statute is general, and includes all persons harboring alien women or girls of the prescribed class, and the fact that they are not also guilty of procuration is immaterial.

For the reasons stated, the demurrer as to both counts of the indictment is sustained.

ANDERSON v. SHARP.

(Circuit Court, W. D. Texas, El Paso Division. July 7, 1911.)

No. 527.

1. REMOVAL OF CAUSES (§ 11*)—JURISDICTION OF FEDERAL COURT.

To authorize the removal of a cause on the ground of diverse citizenship, the suit must be one of which the Circuit Court has original jurisdiction.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 29-31; Dec. Dig. § 11.*]

2. REMOVAL OF CAUSES (§ 11*)—SUIT AND JURISDICTION OF FEDERAL COURT—SUIT BY EQUITABLE OWNER AGAINST A TRESPASSER.

A complaint in a suit in form of trespass to try title, alleging that he was possessed of land by fee-simple equitable title, and that he was dispossessed by defendant, a trespasser, states a cause of action not maintainable in the United States Circuit Court at law because of the equitable title, and not maintainable there at equity, because not seeking equitable relief, and therefore the cause was not removable.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 29-31; Dec. Dig. § 11.*]

3. REMOVAL OF CAUSES (§§ 102, 108*)—PROCEEDINGS FOR REMAND—DISMISSAL.

A suit removed to the federal Circuit Court not within the jurisdiction of that court, should be remanded and not dismissed on the theory that if plaintiff should be required to replead and fully set up his title, he could not prevail in any event, as such dismissal would involve a decision on the merits.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 217; Dec. Dig. §§ 102, 108.*]

Suit by Richard Y. Anderson against H. C. Sharp. Motion to remand to the state court. Cause remanded.

This suit was originally brought in the state court. In form it is one of trespass to try title, the prayer being to recover a tract of land specifically described in the petition. The plaintiff also prays for a writ of possession. The cause was removed on the petition of the defendant to this court. The plaintiff is a citizen of Texas and the defendant a citizen of Iowa, and the amount involved is in excess of \$2,000. Removal was sought on the ground of diverse citizenship. The petition to remove is in the name of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

A. C. Sharpe, while the suit was brought against H. C. Sharp. Advantage is sought by the plaintiff to be taken of this difference in name, but in view of the disposition of the motion the point thus made is not regarded as material. In his petition, filed in the state court, the plaintiff alleges that, on the 10th of December, 1910, he was seised and possessed of the land by fee-simple equitable title; and being so seised and possessed thereof the defendant entered upon and dispossessed him of the same. The motion to remand embraces three distinct grounds, but is deemed essential to consider only the following: "(3) And plaintiff moves the court to remand the cause to the district court of El Paso county because it appears from the plaintiff's petition that this is a suit of trespass to try title of land under the statutes of the state of Texas under which it may be maintained in the state district court, but of which this court has no jurisdiction, either at law or in equity, in that the right pleaded is an equitable title to land, which right cannot be tried or adjudicated at law in this court, and the remedy sought being the recovery of possession of real estate against an alleged trespasser who is without title, is a legal remedy which cannot be granted in equity when equity has not jurisdiction for some other purpose so as to make an order directing the surrendering of possession as incident to some other relief."

F. G. Morris, for the motion.

Charles A. Boynton and S. Engelking, opposed.

MAXEY, District Judge (after stating the facts as above). [1] To authorize the removal of a cause of this nature the suit must be one of which the circuit court has original jurisdiction. Does the present case fall within this category? It is evident that it cannot be maintained at law since the title of the plaintiff is purely equitable. *Carter v. Ruddy*, 166 U. S. 493, 17 Sup. Ct. 640, 41 L. Ed. 1090; *Kircher v. Murray* (C. C.) 54 Fed. 626, and authorities cited. Is the suit one of equitable cognizance? So far as the averments of the pleadings show, the title of the plaintiff to the premises in controversy is equitable, and the defendant is a mere trespasser who has dispossessed the plaintiff. The relief prayed is legal not equitable, such as the statutes of this state authorize, if justified by the facts, whether the plaintiff's title be legal or equitable and whether the defendant be in, or out of, possession of the premises. Rev. St. Tex. 1895, arts. 5254, 5259. But in the courts of the United States the distinction between legal and equitable proceedings is strictly maintained, and the remedies afforded by law and equity are separately pursued. See authorities above cited.

[2] That the present suit is not one of equitable cognizance is clearly demonstrated by the cases of *Fussell v. Gregg*, 113 U. S. 550, 5 Sup. Ct. 631, 28 L. Ed. 993, and *Young v. Porter*, 3 Woods, 342, Fed. Cas. No. 18,171. In *Fussell v. Gregg*, 113 U. S. at page 554, 5 Sup. Ct. at page 633 (28 L. Ed. 993), it was said by the court:

"We think that the averments of the bill do not entitle the plaintiff to relief. Her case, as alleged, is that she has an equitable estate in fee in the premises in dispute, and that the defendants, except Gregg and Kendrick, are in possession without title; in other words, are naked trespassers. The theory of her bill seems to be that, because she has an equitable title only, and for that reason could not recover in an action at law, a court of equity has jurisdiction of her case. But this is plainly an error. Mr. Justice Bradley, in *Young v. Porter*, 3 Woods, 342.¹ To give a

¹ Fed. Cas. No. 18,171.

court equity jurisdiction the nature of the relief asked must be equitable, even when the suit is based on an equitable title. The plaintiff does not allege that the defendants who are in possession of the premises, have the legal title, or that they obtained possession under any person who had it. Nor does she state any facts which connect them with her equity. They being mere naked trespassers, in possession, she prays that they may be turned out of, and she, who has only an equitable title, may be put in possession. The relief prayed for is such as the court of law is competent to grant, if the plaintiff's title would justify it. But the plaintiff does not seek by her bill to better her title. If all the relief asked for were granted, she would still have an equitable title only. The case is therefore an ejectment bill brought on an equitable title."

In *Young v. Porter*, Mr. Justice Bradley used the following language:

"We entirely agree with the complainants' counsel in the proposition that the complainants could not maintain an action at law for the recovery of the land. But that does not prove that they can maintain a suit in equity for that purpose. They cannot maintain a suit which is the equivalent of an ejectment, merely because their title is only an equitable one. They must show that the defendants inequitably withhold the possession from them before they can do this. They must show some connection between the defendants and themselves. If the defendants had procured the legal title with notice of the complainants' equities, or were in any other respect guilty of fraud or want of equity towards the complainants in detaining the possession from them, then the latter might probably come into equity for relief. But they have not shown any such state of things." 3 Woods, 343, 344, Fed. Cas. No. 18,171.

The language of the court in *Fussell v. Gregg* and *Young v. Porter* is peculiarly applicable to the present case. The petition of the plaintiff is merely an ejectment bill, in simple form, brought on an equitable title.

But where the case is not one of either legal or equitable cognizance, must a party in the courts of the United States be left without remedy? To that question Mr. Justice Bradley responded as follows:

"The answer is plain. They must first take those proceedings against Alberty or his representatives or assigns which are necessary to obtain the legal title; and having obtained that, then they can bring trespass to try title against the defendant." 3 Woods, 344, Fed. Cas. No. 18,171.

The suit being one which cannot be maintained on either the law or equity side of the court, what disposition should be made of it? Under such circumstances the cause should be remanded to the state court. Upon this point it was said by the court, in *Cates v. Allen*, 149 U. S. 460, 13 Sup. Ct. 885 (37 L. Ed. 804):

"But it is not to be concluded, where diverse citizenship might enable the parties to remove a case but for the objection arising from the nature of the controversy, that, if such a removal has been had, the suit must be dismissed on the ground of want of jurisdiction. On the contrary, we are of opinion that it is the duty of the Circuit Court under such circumstances to remand the cause. The Circuit Court has jurisdiction to determine whether or not a case was properly removed."

[3] Apparently conceding that this court cannot proceed to a determination of the cause, on either the law or equity side of the docket, counsel for the defendant suggest that, if the plaintiff be required

to replead and fully set up his title, it would appear that he has no claim whatever to the land—it being part of a military reservation, the title to which is in the United States—and hence, that he must necessarily fail in his suit, whether it be heard in the state or federal court. Therefore it is insisted that this court should dismiss the cause rather than remand it to the state court. This suggestion is persuasive, but not convincing. The court must first have jurisdiction of a suit before it can proceed to decide its merits; and the dismissal of a cause, under the circumstances stated, would necessarily presuppose jurisdiction when in fact it did not exist. In sustaining the motion, the court is but following the rule announced in the case of *Cates v. Allen*, *supra*. See, also, *Peters v. Equitable Life Assurance Society* (C. C.) 149 Fed. 290.

The cause will be remanded to the state court.

In re McULTA.

(District Court M. D. Pennsylvania. June 27, 1911.)

No. 1,791.

1. NAMES (§ 20*)—CHANGE OF NAMES—COMMON-LAW RULE—STATUTES.

Act Pa. April 9, 1852 (P. L. 301), authorizing a court of common pleas to change the name of any person residing in the county by a decree on petition and notice, did not change the common-law rule that a man may lawfully change his name at will and will be bound by any contract into which he enters under his adopted or reputed name, and that he may sue or be sued in that name.

[Ed. Note.—For other cases, see Names, Cent. Dig. § 18; Dec. Dig. § 20.*]

2. BANKRUPTCY (§ 140*)—OWNERSHIP OF PROPERTY—FRAUD IN ACQUISITION.

Where creditors of a bankrupt sold goods to him in an assumed name the credit being extended to the man, as distinguished from the name, the bankrupt did not obtain title by fraud because he did not disclose his true name to his creditors.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.*]

3. BANKRUPTCY (§ 399*)—EXEMPTIONS—SALE OF GOODS BY A BANKRUPT AFTER PETITION FILED.

Where creditors of a bankrupt permitted him to keep possession of his property and conduct his store after filing of a petition and before the election of a trustee, instead of having a receiver appointed as they could have done, the fact that during such period the bankrupt sold goods from his stock without keeping track of all of such sales and the proceeds thereof, was not such misconduct as would deprive him of his right to exemptions.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 669; Dec. Dig. § 399.*]

4. BANKRUPTCY (§ 400*)—EXEMPTIONS—CREDITORS.

Where a bankrupt sold goods from his stock between the filing of his petition and the election of a trustee, during which time he was permitted to remain in possession, the amount received therefor, should be deducted from his exemptions, but the burden of proving that he sold more than he admitted having sold was on the excepting creditors.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 400.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Bankruptcy. In the matter of bankruptcy proceedings of J. D. McUita. On certificate to review a referee's decision allowing exemptions. Affirmed on the opinion of the referee, which is as follows:

I, Arthur A. Smith, one of the referees of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the following question arose, pertinent to the said proceedings:

The facts as disclosed by the evidence are as follows: The bankrupt's residence before his removal to Williamsport, Pa., about six years ago, was at Maine, N. Y., where he was known by his real name, Truman Day McCleas. Owing to domestic troubles he deserted his wife and family, came to Williamsport, assumed the name of J. D. McUita, obtained employment at the Park Hotel, where he worked for two years under his assumed name. He then engaged in the grocery business in said city, which he conducted for the past four years under the name of J. D. McUita, his assumed name. No person in the city of Williamsport knew of his past life, or that he was living under an assumed name. Shortly after his arrival in Williamsport he wrote a letter to his wife, informing her of his whereabouts and his assumed name. He conducted his grocery store, did business, and was known in and about Williamsport by the name of J. D. McUita. All goods were sold to him under that name, and his creditors knew him only as J. D. McUita, delivered goods to him and extended him credit under that name.

Four objections to the allowance of any exemption to the bankrupt are raised by the exceptions, which we will dispose of in their order.

[1] I. Because there is no such person as J. D. McUita, who claims to be entitled to the benefit of the exemption provided by the act of Congress establishing a uniform system of bankruptcy throughout the United States, approved November 28, 1898, and its several supplements.

At common law a man may lawfully change his name and will be bound by any contract into which he enters under his adopted or reputed name; and by such name he may sue and be sued. *Doe v. Yeates*, 5 Barn. & Ald. 544; *The King v. Inhabitants of Billingham*, 3 M. & S. 250; *Petrie v. Woodworth*, 3 Caines (N. Y.) 219; *In re Snook*, 2 Pittsb. R. (Pa.) 26; *Linton v. First National Bank of Kittanning* (C. C.) 10 Fed. 894.

There is in force a statute in Pennsylvania, passed April 9, 1852 (P. L. 301) which provides a method for a person to change his name; said Act reads as follows: "It shall be lawful for the court of common pleas of any county * * * to make a decree, changing the name of any person resident in said county, at any time three months after being petitioned to do the same by such person; provided, that notice of the decree, after the same shall be made, shall be published in one or more newspapers to be designated by the court, for four successive weeks." The act of 1852 did not change the common-law rule, but was passed in affirmance and aid of the common law. Without the aid of that act, a man may change his name or names, first or last, and when his creditors and the community have acquiesced and recognized him by his new designation, that becomes his name. *Lafin & Rand Co. v. Steytler*, 146 Pa. 434, 23 Atl. 215, 14 L. R. A. 690. Hence there was no law in force in the state of Pennsylvania, when the bankrupt came to this state and changed his name, prohibiting such a change, and, the same being allowed under the common law, he and those with whom he dealt were bound by the name which he assumed while in the state of Pennsylvania.

[2] II. Because Truman Day McCleas who claims the exemption under the assumed name of J. D. McUita is estopped from claiming the benefit of the exemption provided by the acts of Congress, out of the goods in the hands of the trustee, as said goods were purchased and acquired of the creditors by fraud in that the said Truman Day McCleas represented himself to said creditors as being J. D. McUita when in fact he was not.

This exception charges the bankrupt with fraud in obtaining the goods and merchandise purchased, in that he did not inform his creditors of his right name, and therefore he did not obtain title to the goods which he

claims as exempt. We dismiss this exception. A name is used merely to designate a person or thing. It is the mark or indicia to distinguish him from other persons, and that is as far as the law looks. In *re Snook*, *supra*; *Rich v. Mayer* (City Ct. N. Y.) 7 N. Y. Sup. 69, 70. They are merely used as means of indicating identity of persons. *Meyer v. Indiana National Bank* 27 Ind. App. 354, 61 N. E. 596. There is nothing in the evidence to show that any fraud was committed by the bankrupt in purchasing the goods. They were sold to him under his assumed name (the creditors never knew until after the institution of bankruptcy proceedings and the adjudication, that the bankrupt was doing business under an assumed name;) and he took title to the goods and could have disposed of them under his assumed name and given a good title to the same. Credit in this case was given to the man—not the name—and that man was J. D. McUita. The creditors cannot now claim that they never parted with their goods because they learned that the man—the person or being—to whom they sold the goods was known before he came to this city, over six years ago, by a different name. The bankrupt has title to the goods free from any fraud, and such a title that he can claim his exemption allowed by the laws of the state of Pennsylvania therefrom.

[3] III. Because Truman Day McCleas under the assumed name of J. D. McUita sold goods of the bankrupt stock from the date of the filing of the petition in bankruptcy, December 17, 1910, to the meeting of creditors to choose a trustee, January 16, 1911, without keeping any account of the goods sold or the money realized from the sale thereof, and is not entitled to have any goods set aside to him under the act of Congress allowing an exemption.

The bankrupt was allowed to keep possession of his property and conduct his store from the date of the filing of the petition to the election of a trustee. It was the duty of the creditors, when they filed their petition, or after they filed their petition, and after the case was referred, to petition the court or referee for the appointment of a receiver to take charge of the goods; in which event, exceptions Nos. 3 and 4 would never have entered into the consideration hereof. On the other hand, it was the duty of the bankrupt to keep his stock intact and turn it over to his trustee when elected. It appears from the evidence that between the date of the filing of the petition and the appointment of the trustee the bankrupt conducted his business as usual; and this is assigned as a reason of depriving the bankrupt of his exemption. Such conduct on the part of the bankrupt is not sufficient to deprive him of his exemption under the law of the state of Pennsylvania.

[4] IV. If Truman Day McCleas under the assumed name of J. D. McUita is entitled to the benefit of the exemption provided by the acts of Congress, he is only entitled to have goods set aside to him out of the bankrupt estate for an amount which is the difference between the value of the goods which J. D. McUita sold after the filing of the petition in bankruptcy, December 17, 1910, and the election of a trustee by the creditors, January 16, 1911, and the exemption of \$300.

We sustained this exception, and directed the trustee to deduct from the goods set apart to the bankrupt the amount of goods which the bankrupt sold during the interval of the filing of the petition and the election of a trustee. The creditors claim that a sufficient amount has not been deducted and that the burden was upon the bankrupt to show the amount of goods which he sold.

During the examination of the bankrupt by his creditors, he admitted that he sold goods, keeping an account on slips, which he deposited in his cash register. When asked to produce the slips he stated that all could not be found, but produced such as were in his possession. The creditors established by the testimony of the bankrupt that he had sold certain goods, and then took the position that the burden of proof shifted from them to the bankrupt. The burden of proof rests upon him, who substantially asserts the affirmative of the issue. This burden never changes. The weight of the

evidence may shift from one side of the case to the other. In the matter before us, the creditors showed that the bankrupt had sold certain goods, and the bankrupt later on in his examination admitted to selling more goods than the creditors were able to prove he had sold. The burden of proof that he sold more than he stated he had sold was then placed upon the exceptants, and they were unable to sustain their exception any further. Hence we were bound in our findings by the testimony taken before us; and we accordingly ordered the sum of \$18.46 deducted from the amount which the bankrupt claimed, and made an order to that effect; which order has been appealed from.

We hand up to the court herewith the list of goods claimed by the bankrupt to be exempt, the list of goods set aside to the bankrupt by his trustee, the exceptions filed thereto by the creditors, the answer of the bankrupt to said exceptions, the order of the referee made thereon, and the testimony taken before the referee.

Sprout & Cupp, for claimant.

Ames & Hammond, for exceptants.

WITMER, District Judge. The report of the learned referee contains a satisfactory discussion of the questions submitted, and I need only say that I agree with his reasoning and conclusions, in support of which I will add the thought, moreover, that if the changed name was assumed by the bankrupt in fraud of any one, it clearly appears that it is independent of his creditors, its taints do not run in the veins of the transaction before the court, and hence do not corrupt the current. It does not follow that a party who is a rogue in his other dealings shall be deprived of his rights in another transaction wherein he has been without fault. It is only where the fraud do inhere in the very transaction itself, by its intended effect preventing the collection of the debt, that the fraudulent debtor can claim no right of exemption under the law. The order of the referee is affirmed.

RYAN v. PHILADELPHIA & READING COAL & IRON CO.

(Circuit Court, E. D. New York. June 22, 1911.)

1. ATTORNEY AND CLIENT (§ 150*)—EMPLOYMENT OF COUNSEL.

Where an attorney, prosecuting an action for injuries to an infant on a contingent fee basis, retained counsel to assist him, the question of the counsel's right to payment was a matter between him and the attorney, and was material to the court in determining the amount the attorney should receive out of a settlement only as a guide to the value of the services rendered by the attorney for plaintiff in the entire action.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 354-357; Dec. Dig. § 150.*]

2. INFANTS (§ 84*)—ACTIONS—GUARDIAN AD LITEM—APPOINTMENT OF ATTORNEY—AUTHORITY.

A guardian ad litem for an infant, though appointed in a state court before removal of the action, cannot contract with an attorney for services so as to bind the ward, unless the agreement meets with the court's approval.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 236-245; Dec. Dig. § 84.*]

3. ATTORNEY AND CLIENT (§ 140*)—ATTORNEY'S FEES—INFANTS—SETTLEMENT—CONTINGENT FEE.

An infant having a cause of action for injuries against a corporation, suit was brought for him by an attorney in the state court without any contract for compensation, and a guardian ad litem appointed. The case was removed to the federal court, and as the trial was about to be started a settlement was consummated. No written retainer or contract was signed until after the case had been substantially settled, and until the lack of such a contract was noticed, when the guardian ad litem contracted to pay the attorney 50 per cent. of the settlement. The attorney and his counsel, whom the attorney paid, had conducted the case ably and made a proper settlement. *Held*, that the contract for attorney's fees was proper and would be approved.

[Ed. Note.—For other cases, see Attorney and Client, Dec. Dig. § 140.*

Compensation of attorney on premature termination of employment, see note to *Du Bois v. Mayor, etc.*, of City of New York, 69 C. C. A. 113.]

Action by Joseph Ryan, an infant, by his guardian ad litem, Margaret Ryan, against the Philadelphia & Reading Coal & Iron Company. On proceedings for the distribution of a settlement for injuries to an infant.

George S. Scofield and W. H. K. Davey, for plaintiff.
Armstrong & Brown, for defendant.

CHATFIELD, District Judge. A perfectly proper settlement of this action was consummated as the trial was about to be started. The plaintiff's attorney and his counsel had conducted the case ably, and the defendant was relieved by the settlement from a possibly large recovery, if the plaintiff could establish its legal liability under the statutes of the state where the accident occurred. A further payment for witnesses' fees (agreed upon by the parties as to amount) was also made. Both the plaintiff and the plaintiff's attorney are entitled to be repaid their actual disbursements out of that sum, and the balance, if any, would go into the general fund for the settlement of the case. The infant plaintiff will arrive at his majority within a very short time. He has no general guardian, and the money cannot be paid over unless a guardian be appointed, and bond given, or unless the payment be delayed until the infant arrives at the age of 21. But no difficulty arises on this score. The sole question is whether or not the plaintiff is entitled to a 50 per cent. compensation, upon the basis of a contingent fee, for his services in the case, no written retainer or contract having been signed until after the case had been substantially settled and the lack of such a contract noticed.

[1] The amount paid plaintiff's counsel was entirely proper, and his services seem to have been valuable, but the question of his payment is a matter between him and the attorney for the plaintiff, and is of use to the court only as a guide to the value of the services rendered by the attorney for the plaintiff in the entire action.

[2] This court is bound to hold that a guardian ad litem, being an officer of the court, even though appointed in the state court before removal of the action, cannot enter into a contract with any attorney,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

who is necessarily an officer of the court, which shall bind the ward of the court, unless that agreement meet with the court's approval. The guardian ad litem is not a party who is independent, in the ordinary sense. He is rather a party capable of entering into legal relations, who thus supplies the lack of capacity on the part of the infant.

[3] But the very fact that he is appointed to represent a ward of the court, and that his appointment is by the court, leaves his actions and the actions of all who are responsible to the court, subject to the court's scrutiny, before the court can be asked to lend its authority to a determination of the rights of the party whose protection is being attempted. For this reason the guardian ad litem has the right to call into question the action of the attorney in obtaining from her the signature of a contract for a 50 per cent. attorney fee, upon such terms as might have been asked before bringing the action, and at a time when the possibility of recovery or the obtaining of evidence was entirely undetermined. Such a charge would be unconscionable and entirely out of proportion, no matter what the hazard of recovery might previously have been, if this charge were made for nothing but the actual settlement of a case already on trial, and in which an amount in settlement had been offered.

The plaintiff's attorney might well have reported to the court the exact situation and asked its approval of the signing of the agreement, which seems to have been contemplated by all of the parties throughout the entire proceeding, but no percentage or definite amount had been mentioned, so far as the affidavits of either party show. A 50 per cent. contingent fee, in a case like the one under consideration, was not out of proportion, if an attorney were agreeing to bring such a suit. A fee of this amount even in settlement also does not seem to be out of proportion or unconscionable in this case, from the standpoint of fair compensation to the attorney, including the payment of counsel fees. Especially is this true where the plaintiff will be reimbursed for disbursements or witness fees. And the only question to be considered is whether or not the attorney should have voluntarily offered to take less than he would have insisted upon at any time prior to the actual trial of the action, because he had then learned that the services which he had undertaken without definite agreement were not to be entirely fruitless. He could at no time exact or expect more than would be fair and reasonable for what he was doing, whether it related to past or future services.

The court feels that unless all contingent fees are to be discounted, and unless an attorney is to be punished for ultimately charging what in ordinary practice he might have insisted on, if the parties had not been content to leave the entire matter in his hands, and in a case where all of the circumstances indicate that the parties would have previously consented to the exact arrangement which they did make, the contract entered into between the guardian ad litem and the attorney should be carried into effect.

An order may be entered, therefore, approving of the settlement by the guardian ad litem and directing that judgment for the amount of the settlement may be entered.

The amount paid for witness fees will be used for the payment of the actual disbursements of the plaintiff and of her attorney for securing the attendance of the witnesses, and any balance therefrom will be added to the general recovery for the benefit of the plaintiff.

COPELAND et al. v. STAPLES et al.

(Circuit Court, D. Connecticut. July 21, 1911.)

No. 1,323.

TRUSTS (§ 48*)—CONVEYANCE IN TRUST—VACATION—FRAUD.

In a suit to cancel a conveyance of certain property by complainant to defendant as trustee, evidence *held* insufficient to warrant a finding that complainant had been induced to execute the same either by misrepresentation as to her powers reserved in the agreement to use the principal, to revoke the trust at her election, or as to her inability to divest her husband of his share in her estate by will.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 70; Dec. Dig. § 48.*]

In Equity. Bill by Grace Fones Copeland and others against Frank T. Staples as trustee and others. Decree for defendants.

Wm. Hepburn Russell, for complainants.

John S. Pullman, for respondents.

PLATT, District Judge. This is a bill in equity praying for the cancellation of an agreement between the plaintiff Grace Fones Copeland and the defendant Frank T. Staples, as trustee, on the ground that, when the agreement was executed by the plaintiff, she acted under a mistake as to its effect, which mistake was caused by false representations of the other defendant, Fones, and his agents. It is further alleged that the agreement was executed under duress, but nothing is offered to sustain that allegation, and it will therefore be passed without comment.

There are three particular points upon which it is alleged that false representations were made:

(1) As to Mrs. Copeland's inability to divest her husband of a share of her estate by will.

(2) As to her unlimited power to use the principal as she chose.

(3) As to her absolute power of revocation.

As to the first point, the testimony not only fails to sustain the allegation, but it shows that Mrs. Copeland was truthfully and properly advised that the only absolutely sure way to protect the property from her worthless husband, except by first divorcing him, was to execute the deed of trust.

As to the second point, the complaint charges that both defendants and Mr. Canfield, the attorney, falsely represented in August, 1908, that under the trust agreement Mrs. Copeland "could withdraw and use the principal of said securities which they represented to her she

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was conveying in trust in such a way as to enable her to withdraw such principal as she desired the same."

The rights of the plaintiff with regard to the principal of the fund are set forth in section 5 of the trust agreement, which it is well to quote in full:

"(5) It is further agreed by and between the parties hereto that if at any time through illness of the party of the first part, or unusual emergencies that cannot now be foreseen, or for any cause not herein specified, it should be deemed necessary or expedient *by said Staples* to expend or appropriate for her benefit, or to transfer to her any part or the whole of the principal of said trust estate, *he* shall have the right to do so, first procuring the written authority, consent and request of the party of the first part." (Underscoring mine.)

The testimony shows that Mrs. Copeland's father from whom the estate came died in September, 1907. There was no attempt on the part of Fones or Canfield to hurry her into a decision about her share of the property. She had a child, the pet of its grandfather, and a bad husband, who was living in the South with another woman. Mr. Canfield suggested divorce, but that she did not wish. Mrs. Copeland united with her brother, Dr. Fones, and Mr. Canfield in the desire to protect her share of the estate absolutely in the interest of herself and her child from any future attack thereon by her husband. She was properly advised that this could not be safely done by will, as I have said above. The settlement of the estate progressed leisurely, and it was August, 1908, when the time had come for distribution. Mrs. Copeland and Dr. Fones were the only heirs and by mutual distribution the property set out to each was agreed upon. Mrs. Copeland was given her choice of the kind of property she should have, and she took income producing personal, rather than real, estate. The parties met at Mr. Canfield's office on August 13th and 14th to close the matter up. The trust agreement had been prepared by Mr. Canfield prior to the meeting of the 13th, and was read over carefully and distinctly, paragraph by paragraph, by Mr. Canfield, but was not thought sufficiently elastic by Mr. Staples, who had been selected as trustee, and an adjournment was had until the 14th for a revision of the terms of the agreement. On the 14th Mrs. Copeland, Dr. Fones, and Mr. Staples met with Mr. Canfield at his office. The mutual distribution was first disposed of, and then the trust agreement was taken up. It was again read over, paragraph by paragraph. Before signing, Mrs. Copeland said:

"I might want to build a house, buy an automobile, or buy a horse. In such case I might want to have access to the principal. Now can that be done?"

Mr. Canfield then read over again, aloud and carefully, section 5 of the agreement, and said to her, as he puts it:

"I thought the language in that article was broad enough to exhaust the entire estate, the principal and the income, if it was deemed necessary and expedient to do so."

Dr. Fones remembers that he said, "It is broad enough to cover this point." Mr. Staples remembers that "he stated that that could be

done, provided the trustee thought it necessary." Mrs. Copeland testifies that in response to her remark he read the fifth paragraph over again, and said: "I think, Mrs. Copeland, that is broad enough to cover everything you may wish." Prior to March 5, 1909, differences had arisen between Mrs. Copeland and Mr. Staples, the trustee. She wanted a loan, and the trustee did not find good reason for making it. She thereupon brought the matter to a climax by her letter dated March 5, 1909. In that letter she stated that her memory was that Mr. Canfield "said that was broad enough to prove my rights to all the principal, if need be."

At the argument counsel for Mrs. Copeland announced his willingness to stake her case upon that letter. He insists that it shows that on March 5, 1909, she believed that she had placed her property in trust in such a way as to enable her to use the principal, and that she did it solely to protect the property from any claim her husband might have in case of her death. The letter shows, to my mind, that on March 5, 1909, she was undertaking to carry to the mind of the trustee the impression that such was her belief then, and that she signed the agreement with such a belief. The trouble with the case is that I am unable to believe her when she says so. She is an unusually intelligent woman. This whole case turns on whether under section 5 of the trust agreement Mrs. Copeland understood that she was to be the judge of whether at any time it was necessary to dip into the principal, and whether she was brought to that understanding by the false representations of Dr. Fones or Mr. Canfield. Mr. Staples is, I understand, exonerated by her counsel.

The language of paragraph 5 is so plain that it is impossible for Mrs. Copeland to have had the slightest doubt about what it meant. It is a matter of mystery how any lay person of either sex, and especially one with sufficient command of English to be worth the salary Mrs. Copeland was getting on the Philadelphia paper, can bring oneself to say that it was ambiguous and needed a lawyer to explain it. It is true that in referring to it Mr. Canfield did not discuss the point as to who should decide the question of necessity, but it would seem a waste of words to have done so with such positive language in the paragraph. After Mrs. Copeland spoke about an automobile as within the scope of her possible desires, it might have been wiser for Mr. Canfield to have told her that it was unlikely that such a thing as that would be regarded by the trustee as coming within the spirit of the section; but the trust ought not to be set aside because of Mr. Canfield's failure to cover every possibility of the future, and I am satisfied that nothing which he said or did or neglected to say or do at the August 14th meeting or at any other time, had the slightest influence upon Mrs. Copeland's mind when she signed the agreement. When Mrs. Copeland wrote the letter of March 5, 1909, the crucial point of the case was plain to her, because she apparently endeavored to call to the trustee's mind the section which she insists that Dr. Fones and Mr. Canfield misinterpreted to her. She says:

"Section 5 reads in toto 'through illness, unusual emergencies that cannot be foreseen, or for any cause not herein stated, it should be deemed necessary or expedient to transfer any part or the whole of said trust estate.'"

Section 5 must have been before her when she wrote that language, and a comparison will show that she deliberately omitted every word of the paragraph which demonstrates absolutely that the necessity or expediency of appropriating for her benefit, or transferring to her, any portion of the principal was to be settled by Mr. Staples, the trustee. She must have been possessed of about the same amount of sagacity in August, 1908, as in March, 1909. Any one foolhardy enough to attempt to mislead her on either occasion would have had his labor for his pains. The very object and purpose of the trust would have been defeated if the agreement had meant what she professes to say she thought it meant. Her husband had beguiled her before, and was evidently capable of doing so again. She was protecting herself and child from his attacks, and she deliberately took the only safe way to do so. The facts do not sustain the second point of the allegation.

There is no evidence to sustain the allegation on the third point as to false representations regarding her absolute power of revocation.

It all comes down to this: If she could have had her own way about the principal, or have revoked the trust whenever the whim to do so seized her, the act into which she entered on August 14, 1908, after nearly a year's deliberation, would have been as unstable as the shifting sands. Its solemnity would have been a mockery and a travesty, and the child would have been in constant danger of never enjoying the comfort which it was the fond hope of the grandfather to provide for. It is an abnormal situation that this same child should now be urged by its guardian to take a step, which, if it succeeded, would in all human probability put the trust fund forever beyond her reach.

Let the bill be dismissed, with costs.

In re J. W. ZEIGLER CO., Inc.

(District Court, D. Connecticut. July 19, 1911.)

No. 2,629.

1. BANKRUPTCY (§ 20*)—JURISDICTION—STATE COURTS.

Where, after the appointment of a receiver in a state court, the debtor corporation was adjudged a bankrupt and a receiver appointed by the federal court in the bankruptcy proceedings, and ordered to take and hold the bankrupt's estate, the jurisdiction of the bankruptcy court was paramount, and it was the duty of the state receiver, on being informed of such order, to deliver possession of the property to the federal court receiver.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 20.*]

2. BANKRUPTCY (§ 20*)—SALE OF PROPERTY—STATE COURT RECEIVER—CONTEMPT.

Where a receiver appointed for a bankrupt in a state court refused to deliver possession of property of the bankrupt to the federal court receiver on demand, but such refusal was on advice of counsel on the belief that the state court's jurisdiction having first attached was paramount, the state court receiver's refusal would not be punished as for a contempt.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 20.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Bankruptcy. In the matter of the bankruptcy proceedings of J. W. Zeigler Company, Inc. On motion to punish Nathan C. Herz as receiver of the bankrupt appointed in the state court for contempt. Denied.

Shapiro & Shapiro, for federal receiver.

De Forest & Klein, for state receiver.

PLATT, District Judge. The motion is for an attachment in contempt against Nathan C. Herz, as receiver of the J. W. Zeigler Company, Incorporated, under a state court appointment. It is not directed against him as an individual, and this distinction must be constantly kept in mind while seeking a correct answer to the motion. The order of this court was that its receiver "should take charge of and hold" the estate of the alleged bankrupt corporation. The federal receiver was appointed very shortly prior to a previously arranged and advertised sale of the bulk of the corporation's estate. He now reports that on May 24th (the day of the sale under the state court order) he personally informed Mr. Herz, as state receiver, of our order, and that said Herz, "with full knowledge and notice thereof, refused to obey said order and refused to deliver possession of the alleged bankrupt's estate, and later in the day sold a greater portion of said estate." The order under which our receiver acted might have been made more explicit, definite, and comprehensive, but, if Mr. Herz had no other excuse than the form of the order, his answer would be lame and impotent. He knew what the order meant, and deliberately prevented its execution under advice of counsel. When the federal receiver brought home to the state receiver full knowledge of our order, it was the plain duty of Mr. Herz to turn over at once to our receiver all property belonging to the alleged bankrupt which was in his possession, unless he was holding it under an honest adverse claim. The counsel who advised him assert, and seem to believe, that his position as state receiver was a stronger one than if he had merely been holding the same as an individual with honestly entertained adverse rights. They insist that he would have been in contempt of the state court, if he had surrendered the property without first obtaining the permission of the court so to do.

[1] As I understand the law, the jurisdiction of this court when our order was passed was exclusive, and its order was therefore paramount. The state court itself was bound to obey it, and obedience thereto by the receiver could in no sense have been treated by that court as a contempt of its own order. The argument of counsel upon this aspect of the case is not persuasive. In a general way, therefore, it is clear to me that under the law Mr. Herz, as state receiver, was hindering and obstructing an order of this court, which was at the moment the exclusive and dominating order which both he and the court under which he was acting were bound to obey.

There is, however, in the case a grave question of comity which may perhaps go deeper than a simple rule of etiquette. In ordinary cases the state and federal courts exercising jurisdiction over the same territory are as a matter of theory foreign to each other. This creates

a unique situation which has grown out of the peculiar internal organization of our country, and that we live together under it as happily as we do deserves to be ranked as one of the great wonders of the world. There is a suggestion in these two classes of courts of the family. There are bound to be differences of opinion, but it is expected that the strength of the family tie will serve to prevent the carrying of such differences to an unfortunate extreme. The two jurisdictions are distinct and each is clothed with full power, unless the Constitution of the United States steps in and points out some subject within which the federal power dominates and controls. Bankruptcy is one of the subjects upon which the absolute control of the federal power is provided for, and the Congress with such constitutional authority, has legislated thereon. Under that legislation the order which we are now discussing is supreme, and should be obeyed by every citizen. Back of all this is a recognized principle of law that where federal and state courts have concurrent jurisdiction in the same territory, and either court shall exert its authority and place its hand upon property within its jurisdiction, the other court, upon learning that fact, shall stay its hand and refrain from intruding.

[2] In the case before us the state court exerted its power lawfully when it appointed Mr. Herz receiver of the estate of the Zeigler Company, Incorporated. It was proceeding lawfully in an endeavor to convert that estate into money when the receiver of this court, lawfully appointed, appeared upon the scene. Up to that moment Mr. Herz, as state receiver, was clearly within his rights, putting into execution an order of his own court.

The argument of counsel is that, when our order was disclosed to Mr. Herz as state receiver, his sanction for retaining possession was stronger than if he had been holding it in his private capacity under an adverse claim which he honestly entertained. They insist that his obligation to his own court constrained him to hold on. He was advised by counsel to hold on. Immediate action was imperative. There was no time to ask his court what to do. His refusal to deliver was in no sense a personal disrespect of this court. All this is true and is entitled to weight in reaching a final conclusion. If he had gone to his own court for advice, and had been told to retain possession, a different situation would be presented. On the 24th of May the affair had not ripened to a point where an antagonistic position was asserted by the state court. At the critical moment Mr. Herz as receiver remained true to the Cæsar whom he knew best, and probably supposed to be all powerful.

I trust that I have made it plain that from my view of the law he was badly advised by counsel. And it may be that the state court would, if the pinch had come, have followed their advice, but, as the case stands, the state court was not called upon to cross the bridge, and it is immaterial at this juncture whether it would, if occasion had served, have crossed it or not. The counsel who gave the bad advice are not before me, and, even if they were, I should be constrained to let them go scot-free, because the Supreme Court, the fountain from which I am bound to drink my inspiration, has intimated that to punish

lawyers for giving bad advice would be an unfair attack upon that independence of judgment which they are entitled to maintain. The Supreme Court seems to think, and I accept their conclusion, that such action on the part of the courts would be a long step toward confusion and disorder. After calm, and I hope dispassionate, consideration, I am compelled to think that the curious kind of comity which the Supreme Court in the Case against Watts and Sachs, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933, thinks can be so exercised as to avoid a stubborn contest between the courts had not in this case had a chance to do its perfect work, and I am not inclined to add a brand just now that might have more to do with a conflagration than mortal intelligence can foresee.

If the day shall ever come when it is clear to me that a state court, after reasonable assurances of good will and friendship on the part of the federal court, shall in a matter of bankruptcy undertake to exert and maintain its independent authority and control over property which under the Constitution and law belongs without doubt to the federal court, I shall deem it my duty under my oath of office to uphold with all the force within my control the supremacy of the federal power. In view of the particular facts now before me, I am constrained to say that I do not deem it my duty to punish Mr. Herz, as state receiver, acting as he did, under advice which he doubtless had faith in, but which to my mind was unusually wrong.

The motion for an attachment in contempt is for the reasons above imperfectly set forth denied.

UNITED STATES v. ANDERSON.

(District Court, D. Oregon. July 24, 1911.)

1. INDIANS (§ 36*)—REGULATION—PURCHASING CATTLE FROM INDIANS—SCIENTER.

In a prosecution for purchasing cattle from an Indian in violation of Act July 4, 1884, c. 180, 23 Stat. 76, providing that all sales in violation of the act should be void, and the offending purchaser on conviction should be fined, etc., guilty knowledge was not an element of the offense, and hence an indictment was not objectionable for failure to charge that accused had knowledge that the cattle purchased had been previously purchased by the government and issued to the Indian.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 63, 65; Dec. Dig. § 36.*]

2. INDIANS (§ 36*)—CATTLE—PURCHASE FOR INDIANS—OWNERSHIP—WRONGFUL SALE.

Act July 4, 1884, c. 180, 23 Stat. 94, made an appropriation for the support and contingent expenses of the Indian Department, providing that the President might use any sum appropriated for the subsistence of the Indians and not absolutely necessary for that purpose for the purchase of cattle for the benefit of the Indians for whom the appropriation was made, and then declared that such cattle when issued to the Indians should not be sold except to a member of the tribe without the written consent of the Indian agent, and making a violation thereof an offense. *Held*, that cattle purchased with money so appropriated was property of the United States, and did not cease to be such because of their delivery

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to the Indians for a particular purpose and with limited right of disposal, and that it was to protect such cattle only, and prevent the purchase thereof from the Indians without the consent of the government, that the criminal provision was inserted in the act.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 63, 65; Dec. Dig. § 36.*]

3. INDIANS (§ 36*)—SALE OF CATTLE—OFFENSES.

Act July 4, 1884, c. 180, 23 Stat. 94, making it an offense to purchase cattle from Indians without the consent of the Indian agent, did not apply to cattle bought with money paid for lands ceded by the Indians to the United States and which belonged to the Indians and not to the government.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 63, 65; Dec. Dig. § 36.*]

O. T. Anderson was indicted for purchasing cattle from an Indian in alleged violation of Act Cong. July 4, 1884, and he demurs. Sustained.

Walter H. Evans, for the Government.

Lionel R. Webster, for defendant.

BEAN, District Judge. An indictment was returned by the grand jury against the defendant for purchasing cattle from an Indian in alleged violation of the act of Congress of July 4, 1884, 23 Stat. 76, which provides "that where Indians are in possession or control of cattle or their increase, which have been purchased by the government, such cattle shall not be sold to any person not a member of the tribe to which the owners of the cattle belong, or to any citizen of the United States, whether intermarried with the Indians or not, except with the consent in writing of the agent of the tribe to which the owner or possessor of the cattle belongs. And all sales made in violation of this provision shall be void, and the offending purchaser on conviction thereof shall be fined not less than \$500, and imprisoned not less than six months." A demurrer to the indictment has been interposed because (1) it is not stated therein that defendant knew at the time he bought the cattle that they had been purchased by the government, and (2) that the cattle which he is charged with having bought were not in fact purchased by the government within the meaning of the act of Congress quoted.

For the purpose of having the latter question decided at this stage of the case, the district attorney and the defendant's counsel have agreed that the following undisputed facts be considered as though set out in the indictment: In June, 1901, an agreement was entered into between an agent of the United States and the Indians belonging to the Klamath Agency by the terms of which the latter ceded to the government about 600,000 acres of land for the sum of \$575,000, \$25,000 of this amount to be paid in cash to be distributed among the Indians, \$350,000 to be deposited with the Treasurer of the United States to the credit of the Indians, interest to be paid to them annually. The balance, after the payment of attorney fees, to be expended for the benefit of the Indians under the direction of the Secretary of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the Interior, upon request of the Indians through the agent, in the drainage or irrigation of their lands and the purchase of stock cattle for issue to them, and for such other purposes as might, in the discretion of the Secretary of the Interior, best promote their welfare. The agreement was ratified by Congress in June, 1906 (Act June 21, 1906, c. 3504, 34 St. at L. 367) the necessary appropriation made to carry it into effect, it being provided that of the sum so appropriated, "\$350,000 shall be deposited in the treasury of the United States to the credit of said Indians, and the remainder shall be expended as provided in the third article of said agreement."

Acting under authority of this agreement and the act of Congress ratifying same, the Indian Department advertised in April, 1909, for 4,500 heifers to be delivered at the Klamath Agency, for issue to the Indians. Pursuant to this advertisement and in conformity therewith, and after receiving proper bids, the Commissioner of Indian Affairs, in May, 1909, purchased of William Hanley of Portland, Or., 4,000 heifers, which were delivered during the month of August, 1909, and paid for from the money appropriated to carry into effect the agreement referred to. After the cattle were delivered, they were branded with the government brand and issued to the various Indians entitled thereto, and each Indian, on receipt of his apportioned number, promptly branded them with his own individual brand. It is a part of these cattle that the defendant is charged with having purchased in violation of the act of 1884. Upon the facts thus agreed to, the demurrer will be considered.

[1] Knowledge by the purchaser of cattle from an Indian that such cattle had been previously purchased by the government and issued to the Indian is not made by law an ingredient of the offense denounced by the act of July 4, 1884, and the rule is that where a statute prohibits an act generally and is silent as to the intent, the pleader need not aver knowledge. *U. S. v. Malone* (C. C.) 9 Fed. 897. It is competent for the lawmaking power to declare acts criminal irrespective of the knowledge or motive of the doer, and where it has done so no judicial authority has power to require in the enforcement of the law such knowledge or motive to be shown beyond what is included in the doing of the prohibited act. The general rule is that where an offense is purely statutory, having no general relation to criminal law, it is sufficient in the indictment to charge the defendant with acts coming fully within the statutory description in the substantial words of the statute without any further expansion of the matter provided the indictment is sufficient to apprise the defendant with reasonable certainty of the nature of the accusation against him to the end that he may prepare his defense and plead the judgment as a bar to any subsequent proceeding for the same offense. *U. S. v. Simmons*, 96 U. S. 360, 24 L. Ed. 819. Of course one must know that he commits an act which the statute denounces before he can be guilty of a crime, thus the mailing of a letter without knowledge that it contains obscene matter is held to be no offense. *U. S. v. Slenker*, (D. C.) 32 Fed. 691. But where one knowingly and intentionally commits an act which has been made an offense, regardless of his

motive, knowledge or intent, his guilt is established although he may have been ignorant of some of the essential facts constituting the crime. Thus one who sells liquor to an unallotted Indian under charge of an agent or representative of the government is guilty of a violation of the law although he may have been ignorant of that fact, or indeed may have believed that the person to whom he made the sale was not an Indian but of some other nationality. *U. S. v. Miller* (D. C.) 105 Fed. 944. Again, guilty knowledge is not essential in a prosecution for the statutory offense of selling liquor to a minor. *State v. Chastain*, 19 Or. 176, 23 Pac. 963. Therefore, when one purchases from an Indian cattle which have been previously purchased by the government within the meaning of the act of Congress referred to, he violates the law, although he may not have known that the cattle were so purchased. The demurrer as to the first point is not well taken.

[2] But under the stipulated facts the defendant is not, in my opinion, guilty of the crime attempted to be charged against him. The statute under which he is being prosecuted is a part of the act of July 4, 1884, making an appropriation for the support and contingent expenses of the Indian Department. It provides that the President may use any sum appropriated for the subsistence of the Indians and not absolutely necessary for that purpose for the purchase of cattle for the benefit of the Indians for whom such appropriation is made. 23 St. at L. 97. Cattle purchased with money so appropriated are the property of the United States. They do not cease to be such because of their delivery to the Indians for a particular purpose and with a limited right of disposal thereof. It was to protect such property and to prevent the purchase thereof from the Indians without the consent of the government that the criminal provision of the statute was inserted.

[3] Where, however, cattle are purchased by an Indian with his own funds or by some officer of the government with funds belonging to him the law referred to can have no application, and was not so intended. The cattle in controversy here were bought with money paid for certain lands ceded by the Indians to the United States. They were therefore purchased with money which belonged to the Indians and not to the government. The Secretary of the Interior, in making the purchase, acted as the agent and representative of the Indians in the disbursement or expenditure of their money in pursuance of a contract with them authorizing him to do so. When the cattle were purchased and issued to the Indians, they became the property of the Indians and a purchaser thereof would not be liable criminally for a violation of the statute under which the present indictment was framed.

It follows that the demurrer should be overruled as to the first point, and sustained as to the second, and it is so ordered.

THE DALLES & ROCKLAND FERRY CO. v. HENDRYX.

(Circuit Court, D. Oregon. July 23, 1911.)

No. 3,763.

1. REMOVAL OF CAUSES (§ 45*)—GROUNDS—DIVERSITY OF CITIZENSHIP.

A defendant sued in a court of the state of his residence by a foreign corporation has not the right under Judiciary Act (Act March 3, 1875, c. 137, § 2, 18 Stat. 470, as amended March 3, 1887, c. 373, § 1, 24 Stat. 553, and corrected Aug. 18, 1888, c. 866, § 1, 25 Stat. 434 [U. S. Comp. St. 1901, p. 509]), to removal to the federal court on the ground of diversity of citizenship.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 89; Dec. Dig. § 45.*]

2. REMOVAL OF CAUSES (§ 25*)—GROUNDS—FEDERAL QUESTIONS—MANNER OF DISCLOSING.

Under Judiciary Act (Act March 3, 1875, c. 137, 18 Stat. 470, as amended March 3, 1887, c. 373, 24 Stat. 552, and corrected Aug. 18, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]), a cause cannot be removed from a state court to a federal court on the ground that a federal question is involved, unless the facts disclosed by plaintiff's statement of his claim show that he asserts a right, title, privilege, or immunity under the federal Constitution or laws or treaties, which he seeks to enforce in the action, and such facts cannot be shown by demurrer or answer, or by petition for removal.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 58, 59; Dec. Dig. § 25.*]

3. REMOVAL OF CAUSES (§ 19*)—GROUNDS—FEDERAL QUESTIONS.

A suit by one operating a ferry across the Columbia river from a point in Oregon to a point in Washington, under a license issued by state authority granting an exclusive ferry right for a fixed period, to restrain another from operating a ferry between the same points without any license from either state, does not involve a federal question though defendant challenges plaintiff's ferry rights on the ground that the same unlawfully interferes with interstate commerce, and the cause is not removable to the federal court on that ground.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 37-46; Dec. Dig. § 19.*]

In Equity. Suit by The Dalles & Rockland Ferry Company against W. T. Hendryx. On motion to remove the cause to the state court. Allowed.

W. H. Wilson, for plaintiff.

George S. Shepherd, for defendant.

BEAN, District Judge. This suit was commenced in a state court by a corporation organized and existing under the laws of the state of Washington against a resident of the state of Oregon, to enjoin and restrain the defendant from operating a ferry across the Columbia river. The plaintiff in its bill alleges that it is maintaining and operating a ferry from The Dalles, in Oregon, to Rockland, in the state of Washington, under and in pursuance of a license issued to it in May, 1911, by the county court of Wasco county, granting to it the exclusive right and privilege so to do for a term of five years and to collect

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and receive tolls therefor; that the defendant, without obtaining a license from the authorities of either the state of Oregon or the state of Washington, is engaged in operating a ferry between the same points in violation of the rights of the plaintiff and to its great damage. The defendant filed a petition and bond for removal to this court on the ground of diversity of citizenship, and that the case involves a federal question arising under the Constitution and laws of the United States—i.e., a question of interstate commerce—and the defendant's right to transport passengers from and between a point in the state of Washington and a point in the state of Oregon. The state court approved the bond and entered the usual order of removal. The plaintiff now moves to remand and the motion will be allowed.

[1] The defendant is a resident of the state, and therefore has not the right of removal on the ground of diversity of citizenship. Section 2, Judiciary Act, as amended March 3, 1887, c. 373, § 1, 24 Stat. 553, and corrected Aug. 18, 1888, c. 866, 25 Stat. 434 (U. S. Comp. St. 1901, p. 509). Unless the suit arises under the Constitution or laws of the United States none but nonresidents have the right of removal. Bates on Fed. Pro. § 795.

[2] Nor was the case properly removed because a federal question is involved. The defendant seems to have proceeded on the theory that it is sufficient that the petition for removal shows that he claims a right under the Constitution or laws of the United States. Such was the construction of the law of 1875 (Hughes on Fed. Pro. 286), but the Acts of 1887 and 1888 made a radical change in this regard and under it "a case (not depending on the citizenship of the parties, nor otherwise specifically provided for) cannot be removed from a state court into the circuit court of the United States, as one arising under the Constitution, laws or treaties of the United States, unless that appears by the plaintiff's statement of his own claim; and that, if it does not so appear, the want cannot be supplied by any statement in the petition for removal or in the subsequent pleadings." *Chappell v. Waterworth*, 155 U. S. 107, 15 Sup. Ct. 34, 36, 39 L. Ed. 85. The jurisdiction of the Circuit Court of the United States on removal from the state court is confined to such suits as might have been brought in the federal court by the plaintiff under the first section of the judiciary act. A case therefore cannot be removed as one arising under the Constitution or laws of the United States unless it might have been brought in this court by the plaintiff. And it is firmly established that to give the court jurisdiction of such a suit it must appear from the plaintiff's own statement of his cause of action that he is claiming some right, title, privilege or immunity by virtue of the Constitution, laws, or treaties of the United States, and which he seeks to enforce in the action. If it does not so appear, it cannot be shown by petition, or demurrer or answer. Bates on Fed. Pro. § 671; Hughes on Fed. Pro. § 202; 4 Fed. St. Ann. 282, and authorities cited; *Tenn. v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511; *Minn. v. N. Securities*, 194 U. S. 48, 24 Sup. Ct. 598, 48 L. Ed. 870; *Metcalf v. Watertown*, 128 U. S. 586, 9 Sup. Ct. 173, 32 L. Ed. 543; *City of Lincoln v. Lincoln St. Ry. Co.* (C. C.) 77 Fed. 658; *Indiana v. Alle-*

ghany Oil Co. (C. C.) 85 Fed. 870; Broadway Ins. v. Chicago G. W. Ry. (C. C.) 101 Fed. 507; Ralya M. Co. v. Armour (C. C.) 102 Fed. 530; Mitchell Eng. & Mch. Co. v. Worthington (C. C.) 140 Fed. 947; Shields v. Boardman (C. C.) 98 Fed. 455.

[3] Now, the plaintiff is not asserting any claim, right, or immunity under the Constitution or laws of the United States. Its cause of action is based wholly upon the laws of the state and the action of the state authorities thereunder. The fact that the defendant may challenge its rights on the ground that the authority attempted to be exercised by the state in licensing a ferry across the Columbia river is in violation of the federal Constitution because it unlawfully interferes with interstate commerce is not a ground of removal to this court as is clearly shown by the authorities cited, and particularly the leading case of *Tennessee v. Bank of Commerce*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511, in which it was held that a suit by a state to enforce a lien for taxes could not be removed to the federal court although the defense was that the statute under which the suit was brought was void because repugnant to the Constitution of the United States.

It thus appearing that the suit is one of which the federal court cannot properly take cognizance, it is the duty of the court to remand it, whether requested to do so or not. *C., B. & Q. R. R. v. Willard*, 220 U. S. 413, 31 Sup. Ct. 460, 55 L. Ed. 521 (Supreme Court, April 10, 1911).

The motion allowed.

BARRETT v. CITY OF NEW YORK et al. PLATT v. SAME. WELLS

FARGO & CO. v. SAME.

(Circuit Court, S. D. New York. June 20, 1911.)

1. COMMERCE (§ 63*)—INTERSTATE COMMERCE—REGULATION—EXPRESS COMPANIES.

A person engaged in conducting an interstate express cannot be required by the state or municipal authorities to take out a local license as a prerequisite to conducting his interstate business within the state or municipality.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. §§ 103-122; Dec. Dig. § 63.*]

2. COMMERCE (§ 63*)—LICENSES—USE OF STREETS—EXPRESS WAGONS.

New York City ordinances, regulating express wagons using the streets of the city, requiring that they be licensed and marked with the word "express" and with their official numbers, that they be regularly inspected and pay a license fee of \$5 for each wagon, that the drivers shall also be licensed and pay a license fee of 50 cents, were reasonable and applicable to delivery wagons of express companies engaged in interstate commerce.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. §§ 103-122; Dec. Dig. § 63.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. COMMERCE (§ 57*)—INTERSTATE COMMERCE—REGULATION—EXPRESS COMPANIES—BONDS.

Code of Ordinances of New York, c. 7, art. 3, § 322, requiring a bond of express drivers for each licensed vehicle, conditioned for the safe and prompt delivery of all packages, parcels, and other articles, was a legitimate exercise of the city's police power and applicable to wagons of express companies engaged in interstate commerce.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 57.*]

Regulations as to transportation of property as interference with interstate commerce, see note to *Rupert v. United States*, 104 C. C. A. 259.]

4. LICENSES (§ 5½*)—POWER OF MUNICIPAL CORPORATION—MOTOR VEHICLES.

Laws N. Y. 1910, c. 374, provides that local authorities shall have no power to pass, enforce, or maintain any ordinance, rule, or regulation requiring from any owner or chauffeur, to whom the law is applicable, any tax, fee, license, or permit for the use of public highways, or excluding any such owner or chauffeur from the free use of such public highways, and that no ordinance, rule, or regulation contrary to, or in any wise inconsistent with the provisions of the article, shall be of any effect. *Held* that, where an express company delivers packages in the city of New York by the use of automobiles in charge of licensed chauffeurs under such act, such vehicles and chauffeurs are not subject to an ordinance of the city licensing and regulating express wagons and drivers.

[Ed. Note.—For other cases, see Licenses, Dec. Dig. § 5½.*]

In Equity. Suits by William M. Barrett, as president of the Adams Express Company, by Edward T. Platt, as Treasurer of the United States Express Company, and by Wells Fargo & Co., against the City of New York and others. Decree for complainants.

Guthrie, Bangs & Van Sinderen, for complainants.

Archbald R. Watson (William B. Hale, of counsel), for defendants.

LACOMBE, Circuit Judge. These ordinances were fully discussed in the opinion filed in disposing of the motions for preliminary injunction in these three suits. (C. C.) 183 Fed. 793. Much testimony has been taken, but it merely establishes by competent proof what the court assumed to be the facts when the former decision was made. Neither the new proofs nor the exhaustive briefs which are now presented have induced the court to reach a different conclusion upon the main features of the case from that already expressed.

[1] It may be taken for granted that when the group of ordinances contained in chapter 7 of the New York Code of Ordinances were enacted—if they were enacted as a single piece of legislation, which we may assume to have been the fact—the board of aldermen had primarily in mind the licensing and otherwise regulating certain specified businesses included in the enumeration of section 51 of the Greater New York Charter (Laws 1901, c. 466). It is difficult to see how any one can read the first two sections without reaching this conclusion. Section 305 provides that "the following *businesses* must be duly licensed, as herein provided"; and section 306 provides that "no person shall engage in or carry on any such *business* without a license thereof" under certain specified penalties.

"Expressmen" are included in the enumeration of section 305, but it is abundantly settled by authority that a person engaged in conducting an interstate express cannot be required by the local or state au-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

thorities to take out a local license as a prerequisite to conducting such interstate business in such locality. Complainant, therefore, is entitled to an injunction restraining defendants from taking any action to enforce complainant's compliance with the provisions of these two ordinances.

[2] Incidentally as part of the local legislation embodied in this chapter of the ordinances, regulations as to the use of the streets were adopted. They provide, among other things, that wagons used in express business shall be licensed and marked with the word "express" and their official numbers, and shall be regularly inspected by city inspectors, a license fee of \$5 being charged for each wagon. It is further provided that the drivers of each of such wagons shall be licensed upon certificate as to competency, shall exhibit their official licenses on demand, and shall report any change of residence to the Bureau of Licenses. A license fee of 50 cents is required for each driver. The court has no doubt that it was within the power of the board of aldermen to prescribe such regulations, and believing these provisions to be clearly separable from those which regulate generally the doing of an express business (*Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382), must decline to interfere with their enforcement for reasons sufficiently set forth in the former opinion. The amount of license fee charged is so small that it may fairly be considered merely as providing for the cost of oversight and inspection.

[3] It is also thought that the provision (section 322) requiring a bond to be given for each licensed vehicle in the penal sum of \$100 conditioned for the safe and prompt delivery of all baggage, packages, parcels, and other articles is a legitimate exercise of the police power, which is not to be condemned because it affects interstate commerce.

[4] When the cause was considered on the application for preliminary injunction the use of automobiles by one of these express companies was not discussed. It now appears that the Adams Express Company operates upwards of 90 automobiles; the drivers of these are chauffeurs. The state has itself taken charge of the regulation of these high-powered machines in public thoroughfares; the vehicles themselves and the chauffeurs are licensed by the state. Chapter 374 of the Laws of 1910 provides that:

"Local authorities shall have no power to pass, enforce or maintain any ordinance, rule or regulation requiring from any owner or chauffeur, to whom this article is applicable, any tax, fee, license or permit for the use of the public highways, or excluding any such owner or chauffeur from the free use of such public highways * * * and no ordinance, rule or regulation contrary to, or in any wise inconsistent with the provisions of this article, now in force or hereafter enacted, shall have any effect."

These express company automobiles and chauffeurs have been duly licensed by the state. It is not quite clear whether or not defendants are seeking to require additional licenses for such vehicles and drivers to be taken out under the ordinances; but, if they are doing so, injunction may issue covering all such vehicles and drivers as hold state licenses.

Let a decree be entered in accordance with the views above expressed.

UNITED STATES v. RISPOLI.

(District Court, E. D. Pennsylvania. June 14, 1911.)

No. 18.

WITNESSES (§ 61*)—COMPETENCY—PRIVILEGE—HUSBAND AND WIFE—"PERSONAL INJURY."

In prosecution of a husband for knowingly persuading his wife to go from one state to another with intent that she should practice prostitution in violation of the white slave act (Act Cong. June 25, 1910, c. 395, § 3, 36 Stat. 825), prohibiting white slave traffic, such offense was in the nature of a "personal injury" to her person so as to entitle her to testify against her husband.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 163, 174-176; Dec. Dig. § 61.*

For other definitions, see Words and Phrases, vol. 6, pp. 5340-5344; vol. 8, p. 7753.]

Indictment by the United States against Louis Rispoli for violating the white slave act, in that defendant knowingly persuaded a woman to go from one state to another in interstate commerce with intent that she should there engage in immoral practices, and knowingly causing her to be carried as a passenger in interstate commerce on the line of a common carrier from New York to Philadelphia.

Upon opening the case, the government called to the stand the woman alleged to have been persuaded and brought to Philadelphia in violation of the act. Counsel for defendant objected to her examination, asserting that she was the wife of the defendant. The assertion was assumed to be true, and, upon this assumption, the government presented the following argument in favor of the examination:

The question raised upon this objection—a question, be it noted, of marital *privilege*, rather than of testimonial *competency*, as would be the case if the testimony were *for* the defendant and not *against* him—is to be passed upon in the light of the law of Pennsylvania as it existed when the courts of the United States were established under the judiciary act of 1789 (Logan v. United States, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429); in other words, the common law of that date. The offense for which the defendant is on trial being the creation of an act of Congress passed in 1910, and representing an extension of the powers of Congress under the interstate commerce clause, which naturally enough finds no prototype in English or American legislation prior to the date in question and necessarily denies us the aid of any near precedent among the available cases, the decision should be guided by general analogies and a consideration of the spirit and purpose of the rule of privilege and its exceptions. Many reasons have been adduced in support of the rule itself, granting to husband and wife the privilege not to testify against, or be testified against by, the other. A fair statement, however, of the two principal reasons upon which the rule has been based is found in the following language from the opinion of Judge Paxson in the Court of Oyer and Terminer of Philadelphia in 1871 (Com. v. Reid, 8 Phila. [Pa.] 385):

"First, the community of interest subsisting between husband and wife and the identity of their legal rights. Second, motives of public policy which excluded them upon the ground that it would tend to disturb the harmony of the domestic relations to allow the wife or husband to be a witness for or against each other."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Exceptions to this rule, as firmly established as the rule itself, although not as clearly defined, appear throughout its entire history, based, to quote Judge Paxson again, upon "the necessity of the case, partly for the protection of the life and liberty of the wife, and partly for the sake of public justice." These exceptions are expressed in a variety of cases where injury of a personal nature has been threatened or inflicted upon the wife and where the principal reason for the rule, to wit, the avoiding of marital dissension, is conspicuously absent. One of the earliest and most instructive instances of the application of the exception is found in the notorious case of the trial of Lord Audley in the House of Lords in 1631, on a charge of having instigated a rape against his wife. 3 Howell's State Trials, 401. Prior to the trial, the question was propounded to the Justices of Assize "whether the wife in this case might be a witness against her husband for the rape," to which the Justices replied, "She might, for she was the party wronged; otherwise, she might be abused." In the trial before the House of Lords, the question again arose upon the objection of the defendant, whereupon the judges replied that, while in civil cases the wife might not be allowed to testify against her husband, "in a criminal cause of this nature, where the wife is the party grieved, and on whom the crime is committed, she is to be admitted a witness against her husband."

The principle underlying the decision above cited is found as an earmark of all subsequent rulings where an exception has been established, although the variation of judicial rulings upon this point is such that it is impossible to accurately state a rule which shall even fairly reconcile the conflicting decisions which have been rendered. Each case necessarily stands upon its own peculiar facts, and the case at bar is no exception to this observation. All the cases have agreed that an exception existed in the case of "personal injuries," but no definition of a "personal injury" that will reconcile the cases can be discovered, or suggested, nor can it be denied that the exception has been applied to many cases where no personal injury in the ordinary sense of the word has been suffered.

Amid this conflict of decision it seems that Mr. Wigmore (Pocket Code of Evidence 1910) is not far from the truth in offering as "a broad restatement of the common-rule exception," the statement that the privilege does not apply "in issues involving a tort by one against the other or a crime based on a moral wrong by one against the other." See, also, 4 Wigmore on Evidence, §§ 2227-2240. At any rate, whether this statement is or is not too broad, it is clear that the exception to the common rule must plainly be held to apply to a case such as the present, where the offense is based upon an act passed for the suppression of the "white slave" traffic, and where the indictment charges that the defendant caused a woman who is now assumed to be and to have then been his wife to be carried in interstate commerce for the purpose of causing her to engage in prostitution. The injury is a wrong of a peculiarly personal and revolting character, and it would indeed be a strange doctrine if we were compelled under the fiction of preserving domestic harmony to protect the husband from a disclosure of his crime by its victim, who is necessarily the chief, if not the only, witness to its commission. The terse reply of the Justices in Lord Audley's Case aptly recurs upon this point.

The assertion that the crime is based primarily upon an act of interstate transportation, rather than upon direct personal injury, does not alter the application of the exception. The court should look rather at the crime charged in its entirety, and at the plain purpose and scope of the act, and thus regarded there seems to be no doubt that the offense charged is fairly within the reason and spirit of the common-law exception to the rule of privilege.

We note that this was the attitude of the Supreme Court of Pennsylvania in construing the language of the witness act of 1887 (P. L. 158), permitting a husband or wife to testify against either "in any criminal proceeding against either for bodily injury or violence attempted, done or threatened upon the other." *Com. v. Spink* (1890) 137 Pa. 255, 20 Atl. 680. In that case, the

indictment charged a *conspiracy* to have a sane person confined in an insane asylum. In sustaining the admission of the wife's testimony, the Supreme Court used the following language:

"The words of the act establishing the competency of the wife or husband are not limited to prosecutions for the immediate act of violence, but embrace 'any criminal proceeding,' for such acts. A conspiracy to do an act of violence upon the body of another is a crime, and an indictment therefor is a criminal proceeding; and it may be quite as material, in the administration of criminal justice, to have the testimony of the injured party to the facts which tend to prove the conspiracy, as to the facts which tend to prove the direct act of personal violence."

While the decision is concerned with the interpretation of a statute, the liberal view taken by the court, and the reasons assigned therefor, are equally applicable to the case before us.

Jasper Yeates Brinton, Asst. U. S. Atty.
David Phillips, contra.

J. B. McPHERSON, District Judge. The court overruled the defendant's objection of privilege, and permitted the witness to be examined, on the ground that the offense charged was against the wife's person as really as if the defendant were charged with threatening to inflict physical violence, or of having actually struck her. In cases where the wife's personal rights were concerned, the exceptions to the husband's privilege should be benevolently regarded, and the offense in question was essentially within the spirit of the long-established rule that allows her to testify in protection or in vindication of her right to be secure in her person against threat or assault, even by her husband.

BROOKLYN TRUST CO. et al. v. McCUTCHEN.

(Circuit Court, E. D. New York. July 14, 1911.)

PARTNERSHIP (§ 257*)—ACCOUNTING—GOOD WILL.

Partnership articles provided that all assets should belong to two active partners, and in the event of the death or withdrawal from the firm of either of them, after an equitable accounting to him or to his estate of his interest in the same, the ownership should be with the surviving active partner; that for the purpose of determining such interest, an agreed valuation should be made at the beginning of each year of the trade-marks, brands and other assets of the business or firm which did not appear on its books, which, as regards them, should be by mutual consent the basis of the equitable accounting; that in the event of the death or withdrawal of either party, the liquidation of the business should remain with the surviving partner. The partners continued under such articles for ten years; the agreement being mutually extended without formal re-execution or signature. The firm kept books showing their ordinary assets and liabilities, "trade-marks" carried as an asset from year to year, valued at \$15,000. *Held* that, on the death of one of the partners it would not be assumed that such amount included the good will of the business exclusive of trade-marks but that the good will consisted of general credit and reputation of the firm, etc., for which the continuing partner was bound to account, though no valuation thereof had been made annually in the firm's books.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 563; Dec. Dig. § 257.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 189 F.—18

Action by the Brooklyn Trust Company and another, as executors of the will of Leonard J. Busby, deceased, against Charles W. McCutchen. On demurrer to complaint. Overruled with leave.

Dykman, Oeland & Kuhn (William N. Dykman and Arthur E. Goddard, of counsel), for plaintiffs.

Ivins, Mason, Wolff & Hoguet (Robert Louis Hoguet and William L. Ransom, of counsel), for defendant.

CHATFIELD, District Judge. A suit has been brought by the executors of one Busby, deceased, who before his death was in partnership with the defendant, under articles of partnership signed some 10 years previously, and extended by mutual agreement but without formal re-execution or signature. In general these articles of partnership provided for the conduct of a business from which the senior partner had just retired, but which was to be conducted under the same name as when he had been an active member of the firm. He was to receive interest upon any money left invested in the firm, but had nothing to do with the profits or losses, and as between him and the partners who were to continue the business, he ceased any connection which has to do with this case. The firm has always been solvent. At the death of the partner whose executors are now bringing suit, a large amount of assets was on hand, and the firm was selling a number of brands of goods represented by registered trade-marks, and also enjoyed a large domestic and export business (which had to do generally with the goods represented by these trade-marks and brands) with a valuable and extensive goodwill. The articles of agreement contain the following provisions:

"V. All assets * * * shall belong to the two active partners, * * * and in the event of the death or withdrawal from the firm of either of them, after an equitable accounting to him or to his estate of his interest in the same, the ownership shall be with the surviving or remaining active partner. For the purpose of determining such interest an agreed valuation shall be made at the beginning of each business year of the trade-marks, brands and other assets of the business or firm which do not appear upon its books, which shall as regards them be by mutual consent the basis of the aforesaid equitable accounting.

"VI. The partnership accounts and statements shall be made up to the first day of February in each year."

"VIII. * * * In the event of the death or withdrawal from the firm of either party, the liquidation of the business shall remain with the surviving or remaining partners."

The firm kept books showing their ordinary business assets and liabilities. It appears by the complaint, especially as amended upon the argument of this demurrer, that these books also showed the entry of an asset carried along from year to year under the designation of "trade-marks, \$15,000," and that this \$15,000 covered in no way the value of the good will or firm name, but was an inventory estimate of the mercantile value of the trade-marks as a brand or name for certain goods.

In so far, of course, as the good will in general might be treated as including whatever reputation or advertising was connected with the

name of the firm, some of this \$15,000 might have been included in good will, but the particular form of good will with which this action has to do is not the value to the business of the particular registered marks (for this had already been included). The general credit and reputation of the firm, the attraction of business which would later come to an established house, even if the particular trade-marks were transferred to other parties, is an asset for consideration herein. As the business year began upon the 1st of February, and as this partnership agreement was for a limited term, and inasmuch as the defendant has demurred to the complaint, thereby admitting the allegations set forth, it is evident that the partners, except for the first two years after the signing of the partnership agreement, did not take the trouble to even sign the articles for further extension, and that they never (during the course of the business) upon the 1st of February, nor during any business year, agreed upon the value of the other intangible assets of the firm, except in so far as the item of \$15,000 for trade-marks partially satisfied that provision.

The plaintiffs have sued for an equitable accounting and for the recovery of the value upon such an accounting of the good will or intangible asset represented by the business itself. They admit that the surviving partner had the right to liquidate, and that upon an accounting or liquidation, in the sense of payment to them of the amount representing the deceased partner's share, the business was to remain the property of the surviving partner. In the absence of insolvency, liquidation (especially where there is an agreement that the business shall belong to the surviving partner upon liquidation and accounting) must be held to mean a liquidating of amounts and a carrying out of the accounting, rather than a disposition of the assets to outside parties and a division of the proceeds between the parties themselves.

The plaintiffs suggest that by means of an accounting and ascertainment of profits for some preceding period, this court can liquidate or fix values, and then direct the payment by the surviving partner of the amount represented by good will over and beyond the trade-marks item referred to. The defendant suggests in support of his demurrer that, upon the complaint, the plaintiffs cannot have a liquidation or an equitable accounting other than as exactly specified in the last part of paragraph 5; that is, according to the express figures or statements of the parties themselves, in the books which they have made by agreement the basis for the accounting, and this brings out the real point of difference between the parties.

The defendant has taken over the assets into his possession and gone ahead with the business, subject to any responsibility which may be put upon him. He has shown his readiness to pay for the various items set forth in the books. He disavows his responsibility for good will, on the theory that neither partner entered nor caused to be entered any figures representing this item of good will, and that therefore both of them assented to the proposition that the good will was of no value over and above the physical assets and the trade-marks which were actually recited.

It may be assumed that good will is an asset (*Slater v. Slater*, 175 N. Y. 143, 67 N. E. 224, 61 L. R. A. 796, 96 Am. St. Rep. 605), and that if the parties had entered in their books, during the time when the agreement was in force, any value whatever for good will or other intangible assets, they would have been bound to liquidate upon that basis; and so long as they continued as partners (it being admitted by the pleadings that they assented to the continuation of the agreement), either of these partners might well be held estopped from denying that he had assented to a continuation of the valuation in so far as fixed. But to hold that either partner is estopped from showing that upon the first of February they neither took an inventory, figured up their profits, nor lived up to the agreement in all respects, and that therefore (at least after the expiration of the specified period) he is estopped from showing that they orally agreed not to carry out the agreement, as to some things which they might have orally agreed to continue in force, does not follow. Nor can it be determined as a matter of law that both parties voluntarily waived each one's right to any assets not shown by the books. The demurrer in effect puts the surviving partner in the position of claiming that he is entitled to enforce the unsigned extension agreement so as to hold for his own the entire business upon an equitable accounting; that is, upon a liquidation and payment by him of the value of his partner's share at the time of his death. But it cannot be held as a matter of law that he may also insist, by demurring to the complaint, that he is entitled to exclude from this equitable accounting everything which the partners did not include (or carelessly refrained from including) in writing or in books which were not kept according to the agreement, and which were only required to be kept by the very paper upon the nonsigning of which the defendant has any right to hold the property by agreement. Upon an ordinary accounting as partner, if the agreement had not been extended orally, payment for the good will would have to be included. Any actual evidence that good will was not carried at a substantial valuation, or that the partners agreed to treat it as of no value over and above the physical assets, should be considered, but this defense would have to be raised by answer.

The demurrer should be overruled, with leave to interpose any valid defense within the time specified in the order.

UNITED STATES v. WESELY et al.

(Circuit Court, D. Minnesota, Fifth Division. July 21, 1911.)

No. 756.

1. PUBLIC LANDS (§ 38*)—TIMBER AND STONE LANDS—ENTRYMEN—EQUITABLE RIGHTS.

One whose application to enter land under the timber and stone act (Act June 3, 1878, c. 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545]) has been received by the local land officers has a superior equitable right to a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

subsequent applicant, though by mistake of such officers the first application was noted on the tracts and plat book as relating to other land.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 82; Dec. Dig. § 38.*]

2. PUBLIC LANDS (§ 117*)—PATENTS—VALIDITY.

Where, through mistake of local land officers, the first application to enter land under the timber and stone act (Act June 3, 1878, c. 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545]) is noted on the tracts and plat book as covering another tract of land, and a subsequent applicant procures the first patent to the particular land, the patent is not absolutely void.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 324; Dec. Dig. § 117.*]

3. PUBLIC LANDS (§§ 120, 128*)—CONFLICTING RIGHTS—DETERMINATION.

Title to land entered under the timber and stone act (Act June 3, 1878, c. 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545]) having passed to defendant by prior patent, though another had made prior application to enter and made final proof, his application, by mistake of the local land officers, having been noted on the tracts and plat book as covering another tract of land, the question of the real ownership was open in the proper courts, in a suit by the United States to set aside such patent, or by one claiming under the first applicant to declare a trust.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332-335, 344; Dec. Dig. §§ 120, 128.*]

4. VENDOR AND PURCHASER (§ 231*)—BONA FIDE PURCHASERS—NOTICE—RECORDS—PATENTS.

Under Rev. Laws Minn. 1905, § 4735, authorizing recording of government patents, and under section 3356, making properly recorded instruments notice to subsequent purchasers, purchasers from a prior patentee are chargeable with notice of a junior recorded patent, and are chargeable through such patent with knowledge that, on account of the junior patentee's prior application to enter the land, the senior patentee was not entitled to the land as against him.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 513-539; Dec. Dig. § 231.*]

5. PUBLIC LANDS (§ 120*)—PATENTS—SUIT TO SET ASIDE—LACHES.

Laches does not bar suit by the government to set aside a patent to public land.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332-335; Dec. Dig. § 120.*]

In Equity. Bill by the United States of America against Wencl Wesely and others. Decree for complainant.

The District Attorney, for the United States.
Alford & Hunt, for defendants.

WILLARD, District Judge. Cain and Wesely, each to the exclusion of the other, attempted to acquire title to the land in question under the timber and stone act. 20 Stat. 89. The proceedings in the land office were as follows:

| | Cain. | Wesely. |
|---|----------------|----------------|
| Date of application | Oct. 21, 1903 | Nov. 19, 1903 |
| Final proof and payment..... | March 16, 1904 | March 4, 1904 |
| Approved for patent | Dec. 17, 1904 | Dec. 10, 1904 |
| Patent issued | Feb. 4, 1905 | Jan. 19, 1905 |
| Patent recorded in St. Louis County, Minn.. | Oct. 19, 1905 | April 30, 1909 |

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The land in question is in section 2. When Cain applied to purchase it, the local land officers, in noting his application on the tracts and plat book, by mistake made it appear that his application related to lands in section 1.

[1] Cain having made the first application to enter the land, and his application having been received by the local officers, his equitable right to the land is superior to Wesely's. *Hedrick v. Atchison, Topeka & Santa Fé Railway Co.*, 167 U. S. 673, 17 Sup. Ct. 922, 42 L. Ed. 320.

[2] Though Cain made the first application, Wesely secured the first patent. This patent was not absolutely void. *U. S. v. Schurz*, 102 U. S. 378, 400, 26 L. Ed. 167.

In *N. P. Railway Company et al. v. Trodick*, 221 U. S. 208, 31 Sup. Ct. 607, 55 L. Ed. 704, May 15, 1911, a patent was issued to the railway company for land which was excepted from its grant. The court said:

"So that the issuing of a patent to it in 1903, based on such location, was wholly without authority of law."

Nevertheless the court ordered a decree—

"recognizing *Trodick's* ownership of the lands in controversy and adjudging that the title under the patent was held in trust for him."

In *St. Paul, Minneapolis & Manitoba R. Co. v. Donohue*, 210 U. S. 21, 28 Sup. Ct. 600, 52 L. Ed. 941, the patent had been issued to the railroad company, and Donohue brought suit (101 Minn. 239, 112 N. W. 413) to have it declared that the railroad company held the legal title from the United States in trust for this plaintiff. The court used the language previously employed in several cases to the effect that, when the railway company attempted to select the land, it already had been segregated from the public domain, and was not therefore subject to entry by the railway company. It, however, affirmed the judgment of the Supreme Court of Minnesota, and must have held that a patent issued in defiance of this segregation nevertheless passed the title of the government to the patentee; in other words, that it was not void.

This doctrine of segregation has been announced in several cases. *Frellsen & Co. v. Crandell*, Register, 217 U. S. 71, 77, 30 Sup. Ct. 490, 54 L. Ed. 670; *Osborn et al. v. Froyseth*, 216 U. S. 571, 576, 30 Sup. Ct. 420, 54 L. Ed. 619; *Holt v. Murphy*, 207 U. S. 407, 412, 28 Sup. Ct. 212, 52 L. Ed. 271; *Weyerhaeuser v. Hoyt*, 219 U. S. 380, 31 Sup. Ct. 300, 55 L. Ed. 258. But in no one of them has a patent, issued notwithstanding the segregation, been held absolutely void.

[3] The title to the land having, therefore, passed to Wesely by the patent, the question as to the real ownership was open in the proper courts; and this was so, whether the suit was brought by the United States to set aside the patent, or by an individual to cause the title to be held in trust for him by the patentee. *U. S. v. Schurz*, 102 U. S. 378, 396, 26 L. Ed. 167.

Cain might have brought an action against Wesely to establish his equitable title to the land, but he could bring no action to set aside

the patent. In *re Emblen*, Petitioner, 161 U. S. 52, 16 Sup. Ct. 487, 40 L. Ed. 613; *Mowry v. Whitney*, 14 Wall. 434, 20 L. Ed. 858. It was said in *U. S. v. Beebe*, 127 U. S. 338-342, 8 Sup. Ct. 1083, 32 L. Ed. 121:

"If two patents to the same land had been issued to two different individuals, it may properly be left to the individuals to settle by personal litigation the question of right in which they alone are interested."

This statement was repeated in *Curtner v. U. S.*, 149 U. S. 662, 676, 13 Sup. Ct. 985, 1041, 37 L. Ed. 890. Notwithstanding these declarations, the decisions are to the effect that the United States can maintain this action to cancel the patent. *Oregon & California Railroad Company v. U. S.*, No. 1, 189 U. S. 103, 23 Sup. Ct. 615, 47 L. Ed. 726. In *Brandon v. Ard*, 211 U. S. 11-24, 29 Sup. Ct. 1, 53 L. Ed. 68, the court said:

"In suing the Missouri-Kansas Company the officers of the government acted wholly upon their independent judgment as to the validity of the patents it had issued, and as to what was its duty to those who have previously acquired rights in the particular public lands covered by those patents."

As against Wesely the government is entitled to the relief asked. It remains to consider the rights of the defendants *Sears and Fessenden*. They acquired the interest of Wesely after the patent to Cain had been recorded, but had no actual knowledge thereof. Otherwise they are innocent purchasers of the land for value. The patent to Wesely being voidable, but not void, it seems that an innocent purchaser for value would be protected. *U. S. v. Stinson*, 197 U. S. 200, 25 Sup. Ct. 426, 49 L. Ed. 724.

[4] However, the laws of Minnesota authorize (R. L. 1905, § 4735) the recording of a government patent in the local registries, and provide (R. L. § 3356) that every instrument properly recorded shall be notice to the parties. *Sears and Fessenden* were therefore charged with notice of the patent to Cain. Inquiry by them at the land office would have disclosed the fact that their remote grantor, Wesely, was not entitled to the land as against Cain. They therefore stand in no better position than Wesely.

[5] The government is not barred by laches. *U. S. v. Minor*, 114 U. S. 233-238, 5 Sup. Ct. 836, 29 L. Ed. 110. Where this view of the case will leave Cain, and whether his patent is void or valid, are questions that it is not necessary to decide.

Let a decree be entered for the complainant as prayed for in the amended bill.

JEWEL TEA CO. v. LEE'S SUMMIT, MO., et al.

(Circuit Court, W. D. Missouri, W. D. August 7, 1911.)

No. 3,694.

1. COMMERCE (§§ 41, 68*)—INTERSTATE COMMERCE—INTERFERENCE BY MUNICIPAL ORDINANCE—"PEDDLER."

A merchant in Chicago employed an agent, who solicited orders for merchandise in a city in Missouri and reported the orders. The merchant put up each article ordered in a package, and all the packages were shipped to the agent, who took the goods from the depot and delivered them to the customers and collected the price. *Held*, that the transaction was interstate commerce, and the agent was not a "peddler," within an ordinance of the city imposing a license for selling merchandise from wagons, and the ordinance, as applied to the transaction, was invalid as an interference with interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 30, 31, 107-109; Dec. Dig. §§ 41, 68.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5260-5267; vol. 8, p. 7750.]

2. INJUNCTION (§ 85*)—RESTRAINING ENFORCEMENT OF VOID ORDINANCE—JURISDICTION.

The enforcement of a municipal ordinance, void for interference with interstate commerce; by criminal proceedings, with frequent arrests and other arrests threatened, will be enjoined.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 155, 156; Dec. Dig. § 85.*]

In Equity. Suit by the Jewel Tea Company against Lee's Summit, Mo., and others, to enjoin the enforcement of a municipal ordinance. Injunction granted.

Cowherd, Ingraham, Durham & Morse, for complainant.
Chas. R. Pence and E. S. Bennett, for defendants.

SMITH McPHERSON, District Judge. The defendants, the city and its mayor and marshal, are sought to be enjoined from enforcing an ordinance requiring a license of \$1 per day for selling merchandise from wagons. There is a state statute with reference to peddlers. *Emert v. Missouri*, 156 U. S. 296, 15 Sup. Ct. 367, 39 L. Ed. 430.

[1] The bill of complaint and a deposition of complainant's agent, show without conflict the following facts: Complainant is the owner of a store, and does business in Chicago, Ill. It has an agent, by name of Heins, who every two weeks goes from house to house in the defendant city and solicits orders for tea, coffee, and other articles. The orders are reported by mail by the agent to the complainant. In thus reporting the orders, the agent does not give the names of the prospective purchasers. But he recites in his reports that a certain number of purchasers will each take one pound of tea, so many one pound of coffee, so many one-half pound, and so on. The articles are each put up in cartons, or packages, corresponding to the orders, of which the agent keeps a list. The separate packages thus wrapped are all put in one large box, shipped to Kansas City to a sub or other agency, and the requisite number of such packages reshipped to Lee's Summit,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

consigned to complainant. The agent takes them from the depot, puts them on a dray, which he accompanies to the homes of the customers, delivers the goods, collects the price, and takes new orders for the next bimonthly delivery. In case any of the packages are broken, they are not delivered, but are returned to the Kansas City house. Whether that house returns them to Chicago does not appear. The agent is on a salary, paid him by the house from Chicago. Its agent, Heins, has been arrested five times. Some of the cases are still pending in the trial courts. In others convictions have been obtained, which are now pending on appeal.

Those facts do not make Heins a peddler. The tea company desires patrons. Instead of obtaining names of possible purchasers by any method, and sending samples by mail or other agency to such persons, which clearly would not be peddling, or in violation of the ordinance, the company employs Heins, pays him a salary, and he takes samples for inspection, and solicits and takes orders. Instead of consigning the goods to a drayman, employed by letter, for delivery and collection, which clearly would neither be hawking nor peddling, nor a violation of the ordinance, it sends Heins to take the goods from the railway station, employs a drayman to haul the goods, accompanied by Heins, who carries the goods into the house, collects the price, and takes an order for the next delivery.

The shipment of the goods from Chicago to Kansas City, from Kansas City to Lee's Summit, draying them from the railway depot at Lee's Summit to the street in front of the customer's house, and carrying them by Heins or the drayman into the house, are all parts of one transaction, and that one transaction is interstate commerce. A shipment like that cannot be divided into parts, so as to make one or more parts an intrastate shipment. They must all be taken and regarded as one shipment, and when across a state line the same is an interstate shipment, and is covered by the commerce clause of the national Constitution (article 1, § 8). *United States v. Railroad* (D. C.) 149 Fed. 486, 490; *United States v. Railroad*, 157 Fed. 321, 326, 85 C. C. A. 27, 15 L. R. A. (N. S.) 167, and cases cited by the Circuit Court of Appeals for this circuit.

Ordinances, as well as statutes, like this, are in all instances artfully drawn, and their fairness and equality insisted upon. But courts do not observe mere words or phrasing, but look to the substance, effect, and meaning, and, when those are ascertained, enforce the rights of the parties. The ordinance in question is clearly one to compel the people, in the interest of local merchants and middlemen, to buy their necessities from them; and because of such influences, the officers first adopt, and then seek to enforce, such regulations, so as to eliminate outside venders of merchandise, including the necessary articles of food for every family table. The stale argument that the local resident, who votes, and who pays the taxes, and otherwise maintains the town, and bears the local burdens, should be given these privileges as against the outsider and nonresident, is in all such cases strongly urged. The tax of \$1 per day is not intended as a measure to raise revenue, but is intended to be, as it will be, if enforced, a

measure to prohibit all kinds of competition by outsiders. There is nothing new in all this. It was done by New York and Rhode Island before we had a government. It was the central thought for the creation of our government; and because of such interference the commerce clause was put in our national Constitution, giving to Congress, and it alone, the power to regulate commerce between the states.

To me the suggestion that a city, as part of the state, can, by a pretended taxation, control the shipment of freight and the sale of such commodities, coming from another state in their original packages, is not to be submitted to for a day. Many states have attempted this, often by statutes, and sometimes by city ordinances, with the result that such action is uniformly held by the Supreme Court of the United States to be void. A citation of a few of those cases will suffice. *Crandall v. Nevada*, 6 Wall. 35, 18 L. Ed. 745; *Welton v. State of Missouri*, 91 U. S. 275, 23 L. Ed. 347; *Henderson v. Mayor of New York*, 92 U. S. 259, 23 L. Ed. 543; *Railroad v. Husen* (a Missouri case) 95 U. S. 465, 24 L. Ed. 527; *Telegraph Co. v. Texas*, 105 U. S. 460, 26 L. Ed. 1067; *Moran v. New Orleans*, 112 U. S. 69, 5 Sup. Ct. 38, 28 L. Ed. 653; *Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. 862, 34 L. Ed. 455; *Brimmer v. Rebman*, 138 U. S. 78, 11 Sup. Ct. 213, 34 L. Ed. 862.

No better nor abler discussion of this question will be found than in the Lectures (No. 9) of that great jurist, Samuel F. Miller, Associate Justice of the Supreme Court, page 433, and the notes thereto at page 479 and following, where all the cases by the national Supreme Court down to the year 1891 are collected. And the fact, if it is a fact, that an ordinance or statute is declaratory against all persons, whether residents or nonresidents of the state, and the fact, if it is a fact, that the same is attempted to be enforced against both residents and nonresidents, will not give validity thereto. *Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. 862, 34 L. Ed. 455.

[2] The enforcement of a void ordinance, by criminal proceedings, with frequent arrests, and other arrests threatened, will be enjoined in an action in equity in United States courts. *City of Hutchinson v. Beckham*, 118 Fed. (8th Circuit Court of Appeals) 399, 55 C. C. A. 33. In my opinion the ordinance is void, being in effect a burden on commerce between the states.

An injunction will issue against its enforcement as against complainant and its agents.

FINANCE CO. OF PENNSYLVANIA v. TRENTON & N. B. RY. CO. et al.

(Circuit Court, D. New Jersey. May 22, 1911.)

1. RECEIVERS (§ 161*)—ADMINISTRATION—EXPENSES.

In general, expenses incident to the administration of a receivership are chargeable only on the income, unless there has been a diversion of current income to the purchase of additional equipment and the making of permanent improvements on the fixed property, in which case, if the cur-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

rent income is insufficient, obligations incurred in preserving and managing the property may be charged on property pledged.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 311; Dec. Dig. § 161.*]

2. RECEIVERS (§ 155*)—EXPENSES—POWER.

Where the power lines of two electric railway companies were connected with a knife switch, so that, when the switch was closed, power would flow from one to the other, the receiver of one of such companies was not entitled to recover the reasonable value of current alleged to have been furnished through such switch to defendant company, without any contract, without the knowledge of defendant's receiver, and without any necessity therefor, as against defendant's creditors after the administration of the receivership was closed.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 155.*]

In Equity. Bill by the Finance Company of Pennsylvania against the Trenton & New Brunswick Railway Company and others. On rule to show cause and proofs on petition of Mitchell B. Perkins, as receiver of the Bordentown Electric Light & Motor Company. Denied.

See, also, 183 Fed. 830.

Ellis L. Pierson and Gaskill & Gaskill, for petitioner.

Bayard Stockton and Joseph De F. Junkin, for complainant.

RELLSTAB, District Judge. The petitioner seeks to intervene as a party defendant, claiming to have a preferred equitable lien on the funds in the hands of the master ready for distribution. He claims that during the time that the Trenton & New Brunswick Railroad Company (hereinafter called the defendant company) was in the hands of the receiver, the Bordentown Electric Light & Motor Company (hereinafter called the power company), of which he is the receiver, without its knowledge, furnished the defendant company with electric current used by it as motive power for a portion of its lines.

The record shows that the power company plant was at Bordentown, and that under contract it furnished electric current to the Camden & Trenton Company before it passed into the hands of a receiver, and during the receivership; that it had no contract with the defendant company or its receiver; that the latter company had its own power plant, located about midway of its line, by which it operated its own cars; that at a place known as New York Junction, in Trenton, the line of the defendant company approached the line of the Camden & Trenton Company; that at such junction there existed what is known as a knife switch, which, when closed, connected the lines used by such two railway companies; that when the switch was closed the electric current from either power plant could flow along the line of either railway company, the source of the used flow, in whole or in part, depending upon the demand of the traffic on both lines at the same time and the ability of the respective power plants to furnish the required power to adequately operate the cars on its own lines; that such switch was put in by the managements of the two railroad companies prior to the appointment of the receivers; and that the traffic

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

agreement between such companies stipulated that the defendant company should furnish power to the Camden & Trenton Company through this switch when required.

The receiver for the defendant company was appointed in February, 1908, and discharged in May, 1910, after an allowance of his accounts and payments of all bills contracted by him. No representation was made to the court by the receiver of the defendant company that any additional power was necessary, and no order was made authorizing him to purchase or use electric current from any other concern or plant. No claim was presented to the receiver for any current alleged to have been supplied by the petitioner; the latter's excuse in that behalf being that he was not aware that such current was supplied until after the receiver was discharged. No claim is made that such current was used by the defendant company with the knowledge of its receiver. On behalf of the defendant company, it is insisted that during such receivership there was no necessity for any current additional to that furnished by its power plant, and that, if at times such switch was closed, it would result in the loss of its own current, rather than the gain of current from the power company.

Whether this insistence is correct may be said to be an open question; but the petitioner's right to intervene for the purposes claimed is not assured upon the mere showing that during such receivership the defendant company had obtained some of its electric current, or even that such current was beneficial to such company in the operation of its road. The petitioner does not seek to fasten its claim upon the income derived from the operation of such road. There is no such income. That was all distributed at the final settlement of the receivership, and none of it was diverted to uses inuring to the sole benefit of the secured creditors. The fund he seeks to attach is the proceeds of the sale under foreclosure proceedings, and represents the corpus mortgaged as security for the bondholders.

[1] From this recital, it is clear that no contractual relation existed between the power company or its receiver and the defendant company or its receiver; that the defendant company's lines could be operated without the aid of outside power; and that, if at times such current was obtained from the power company, it was without the knowledge of the receiver of the defendant company. In such circumstances, no basis exists for an implied contract to pay for such current by the secured creditors of such defendant company. The general rule is that the expenses incurred in the administration of the receivership are chargeable only on the income. In some instances, however, the corpus itself may be so charged. But such exceptions are never to be extended beyond their necessity. Instances and illustrations of special equities justifying a departure from the general rule will be found in the cases cited in *Gregg v. Metropolitan Trust Co.*, 197 U. S. 187, 25 Sup. Ct. 415, 49 L. Ed. 717, where it was held that a diversion of the current income to the purchase of additional equipment and the making of permanent improvements on the fixed property—a diversion that inures to the sole benefit of the secured creditors—and the payment of the obligations incurred in preserving and managing the prop-

erty under orders of the court, where the current income is insufficient for such purpose, may be charged upon the property pledged.

[2] Assuming that the court might entertain such a petition after the accounting and discharge of the receiver, the claim has not been brought within the exceptions which are confined to cases where, "in the administration of the affairs of the company, the mortgage creditors have got possession of that which in equity belonged to the whole or a part of the general creditors." *Fosdick v. Schall*, 99 U. S. 235-254, 25 L. Ed. 339.

The petitioner presents no equities which entitled him to intervene as a party defendant for the purposes prayed. The petition is therefore dismissed.

CAMP et al. v. FIELD.

(Circuit Court, N. D. Georgia. May 20, 1911.)

No. 1,327.

1. REMOVAL OF CAUSES (§ 89*)—PETITION FOR REMOVAL—CONCLUSIVENESS.

The facts stated in a petition for the removal of a cause to a federal court, which are not in conflict with anything contained in the pleadings in the suit, must be taken as true unless traversed.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 89.*]

2. REMOVAL OF CAUSES (§ 4*)—ACTIONS REMOVABLE—SUIT IN EQUITY.

A suit instituted in a state court as authorized by Civ. Code Ga. 1910, §§ 3895, 3896, to compel an executor to assent to a legacy to plaintiff, is a suit in equity, independent of and distinct from the administration of testator's estate by the ordinary's court, and may be removed to the federal court on the ground of diversity of citizenship.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 11-20; Dec. Dig. § 4.*]

In Equity. Suit by Mrs. Jane M. Camp and another against Richard H. Field. Motion to remand cause to state court. Overruled.

D. W. Blair, for complainants.

R. H. Field, for defendant.

NEWMAN, District Judge. This is a motion to remand. The suit, brought in the state court and removed to this court, was to compel Field, as one of the executors of George H. Camp, deceased, to assent to a legacy to the plaintiff, Mrs. Camp. The proceeding is instituted under a provision of the Code of Georgia, and the two sections of the Code which are material here are sections 3895 and 3896 of Hopkins' Code of Georgia of 1910. They are as follows:

"Sec. 3895. Assets to Pay Debts. All property, both real and personal, in this state, being assets to pay debts, no devise or legacy passes the title until the assent of the executor is given to such devise or legacy.

"Sec. 3896. Effect of Assent. The assent of the executor may be presumed from his conduct, as well as his expressed consent; the executor, however, cannot, by assenting to legacies, interfere with the rights of creditors, nor can he, by capriciously withholding his assent, destroy the legacy. In equity the legatee may compel him to assent."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The last language of the latter section is the most material here; that is, "in equity the legatee may compel him to assent."

The motion to remand is on the ground that:

"The petition in said case is not a suit at common law, as contemplated by the statute conferring jurisdiction upon this honorable court; the petition in this case is not a suit in equity, as contemplated by the statute conferring jurisdiction upon this honorable court; the matter in dispute does not exceed the sum or value of \$2,000 in the sense contemplated by said statute, in that no recovery is sought from the defendant therein. The petition does not seek a money judgment against the defendant, but simply to compel the performance of a duty assumed by him as executor of said deceased."

No amount is stated in the suit brought in the state court as being involved, but the petition for removal states that the matter in dispute exceeds the value of \$2,000 exclusive of interest and costs.

[1] The facts stated in the petition for removal, which do not conflict with anything contained in the pleadings in the suit removed, will be taken as true unless traversed. *Dishon v. Railroad Co.*, 133 Fed. 471, 66 C. C. A. 345; *Atlanta, K. & N. Ry. Co. v. Southern Ry. Co.*, 153 Fed. 122, 82 C. C. A. 256; *Waha-Lewiston Land & Water Co. v. Lewiston-Sweetwater Irrigation Co., Ltd.* (C. C.) 158 Fed. 137.

[2] The only real question for determination here is whether or not this is such a proceeding as to take jurisdiction of it in the Circuit Court would involve interference with the administration of the estate; that is, the authority and control of the court of ordinary of Cobb county over the probate proceedings and the administration and distribution of the estate.

The statute (3896) shows clearly that a proceeding in equity, entirely independent of and distinct from the administration of the estate by the ordinary's court, is authorized. If a suit to require the assent of the executor to a legacy may be brought in the superior court of the state, why may not such suit be brought in the Circuit Court of the United States, if the necessary jurisdictional amount is involved and the requisite diverse citizenship exists? I see no reason whatever why it may not.

I think this case is fully controlled by a recent decision of the Supreme Court in *Waterman v. Canal-Louisiana Bank & Trust Company, Executor*, 215 U. S. 33, 30 Sup. Ct. 10, 54 L. Ed. 80. This is the last decision which deals with the distinction between cases which will and those which will not interfere with the control of probate courts over the estates of decedents. The part that is pertinent here is stated in the second syllabus as follows:

"While federal courts cannot seize and control property which is in the possession of the state courts and have no jurisdiction of a purely probate character, they can, as courts of chancery, exercise jurisdiction, where proper diversity of citizenship exists, in favor of creditors, legatees, and heirs, to establish their claims and have a proper execution of the trust as to them."

No question is made in this case as to the existence of the requisite diverse citizenship.

The motion to remand will be overruled.

SPRUKS et al. v. LACKAWANNA DAIRY CO.

(District Court, M. D. Pennsylvania. July 19, 1911.)

No. 90.

BANKRUPTCY (§§ 348, 349, 350*)—CLAIMS—PREFERENCE.

Where petitioner was employed by the bankrupt to deliver milk at the bankrupt's premises with his team, and there was no evidence to individuate petitioner's services and those of the team, he was not entitled to priority either under Bankr. Law July 1, 1898, c. 541, § 64b (4), 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447), allowing preference for wages due workmen, or under section 64b (5), giving a preference to debts owing to any person who by the laws of the state or United States is entitled to priority.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. §§ 348, 349, 350.*]

In Bankruptcy. Petition by David Spruks and others for an order directing the receiver of the Lackawanna Dairy Company, a bankrupt, to pay petitioner a claim as preferred. Denied.

A. A. Vosburg, for petitioner.

George D. Taylor, for demurrer.

WITMER, District Judge. The petitioner was employed by the bankrupt to deliver milk at the bankrupt's premises with his team at a fixed price of \$120 per month. He asks that the balance due him on account of this contract should be awarded to him out of the bankrupt's estate as a preferred claim.

Section 64b of the bankruptcy law (clause 4) gives the following preferences:

"Wages due to workmen, clerks or servants which have been earned within three months, before the date of the commencement of proceedings, not to exceed \$300.00 to each claimant."

And clause 5:

"Debts owing to any person who by the laws of the states or the United States is entitled to priority."

It is evident that the petitioner's claim cannot be allowed under clause 4 of the above section because he is neither a workman, clerk, or servant within the meaning of the act.

Neither can his claim be allowed as preferred under clause 5, because the work has been performed in the state of Pennsylvania, petitioner having not been able to point to any act of assembly that makes his claim a preference. The earnings of horses and teams are not preferred under the state laws, except possibly when engaged in connection with certain business made the subject of special legislation. There is nothing in the petitioner's contract to individuate his services and the services of his team. So far as the facts appear before us, the earnings of each cannot be separated, and therefore no portion of the claim can be allowed.

The prayer of the petition is refused.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

MAR POY v. UNITED STATES.

(District Court, W. D. Texas, El Paso Division. July 21, 1911.)

No. 272.

ALIENS (§ 32*)—DEPORTATION—CITIZENSHIP.

In Chinese deportation proceedings, evidence *held* to require a finding that respondent was born in the United States, and was therefore a citizen not subject to deportation.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 93-95; Dec. Dig. § 32.*]

What Chinese persons are excluded from the United States, see note to Wong You v. United States, 104 C. C. A. 538.]

Deportation proceedings by the United States against Mar Poy. From an order of deportation, the alien appeals. Reversed.

This is an appeal from an order of deportation passed by the United States Commissioner at El Paso. The appellant claims to be a citizen of the United States by virtue of his birth in San Francisco, Cal. At the hearing before the commissioner the appellant, failing to produce evidence of his nativity, was ordered deported. Pending the appeal the testimony of two Chinese witnesses of San Francisco was taken to prove his birth in that city. There also appears in the record the testimony of the appellant in his own behalf and that of the Chinese interpreter and the deputy marshal introduced by the government. The statement made by the appellant to the immigration authorities at the time of his arrest was also submitted in evidence by the assistant district attorney.

Turney & Burges and W. D. Howe, for appellant.
S. Engelking, Asst. U. S. Atty.

MAXEY, District Judge (after stating the facts as above). The present is purely a fact case. The two witnesses for appellant—whose testimony is unimpeached—tell a plain, straightforward, and apparently truthful story, touching the birth of the appellant in San Francisco, and their knowledge of his whereabouts until he reached the age of 18 or 20 years. Although the statements made by the appellant in his testimony taken by Mr. Oliver after the order of deportation was entered by the commissioner differed in some respects from those made by him about the time of his arrest to the immigration officials, yet it must be remembered that he is unacquainted with our language, and that the statements, made to the immigration authorities, were made at an *ex parte* examination in the absence of either attorney or friends. The circumstances considered, due allowance should be made for admissions thus elicited.

Upon a review of the record the court is of the opinion that the appellant has fairly proved his American citizenship.

The courts should not be expected to ignore altogether the testimony of witnesses who tell a candid and consistent story and who stand unimpeached.

The order of deportation will be reversed and the appellant discharged.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

CITY OF VERMILLION v. NORTHWESTERN TELEPHONE EXCH. CO.

(Circuit Court of Appeals, Eighth Circuit. August 21, 1911.)

No. 3,466.

1. TELEGRAPHS AND TELEPHONES (§ 10*)—RIGHTS IN STREETS—CONSENT OF MUNICIPALITY—LIMITATION OF FRANCHISE.

Under Const. S. D. art. 10, § 3, which provides that "no telephone line shall be constructed within the limits of any village, town or city without the consent of its local authorities," a city may grant its consent to the construction of such a line on such terms and conditions as it chooses to impose, including a limitation of the term of the franchise.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 6; Dec. Dig. § 10.*]

2. MUNICIPAL CORPORATIONS (§ 120*)—CONSTRUCTION OF ORDINANCES—EXTRINSIC EVIDENCE.

The meaning of municipal ordinances, like that of other legislative acts, must be ascertained from their language; and the private and undisclosed views of members of a city council cannot be received, years after an ordinance was passed, and after litigation has arisen, to explain its scope or qualify its meaning.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 274-280; Dec. Dig. § 120.*]

3. TELEGRAPHS AND TELEPHONES (§ 10*)—GRANT OF FRANCHISE—CONSTRUCTION—"TELEPHONE LINE."

The words "telephone line," in a resolution granting the right to a company to construct a telephone line within and through a city, cannot be construed to limit the grant to the construction of a single through-line, to the exclusion of an exchange.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 10.*]

For other definitions, see *Words and Phrases*, vol. 8, p. 6899.]

4. TELEGRAPHS AND TELEPHONES (§ 10*)—RIGHTS IN STREETS—CONSTRUCTION OF GRANT.

A resolution of a city council, granting to a company engaged in constructing and operating through telephone lines and local exchanges the right "to occupy the streets, alleys, and public grounds within said city for the purpose of placing therein its poles, wires, and fixtures, constituting its telephone line within and through said city," reserving to the city the free use of its poles for fire alarm and police wires, embraced the right to construct and operate a local exchange; and, there being no limitation of the term of the grant, the company, which afterward purchased an existing exchange, was not bound by a limitation in the franchise under which such exchange was constructed.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 10.*]

Rights of telegraph and telephone companies to use of streets, see notes to *Southern Bell Telephone & Telegraph Co. v. City of Richmond*, 44 C. C. A. 155; *City of Owensboro v. Cumberland Telephone & Telegraph Co.*, 99 C. C. A. 14.]

Appeal from the Circuit Court of the United States for the District of South Dakota.

Suit by the City of Vermillion against the Northwestern Telephone Exchange Company. Decree for defendant, and complainant appeals. Affirmed.

Thomas Sterling (Jason E. Payne, City Atty., on the brief), for appellant.

J. O. P. Wheelwright and Charles P. Bates (E. A. Prendergast, Cobb & Wheelwright, and John I. Dille, on the brief), for appellee.

Before ADAMS and SMITH, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. Complainant and appellant, the city of Vermillion, S. D., on the 5th day of September, 1895, passed an ordinance granting to W. A. Cotteral and others, their successors and assigns, for a period of 10 years, the right to construct and maintain upon the streets and public grounds of the city, poles, wires, and fixtures proper and necessary for supplying to its citizens communication by telephone, subject to the usual police regulations as to the height and location of poles, etc. Under this ordinance the grantees erected a local telephone exchange.

On the 16th day of August, 1897, the city at the instance of the appellee, the Northwestern Telephone Exchange Company, passed the following resolution:

"Resolved by the mayor and city council of the city of Vermillion, South Dakota, that the right, privilege, and authority is hereby given, (——) granted to the Northwestern Telephone Exchange Company, its successors and assigns, to occupy the streets, alleys, and public grounds within said city for the purpose of placing therein its poles, wires, and fixtures, constituting its telephone line within and through said city, provided that the location of said poles and wires and fixtures shall be designated by the street committee of the city of Vermillion, with the understanding that all the costs of printing ordinances and otherwise, if any, shall be paid by said telephone company, and provided that all wires be at least 25 feet from the ground, and that the city of Vermillion may have the free use, if desired, of their poles for fire alarm and police wires, subject to the approval of said N. W. Tel. Ex. Co., said poles to be painted a uniform color and so set as not to interfere with public travel on said streets, and shall be set a uniform distance from the street line. The privilege granted under this resolution shall not be exclusive."

At the time this resolution was passed the Northwestern Telephone Exchange Company was engaged in constructing a long-distance line from Sioux City, Iowa, to Yankton, S. D., passing through Vermillion, and one of the objects of the resolution was to obtain authority from the city to use the necessary streets for this through line. Mr. Wainman, the executive officer of the company, however, testifies that at that time the local telephone exchange in Vermillion was owned by a rival company, with headquarters at Sioux City, Iowa, and that it was the intention of his company to erect a local exchange in competition therewith as soon as the toll line was completed. At about that time the Sioux City company became financially involved, and entered upon negotiations with the Nebraska Telephone Company, with headquarters at Omaha, for the sale of its property, including the local exchange at Vermillion, to that company. These negotiations resulted in a sale some time during the year 1898. The Nebraska Company being, like the Northwestern Company, a licensee of the American Bell Company, the motive for erecting a

local exchange at Vermillion by the Northwestern Company ceased. Arrangements were at once made for connection with the local exchange by the Northwestern Company, and a short time afterwards negotiations were commenced which resulted, in the year 1900, in the transfer of the local exchange at Vermillion from the Nebraska Company to appellee. It was these negotiations and transfers which Mr. Wainman testifies caused his company not to erect a local exchange at Vermillion under authority of the resolution above quoted.

The 10-year period prescribed by the Cottler franchise expired on the 5th day of September, 1905. The city, claiming that appellee, as purchaser of the local exchange, held it subject to that limitation, insisted that its right to use the streets for its wires and poles would cease at the end of the period. Negotiations were entered upon looking to the passage of a new ordinance, but the parties were unable to come to terms which were mutually satisfactory. Finally the city passed a resolution requiring the company to remove its poles and wires from the streets, and, the company having expressed its purpose not to comply with this resolution, the city brought the present suit to have the telephone system of the defendant declared to be a nuisance, and the defendant ordered to remove the same from the streets. The telephone company filed a cross-bill, in which it set up facts by which it claimed the right to maintain its local exchange without any further grant from the city. The trial court dismissed the bill, and entered a decree upon the cross-bill, adjudging that the defendant is entitled to maintain and operate its telephone system within the limits of the city, subject only to its police power. The present appeal seeks a review of that decree.

The case involves, not only the acts of the city council above set forth, but also certain statutes of South Dakota, and one provision of its Constitution. Section 554 of the Civil Code of the state reads:

"There is hereby granted to the owners of any telephone lines operated in this state * * * the right to use public grounds, streets, alleys and highways in this state subject to control of the proper municipal authorities as to what grounds, streets, alleys or highways said lines shall run over or across, and the place the poles to support the wires are located."

Section 1229 of the Political Code of the state, being part of the chapter providing for the organization of cities, vests the city council with power "to regulate and prevent the use of streets and public grounds for telegraph and telephone poles." Section 3 of article 10 of the state Constitution provides:

"No telephone line shall be constructed within the limits of any village, town or city, without the consent of its local authorities."

[1] Upon these statutes alone telephone companies would possess a franchise to stretch their lines in streets subject only to the police power of the city; but the Constitution imposes an important limitation upon that right. Counsel for appellee contends that the consent of the city is confined by the Constitution to the "construction" of a telephone line, that the franchise to use the streets is derived from the state, and that it was not competent for the city to limit the privilege to a term of 10 years, as was attempted in the Cottler ordi-

nance. We cannot accept this position. The Constitution vested the city with an absolute discretion as to the terms upon which it would give its consent. A limitation of the period for which the privilege should be enjoyed was not only within the provision of the Constitution, but was also justified by the highest wisdom as a proper protection of the rights of the city in its streets. Such limitations are at the present time a prominent feature of sound municipal action. This has been the uniform interpretation of similar constitutional provisions. *City of Allegheny v. Millville, etc., Ry. Co.*, 159 Pa. 411, 28 Atl. 202; *Mayor v. Houston Street Railway Co.*, 83 Tex. 548, 19 S. W. 127, 29 Am. St. Rep. 679; *People v. O'Brien*, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. Rep. 684. The Supreme Court of South Dakota has thus construed its Constitution. Speaking of that subject in *City of Mitchell v. Dakota Central Telephone Co.*, 127 N. W. 582, 584, the court says:

"It is quite apparent from this section of the Constitution that there is reserved to the municipality the right to grant or refuse to grant to telephone companies the privilege or franchise for establishing a telephone system within the municipality, and that it necessarily follows that, if it had the right to refuse to grant such franchise or privilege, it necessarily has the right to grant the same upon such terms and conditions as it may choose to impose, and, if the telephone company accepts the conditions, they become binding upon the company."

This construction is, of course, binding upon us.

The right to use the streets, which the statute purports to give, being conditioned by the Constitution upon obtaining the consent of the municipal authorities, the source of the beneficial right would seem to be the city rather than the state. Speaking of such a situation, the Circuit Court of Appeals of the Seventh Circuit, in *Andrews v. National Foundry & Pipe Works*, 61 Fed. 782, 788, 10 C. C. A. 60, 66, says:

"But, though capable of receiving, it could acquire no complete or effective right or franchise without the consent, and there is no impropriety, legal or verbal, in saying without the grant, of the city. The ultimate source of such franchises in all cases being the state, the difference between municipal power to grant them and authority to consent to the exercise of them is a difference of words rather than of substance. The language of the Court of Appeals of New York in the case of *People v. O'Brien*, 111 N. Y. 1, 18 N. E. 692 [2 L. R. A. 255, 7 Am. St. Rep. 684], is pertinent: 'This right, under the Constitution, could be acquired only from the city authorities, and they could grant or refuse it at their pleasure. The Constitution not only made the consent of the municipal authorities indispensable to the creation of such a right, but, by implication, conferred authority upon them to grant the consent upon such terms and conditions as they chose to impose.' So, here, not by reason of a constitutional provision, but by statute, the ultimate efficient right could be acquired only by act and consent of the city authorities, which they could grant or refuse at their pleasure."

Such, also, was the issue before the Supreme Court in the important case of *Blair v. Chicago*, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. Ed. 801. There the state of Illinois granted to a street railway the right to construct, maintain, and operate a single or double track railway in the city of Chicago, and in and along the streets, highways, and bridges of the city, upon such terms and conditions as the city

should prescribe. It was urged by the street railway companies that the franchise to lay and maintain their lines in the streets was derived from the state, and that the city was confined to their regulation under its police power, and that it was not open to the city to limit the period during which the franchise should be enjoyed. There were amendatory statutes which gave such color to this contention as to convince the lower court and lead to a powerful dissenting opinion, in which three justices of the Supreme Court united. The court, however, refused to adopt the construction urged by the railroad companies. It sums up its views on the subject at 201 U. S. 458, 26 Sup. Ct. 439 (50 L. Ed. 801), as follows:

"The act under consideration nowhere assumes to fix the duration of the grant, nor excludes the conclusion that it is embraced in the 'terms and conditions' which are to be fixed by contract with the city. If the franchise to use the streets, without regard to municipal action, was fully conferred by the legislative act under consideration, then the company had only to take possession of the streets, subject to regulations as to the running of the cars, etc., by the city council. On the contrary, under the terms of this act, the city, by withholding its consent, could prevent the use of the streets by the corporations. No way is pointed out by which this consent could be compelled against the will of the council. That body might, for reasons sufficient to itself, under the terms of this act, by withholding assent, determine that it was undesirable to have the corporations in control of the use of the streets. * * * What, then, was conferred in the franchise granted by the state? It was the right to be a corporation for the period named, and to acquire from the city the right to use the streets upon contract terms and conditions to be agreed upon. The franchise conferred by the state is of no practical value until supplemented by the consent and authority of the city council."

The same view is adopted by the Court of Appeals of New York in *Ghee v. Northern Union Gas Co.*, 158 N. Y. 510, 513, 53 N. E. 692, 693, where it is said:

"The legal effect of the consent, therefore, is the same as if the local authorities in form granted the franchise."

We are of the opinion, therefore, that the limitation contained in the Cotteral ordinance was valid; and, if the company's right to occupy the streets was confined to that ordinance, the decision of the trial court was wrong.

This brings us to the resolution of August 16, 1897. Upon its interpretation the case turns. If it grants the consent of the city to the defendant to place a local exchange in its streets, the decree should be affirmed; otherwise, it should be reversed.

[2] Counsel for the city urges that extraneous evidence should be received to show that the resolution was intended to cover a through line only. But the meaning of municipal ordinances, like other legislative acts, must be ascertained from their language. The record of debates in Congress is official and contemporaneous with the acts to which they relate, and yet they "are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body." *U. S. v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007. Much less can the private and undisclosed views of members of a city council be received, years after an ordinance is passed, and after litigation has

arisen, to explain its scope or qualify its meaning. We must, therefore, find the meaning of this resolution in its language alone.

[3] Counsel first says that the word "line" fairly indicates that the resolution was confined to a single through line, instead of a local exchange. No reasonable support can be found for such an interpretation of the word "line" when used in such expressions as telephone or telegraph line. In popular language the word has a generic meaning. We get its true significance in such phrases as "Great Northern Railway Line," "Northwestern Line," "Merchants' Dispatch Line," "White Star Line." In the Constitution of South Dakota the term is used in the same sense. Section 3 of article 10:

"No telephone *line* shall be constructed within the limits of any city without the consent of its local authorities."

The same use occurs in numerous statutes of South Dakota and other states. It cannot fairly be said, therefore, that the expression "telephone line," in the resolution restricts the grant to a through line. This language is equally appropriate to a telephone exchange.

[4] There are three features of the resolution which, in our judgment, make its language fairly embrace a local exchange:

(1) It grants to the Northwestern Telephone Exchange Company, its successors and assigns, the right "to occupy the streets, alleys, and public grounds within the said city for the purpose of placing therein its poles, wires, and fixtures." If it had been the intent of the resolution to restrict the grant to a single line through the city, the resolution would much more appropriately have specified the particular street or streets along which the single line should be erected.

(2) The grant is for a telephone line "within and through said city." Naturally counsel for the city says that "within" can be given no significance; that it should be rejected, and the resolution construed as if it read a telephone line through said city. No reason is given why the word "within" should be rejected, except that its presence militates against the construction desired. But it is the duty of courts, in ascertaining the meaning of statutes and ordinances, to give effect to every word which they contain, unless there is a clear and imperative necessity to reject a part of the language in order to give effect to the plain meaning of the entire statute or ordinance. In the present case no such necessity is shown. At the time this resolution was passed, the Northwestern Telephone Exchange Company was engaged in the business of operating local exchanges as well as through lines. In fact, at that time the necessity for local exchanges at important points as adjuncts of a through line was beginning to be appreciated, and has since become a well-recognized feature of the telephone business. In no other way can the through line be effective. Customers in large towns cannot be troubled to go to toll offices every time they wish to use the long-distance telephone. Under existing close commercial and social relations, it is often quite as important that business men be enabled to communicate from their offices with other cities and towns, as it is for them to communicate with business establishments in their own city. So imperative is this necessity that

in many cities dual exchanges have been established for that purpose. Great as are the objections to such a dual system of telephones, the practice has been too general to justify the rejection of the plain language of the resolution here under consideration solely upon the ground that Vermillion was already supplied with one local exchange, and it could not, therefore, have been the intent of the parties that another local exchange should be established.

(3) The resolution further provides "that the city of Vermillion may have the free use, if desired, of their poles for fire alarm and police wires." This language clearly indicates that a local exchange was to be established. The use of the poles of a through line would have been of no advantage for the purposes of fire alarm and police wires.

In our judgment, therefore, the resolution of August 16, 1897, expresses the consent of the city to the construction and maintenance of a local exchange. Under its terms the appellee could have erected such an exchange. Instead of doing so, it purchased the one which was already in existence. It has, of course, with respect to the lines so acquired, every right which it would have possessed if it had constructed the exchange itself. The wires and poles became its property. If no resolution had been passed, the Northwestern Company, in acquiring the property, would have taken it subject to the limitation of the Cottler franchise. But having itself an unrestricted right to place wires and poles in the streets for a local exchange, it may use the property freed from the restriction under which it was originally placed in the streets.

This construction does not vest the company with a perpetual franchise. Under section 12 of article 6 of the state Constitution, its rights are at all times subject to legislative action, and there are possibly other limitations. *Omaha Electric Light & Power Co. v. City of Omaha*, 179 Fed. 455, 102 C. C. A. 601.

The decree is affirmed.

KIMMERLE v. FARR.

(Circuit Court of Appeals, Sixth Circuit. July 12, 1911.)

No. 2,106.

1. BANKRUPTCY (§ 303*)—SUIT TO AVOID PREFERENCE—BURDEN AND MEASURE OF PROOF.

Under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 (U. S. Comp. St. Supp. 1909, p. 1314), the burden of proof is on a trustee in bankruptcy seeking to avoid as a preference a transfer of property made by a bankrupt to prove by sufficient evidence that the bankrupt (1) while insolvent (2) within four months of the bankruptcy (3) made the transfer in question; (4) that the creditor receiving the transfer will be thereby enabled to obtain a greater percentage of his debt than other creditors of the same class; and (5) that the creditor receiving the transfer had reasonable cause to believe that it was thereby intended to give a preference.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 303.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. TRIAL (§ 105*)—EFFECT OF ADMISSION OF EVIDENCE—FAILURE TO OBJECT.
Evidence received, though incompetent as hearsay or otherwise, if not reasonably objected to on proper grounds, constitutes evidence in the cause.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 260-266; Dec. Dig. § 105.*]

3. BANKRUPTCY (§§ 166, 303*)—VOIDABLE PREFERENCE—INTENTION OF DEBTOR—EVIDENCE.

To render a preference voidable under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), there must have been an actual intention on the part of the debtor to give a preference; but, where the necessary result of the transaction was to create a preference, the law will conclusively impute such intention to the debtor.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. §§ 166, 303.*]

4. BANKRUPTCY (§ 166*)—VOIDABLE PREFERENCE—INTENTION OF DEBTOR—EVIDENCE.

A presumption of law that a bankrupt in making a payment or transfer to a creditor intended to give a preference does not arise from the fact alone that he knew himself to be insolvent, nor is the creditor's belief that the debtor is insolvent in itself equivalent to a belief that he intends a preference so as to render the payment or transfer voidable under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445).

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 166.*]

5. BANKRUPTCY (§ 303*)—SUIT TO AVOID PREFERENCE—SUFFICIENCY OF EVIDENCE.

Evidence considered in a suit by a trustee in bankruptcy to set aside as a preference a transfer of a mortgage by the bankrupt to defendant as security, and *held* insufficient to sustain the burden of proof resting on complainant to show that at the time of such transfer defendant had reasonable cause to believe that the bankrupt intended to give him a preference, or that such preference was in fact intended.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 303.*]

Appeal from the District Court of the United States for the Western District of Michigan.

Suit in equity by Charles H. Kimmerle, trustee in bankruptcy of the City Bank of Dowagiac, against Willis M. Farr. Decree for defendant, and complainant appeals. Affirmed.

Clyde W. Ketcham and Chas. E. Sweet, for appellant.

Kleinhans & Knappen and C. W. Hendryx, for appellee.

Before SEVERENS and KNAPPEN, Circuit Judges, and SANFORD, District Judge.

SANFORD, District Judge. This is a bill in equity filed in April, 1909, in the United States District Court by the appellant, Charles H. Kimmerle, as trustee in bankruptcy of the City Bank of Dowagiac, against Willis M. Farr, the appellee, to set aside the assignment of a real estate mortgage from said bank to Farr, made within four months prior to the filing of the petition in bankruptcy, on the ground that said assignment constituted the giving of a preference voidable by the trustee under section 60 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]).

The District Court being of opinion that the trustee had not sus-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tained the burden of proof in establishing either that the bank in assigning the mortgage to Farr intended to give him a preference, or that Farr had reasonable cause to believe that such intent existed, entered a decree dismissing the bill; from which decree the trustee has appealed to this court.

The City Bank of Dowagiac, a partnership composed of Frank W. Lyle, Ira B. Gage, and Leon R. Lyle, had been for many years engaged in carrying on the business of a private bank in the city of Dowagiac, Mich. The officers who had the principal charge and conduct of its affairs were Frank W. Lyle, president, and Ira B. Gage, for many years cashier and later vice president. On October 4, 1907, the defendant Farr, who was treasurer of a local committee appointed for the purpose of building a soldiers' monument, apparently fearing litigation over the funds with other persons claiming to be the lawful members of the committee, withdrew from deposit in the City Bank all funds that had previously been deposited in the bank to the credit of the treasurer of the committee, aggregating \$2,549.86, and received in lieu thereof a draft in his favor for a like amount drawn by the City Bank, by Gage as vice president, on the National City Bank of New York, the City Bank agreeing at the time to pay Farr interest on this draft until collected, as on a certificate of deposit.

Farr retained this New York draft in his possession without presenting it for payment until February 7, 1908, when he took it to the City Bank, and surrendered it to the bank, and received from the bank in exchange a certificate of deposit for the amount of the draft and interest, \$2,567.20. He also received from the bank as collateral security for the payment of this certificate of deposit the assignment of a mortgage for \$3,000 held by the bank on certain real estate in Dowagiac. On the day following this assignment of the mortgage the bank closed its doors and suspended business. One week later the bank and its individual members filed their petition to be adjudicated voluntary bankrupts. Such adjudication was made, and the complainant was subsequently appointed trustee in bankruptcy in such proceedings.

The trustee is now seeking to set aside as a preferential transfer the assignment to Farr of the mortgage as collateral security to the certificate of deposit.

[1] Under sections 60a and 60b of the bankruptcy act, as it stood after the amendment of February 5, 1903 (Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 [U. S. Comp. St. 1909, p. 1314]), and prior to the amendment of June 25, 1910 (Act June 25, 1910, c. 412, 36 Stat. 838), the burden of proof is on a trustee in bankruptcy, seeking to avoid as a preference a transfer of property made by a bankrupt, to prove by sufficient evidence: That the bankrupt (1) while insolvent (2) within four months of the bankruptcy (3) made the transfer in question; (4) that the creditor receiving the transfer will be thereby enabled to obtain a greater percentage of his debt than other creditors of the same class; and (5) that the creditor receiving the transfer had reasonable cause to believe that it was thereby intended to give a prefer-

ence. Act July 1, 1898, c. 541 (30 Stat. 354); Act Feb. 5, 1903, c. 487 (32 Stat. 797); *Tumlin v. Bryan* (Fifth Circuit) 165 Fed. 166, 167, 91 C. C. A. 200, 21 L. R. A. (N. S.) 960; *In re Neill-Pinckney-Maxwell Co.* (D. C.) 170 Fed. 481, 483.

It is undisputed that the mortgage was assigned to Farr within four months of the bankruptcy, and that, if not avoided, its effect will be to give Farr a larger percentage of his debt than other like creditors. And while the evidence as to the insolvency of the bank at the time the mortgage was assigned is meager, falling short of the requirements stated in *Tumlin v. Bryan*, supra, and would, in large part, have been subject to exclusion if the action of the court below had been invoked thereon by proper objection, yet the fact that the bank was then insolvent is not now disputed, and in the present state of the record must be regarded as established by the weight of the proof. [2] Evidence, though incompetent as hearsay or otherwise, if not seasonably objected to on proper grounds or excepted to, constitutes evidence in the cause. *Schlemmer v. Railway Co.*, 205 U. S. 1, 19, 27 Sup. Ct. 407, 51 L. Ed. 681; *Damson v. Carrol*, 163 Mass. 404, 408, 40 N. E. 185. And see *Teal v. Bilby*, 123 U. S. 572, 576, 579, 8 Sup. Ct. 239, 31 L. Ed. 263; *Supreme Council of Catholic Knights v. Fidelity & Casualty Co.* (Sixth Circuit) 63 Fed. 48, 57, 11 C. C. A. 96.

The controlling question in the case then is whether the complainant has established by the weight of the proof the fact that Farr had reasonable cause to believe that by the assignment of the mortgage it was intended to give him a preference.

We first proceed to a consideration of the principles of law in the light of which this question of fact is to be determined.

[3] 1. Upon the question whether the requirement of section 60b that the creditor "should have had reasonable cause to believe that it was intended thereby to give a preference" involves the necessity of showing that the debtor in fact intended to give a preference, there has been a diversity of opinion.

In *Western Tie Co. v. Brown*, 129 Fed. 728, 64 C. C. A. 256, in which it was held by the Circuit Court of Appeals for the Eighth Circuit that a transaction by which a creditor, without the consent of the debtor, appropriated to the payment of his claim property of the debtor which happened to be under his control, constituted a voidable preference, the court said that:

"an intention on the part of the insolvent to give a preference by means of a transfer which he makes is not always indispensable to its existence."

This decision was, however, reversed by the Supreme Court on the ground that to constitute a preference the transfer or payment must have been the act of the debtor. *Western Tie Co. v. Brown*, 196 U. S. 502, 509, 25 Sup. Ct. 339, 49 L. Ed. 571, cited on this point in *Rector v. Bank*, 200 U. S. 405, 419, 26 Sup. Ct. 289, 50 L. Ed. 527.

In *Parker v. Black* (D. C.) 143 Fed. 560, it was held that, if the creditor knew or had reason to believe that the debtor was insolvent at the time a payment was made on a pre-existing debt, such payment constituted a voidable preference "irrespective of whether the bank-

rupt intended to give a preference or not." To the same effect is *Benedict v. Deshel*, 177 N. Y. 1, 68 N. E. 999.

On the other hand, in *Hardy v. Gray*, 144 Fed. 922, 75 C. C. A. 562, it was held by the Circuit Court of Appeals for the First Circuit, after a full consideration of the language of the act and a review of former decisions, that to render a preference voidable under section 60b of the bankruptcy act, and therefore one which must be surrendered by the creditor receiving it before proving his claim under section 57g, there must have been an actual intention on the part of the debtor to give a preference or that which the law regards as its equivalent, since without the existence of such intention in fact on the part of the debtor the creditor cannot be said to have had reasonable cause to believe that a preference was intended. The court said:

"Naturally and justly it would be said that no one could be charged with a reasonable cause to believe something unless the something existed to which the belief was supposed to relate. It is true that the ordinary rule that a person who does an act is supposed to contemplate what results therefrom, applies to cases of this class, but only as an element; and it cannot apply even as an element unless the party who does the act has a knowledge of the essential facts which tend to produce the resulting consequences, or at least has a reasonable cause to believe them, or purposely shuts his eyes."

In *In re First National Bank of Louisville*, 155 Fed. 100, 103, 84 C. C. A. 16, 19, this court, speaking through Judge Severens, said:

"But, to make the reception of payment a preference, the creditor must have had reasonable cause to believe that the debtor was intending to give him a preference over other creditors, and we incline to think, with the Circuit Court of Appeals for the First Circuit (*Hardy v. Gray*, 144 Fed. 922, 75 C. C. A. 562), that the reasonable implication of the language is that the debtor himself must have intended the preference. The very word signifies the doing of a thing with a purpose to give an advantage; and the construction which treats the motive of the debtor as indifferent seems artificial and awkward."

In *Rutland County Nat. Bank v. Graves* (D. C.) 156 Fed. 168, the court said:

"That, in order to make a payment a preference, it must have been made by the debtor with intent to prefer, and the creditor who received it must have had reasonable cause to believe that a preference was intended. To enable a trustee to recover, the equivalent of both these conditions must appear."

To the same effect are *Collier on Bankruptcy* (8th Ed.) § 60b, p. 671, and *Tumlin v. Bryan*, *supra*, in which the Circuit Court of Appeals for the Fifth Circuit cites, with apparent approval, both *Hardy v. Gray* and *In re First Nat. Bank of Louisville*, as holding that the reasonable implication of the statute "is that the debtor himself must have intended the preference."

After careful consideration we now hold, confirming, both upon principle and under the weight of authority, the intimation contained in *Re First Nat. Bank of Louisville*, that, under the necessary implication contained in section 60b of the bankruptcy act, in order to show that a creditor had reasonable ground to believe that a prefer-

ence was intended, it must appear that the debtor in fact intended to give a preference.

2. This rule is, however, subject to the manifest qualification suggested in *Hardy v. Gray*, supra, that the intention to give a preference may be shown not merely by proof of actual intent, but by its equivalent in law—that is, by proof that the necessary result of the transaction was to create a preference—in which case the intention to give a preference will be presumed. Where the inevitable result of a transaction between a debtor and creditor is to create a preference, the law will conclusively impute to the debtor the intention to bring about the result necessarily arising from the nature of the act which he does. *Western Tie Co. v. Brown*, 196 U. S. 502, 508, 25 Sup. Ct. 339, 49 L. Ed. 571.

[4] 3. However, a presumption of law that the debtor intended to give a preference does not arise from the fact alone that he knew himself to be insolvent. *Hardy v. Gray*, supra. It will often, if not generally, happen that a person, though in fact insolvent, will, while continuing his business in the usual way, make payments without a thought of disparagement of other creditors and with confidence in his ability to pay them all. In *re First Nat. Bank of Louisville*, supra, page 104, 155 Fed., 84 C. C. A. 16; *Tumlin v. Bryan*, supra, at page 168.

4. Neither is the creditor's belief that the debtor is insolvent in itself equivalent to a belief that he intends a preference. In *re First Nat. Bank of Louisville*, supra, at page 104; *Tumlin v. Bryan*, supra, at page 168; contra, *Parker v. Black*, supra. The creditor, as was said by this court in *Re First Nat. Bank of Louisville*, "may share in the confidence of his debtor, and may well suppose that the debtor while paying him his debt in the common course of business is acting without any purpose of giving special favor."

5. And as was said by the Circuit Court of Appeals for the Fifth Circuit in *Tumlin v. Bryan*, supra, at page 169:

"Reasonable cause to believe that a preference was intended cannot be held to be proved by circumstances that would merely excite suspicion. And circumstances may seem suspicious after the bankruptcy occurs that would not appear unusual at the time of their occurrence, and would then have presented no 'reasonable cause' on which to found a belief of intended preference. Merchants and other business men constantly continue to make payments up to the very eve of failure, and it would be disastrous to have them set aside on slight proof or mere suspicion. *Grant v. National Bank*, 97 U. S. 80, 24 L. Ed. 971; *Stucky v. Masonic Savings Bank*, 108 U. S. 74, 2 Sup. Ct. 219, 27 L. Ed. 640."

[5] We come then to consider whether, in the light of the foregoing rules of law, the complainant has shown, by the weight of the proof, that Farr had reasonable cause to believe that the bank intended by the assignment of the mortgage to give him a preference.

The material evidence bearing on this disputed question of fact, so far as necessary to be recited, is as follows:

Farr, who had been for about 20 years a depositor in the City Bank, and then had a small individual deposit in the bank, testifies, in substance, that needing, as treasurer of the monument committee, about

\$2,500 with which to make a payment to the contractor, Rutherford, he went to the bank on February 6, 1908, and stated to Lyle and Gage, the president and vice president, that he wanted to get the currency which he had on deposit represented by his New York draft; that they hesitated and said that there was a financial stress on at that time among banks throughout the United States; that people were calling for their money, and they were a little short; that, if he did not actually want to use the money and would let it stay there, it would be an accommodation; that they thought the stress would be over in three or four weeks, and that the bank was perfectly solvent, and that, supposing any crisis should come, the bank had the assets and he would be paid; that after quite a discussion, in which he said he could probably pay the money due out of some private funds, if necessary, they finally asked him whether he would not let the money stay and accept collateral for it; that he took this matter under consideration overnight, and the next morning went back and said that he wanted the money, and had concluded not to take collateral; that they asked him if he had heard any rumors about the bank, and he answered that he had heard a little rumor about it, but paid no attention to it; that he was questioned also about another matter, and said that he had heard that a Mr. Atwood had drawn his money out, to which Gage replied that there was nothing in the rumor and that Atwood was doing business right along with them, and offered to show him the books, to which he replied that he would take their word for that, and did not care to see the books; that they finally offered him the real estate mortgage in question, on property which he knew; that, before accepting this mortgage, he went to see the attorney for the monument committee; that this attorney said it would not do any harm, and advised him to take the security, which he then did; and that he took the collateral, not for himself particularly, but because he felt under obligation to the subscribers to the monument fund and thought it was a business precaution. He further testifies that he believed their statement that the bank had the assets and that if a crisis should come he would be paid; that he had no thought or information that the bank was insolvent or anything of that kind; that he believed the bank was solid, although he didn't know but that it might be short on currency or something of that sort, as all banks were liable to be, and as he knew that all banks were hedging at the time, and using clearing house certificates; that he did not know that either Lyle or Gage individually owed the bank anything; and that he knew their individual properties in a general way and supposed from their real estate holdings that they were both perfectly solvent.

Rutherford, the contractor, corroborates Farr to the extent of stating that about the time of the failure of the City Bank he applied to Farr to pay him \$2,500 to enable him to make a cash payment on granite he was purchasing for the monument, and that Farr replied that the banks were short of currency, and it might be a little slow, and he feared he would have to furnish the money from his own funds. But, on the other hand, Rutherford's testimony as to when the payments were made to him is vague and inaccurate, and it clearly

appears from other evidence that during all this time Farr had on deposit, as treasurer, more than \$2,500 at another local bank which he did not draw out, and that in fact he made no payment to Rutherford until July 18th, when he paid him \$2,550.

Lyle, the president of the bank, died before his evidence had been taken.

Gage, the vice president, testified, in substance, that Farr came into the bank on the afternoon of February 6th, and presented the draft, and said he guessed he would have to draw the money on it; that he asked him if he had to have it for the payment on the monument, and he rather hesitated, and finally said he did not, and he (Gage) remarked that if he did have to, if he would turn over the paper instead of using the currency, it would help the bank very much as he knew the condition of affairs at that time; that they were then in the midst or close of a panic; that Farr still insisted on drawing the money, and, after he had explained that he could not use the paper instead of drawing the currency, remarked that he had heard rumors, that it had been told him that the bank was in a precarious condition, and he wanted to protect himself by drawing the money; that he then asked Farr to go with him into the back room and talk to Mr. Lyle, which they did, and their previous conversation repeated in the presence of Lyle; that, after talking with Lyle for a time, Farr left the bank; and that the subsequent arrangement as to the assignment of the mortgage as security was made entirely between Farr and Lyle. He further testified that at that time the money market was very tight; that the banks in the cities were issuing clearing house certificates, and it was practically impossible for any country bank to get deposits which they had in financial centers to draw against, though drafts would go through the clearing house all right; that at that time if a customer came in he sometimes asked him if he could not use exchange or a certificate or something like that, but that if he insisted on the money he got it; and that the City Bank did not discount any paper, but borrowed and deposited as collateral, and thereby kept up its reserve. He further testified that, while he supposed the bank was securing Farr, the thought never entered his head that they were preferring him over other creditors, and he did not have any idea but that the bank was solvent and could pay everybody at the time, although he states that naturally he knew that they were putting Farr in a better position than the other creditors.

It further appears that in a former case in the criminal court in which Gage had been indicted he testified that he first learned or became satisfied that the bank would have to close at a conference between the members of the firm and their attorneys after supper on the night of Saturday, February 8th; that this decision was arrived at after some discussion and argument in regard to the insolvency of the bank; and that he then believed and insisted that the bank was solvent; although he admits that he confessed insolvency at the time the bank was closed, and that there was no substantial difference in the condition of the liabilities and assets of the bank as they existed on February 7th and on February 8th.

It further appears from the testimony of the trustee that the greatest borrowers in the bank at the time it failed were Lyle, the president, who owed it about \$132,000 in notes and overdrafts which had been going on approximately three or four months, and Gage, the vice president, whose notes and overdrafts at the time the bank closed and for about three months prior thereto amounted to about \$29,000; and that the total assets of the bank, as given by its books, including the notes of Lyle and Gage, amounted to \$250,644.56; and the trustee expressed the opinion that the bank was insolvent for several years before it closed. There was, however, no evidence whatever as to the liabilities of the bank, and no other evidence as to the financial condition of either Lyle or Gage, either as to assets or total liabilities; the sole fact appearing being that within a few days after the bank suspended business they filed voluntary petitions in bankruptcy.

It further appears that on February 8, 1908, the day after this mortgage was assigned, the books of the City Bank showed that it had a credit with the National City Bank of New York of \$103.41, after paying all drafts, and that, after the closing of the doors of the City Bank, the National City Bank of New York paid the trustee in bankruptcy the sum of \$2,132.56 as a balance due the bankrupt estate.

The evidence also shows that on February 6th Farr's individual balance on deposit in the City Bank was \$240.45; that on the 7th his account was credited with a deposit of \$17.02, and debited with a check of \$197.34, leaving a balance to his credit at the suspension of business of \$60.13. There is conflicting evidence as to whether this \$197.34 check was given for a feigned purpose in order to reduce his balance in the bank; but it is inconclusive in character, and need not be here set out.

There is also hearsay evidence to the effect that a few days after the bank's failure the local attorney for the monument committee, whom Farr consulted in reference to accepting the mortgage as collateral, and who appears inferentially to have drawn the mortgage, boasted in the presence of several persons that he had known that the bank was shaky and had taken care of his clients, who withdrew their funds or obtained security, although Farr's name was not mentioned in this connection. The testimony in this case was by stipulation taken by depositions before a notary public. At the time the depositions were taken the defendant objected to the questions calling for this evidence as hearsay statements not made in Farr's presence and incompetent, and also moved to exclude the testimony of one of the witnesses, but no ruling was made on the objection or motion by the notary public, and the witnesses were permitted to answer; and, so far as the record discloses, neither these objections nor the motion were called to the attention of the court at the hearing or any ruling of the court invoked thereon or any exception taken in any manner at the hearing to the admission of these answers. Upon the question whether the case of *White v. Wansey* (Sixth Circuit) 116 Fed. 345, 347, 53 C. C. A. 634, is to be regarded as controlling authority in support of the proposition that under the circumstances this evidence is now to be regarded as admitted without objection and by consent and

as now constituting a part of the evidence in the case, to be considered for what it is worth, the court is not agreed; but, without determining this question, it is sufficient to say that in the opinion of a majority of the court, even if considered, its character is such that it is not controlling of the case or of sufficient weight to change the conclusions otherwise reached by the entire court.

In addition to this it should be stated that Farr's attempted explanation of why he did not turn over the New York draft to Rutherford as a payment on account is evasive and unsatisfactory.

Upon the whole, after a careful consideration, the conclusion is reached that the complainant has failed to show by the weight of the proof regarded by the members of the court, respectively, as now constituting part of the evidence to be considered in the case, that Farr in receiving the assignment of the mortgage had reason to believe that a preference was thereby intended. While we concur in the view expressed by the learned district judge who tried the case below, that the reasons which Farr alleges for insisting upon the payment of the draft in currency were not the sole and probably not the controlling reasons for his action, and have no doubt but that he was alarmed about the condition of the bank, we think, with the trial judge, that neither the feeling of alarm and anxiety which exists among depositors in banks at a time of general financial depression and anxiety, such as is shown in this record to have existed at the time these transactions occurred, nor even the suspicion which the weight of the proof indicates that Farr may well have entertained, and did in fact entertain, as to the condition of the bank, is, in the light of the other evidence, sufficient to establish the fact that in receiving the assignment of the mortgage he had reason to believe that the bank intended thereby to give him a preference.

Under the meager evidence in this record as to the exact financial condition of the bank and of the individual members composing the firm, we do not think that it satisfactorily appears from the weight of the evidence that the officers of the bank then contemplated its suspension of business or insolvency, or that in assigning the mortgage to Farr they intended to give him a preference over other creditors. It is our opinion that upon the whole the weight of the proof, especially the testimony of Gage, indicates that they believed the financial depression would soon be over and that the bank would be able to continue in business and meet its obligations, and that they assigned the mortgage to Farr as collateral, not for the purpose of giving him a preference over other creditors, but rather for the purpose of satisfying his mind as to the condition of his claim so that he would not insist upon the immediate withdrawal of currency from the bank and precipitate a condition of affairs which in the then prevailing financial condition might result disastrously to the bank. The evidence discloses no motive whatever on the part of the officers of the bank for intending to prefer Farr over other creditors; on the contrary, they appear to have acted as they did in the expectation that by thus tiding over matters with him they would be able to keep up the bank as a going concern and eventually relieve its embarrassment.

While it is true that the financial condition of the officers who were its principal debtors, may have been such that it was clearly impossible for them to discharge their obligations to the bank and to make its insolvency inevitable, so that in assigning the mortgage to Farr an intent to give him a preference would have to be imputed to them as an inevitable result of the action taken, under the doctrine of *Western Tie Co. v. Brown*, 196 U. S. 502, 508, 25 Sup. Ct. 339, 49 L. Ed. 571, *supra*, it is sufficient to say that this condition of affairs is not shown in the evidence. What was the exact financial condition of the individual officers of the bank or of the bank itself and what was in fact the bank's financial prospect under the situation known to its officers is a matter of mere conjecture; and conjecture cannot supply the deficiency in the proof. The only positive evidence on this point is the testimony of Gage, who states unequivocally that the thought never entered his head that the bank was giving Farr a preference and that he had no idea but that the bank was solvent, and who appears to have believed up to the very hour of its suspension that the bank was in fact solvent and to have opposed its suspension to the very last. In the face of this evidence there is no sufficient inference to be drawn from the meager evidence in the record that either officer of the bank then realized that there would be any such loss on their personal loans from the bank as to make a collapse of the bank inevitable or imminent; and the entire conduct of its officers is consistent with the statement which, according to Farr's statement, they made him at the time that they believed the financial stress would be over in a few weeks, and that, even if a crisis should come, the bank had the assets.

We therefore hold that upon the entire evidence the trustee has not shown by the weight of the proof that the bank by the assignment of the mortgage to Farr intended to give him a preference, and has failed to show that Farr, in receiving the assignment of the mortgage, had reason to believe that a preference was thereby intended.

The decree of the District Court dismissing the bill of complaint will accordingly be affirmed, and the appeal dismissed, with costs.

CALICCHIO et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. June 19, 1911.)

No. 263.

CRIMINAL LAW (§ 1169*)—APPEAL AND ERROR—REVIEW—HARMLESS ERROR—
ADMISSION OF EVIDENCE.

Various assignments of error to the admission of evidence over objection in a criminal case considered, and *held* without substantial merit either on the ground that the rulings were correct, or the error cured by a subsequent direction to the jury to disregard the evidence, or that it was not prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137-3143; Dec. Dig. § 1169.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
189 F.—20

In Error to the Circuit Court of the United States for the Southern District of New York.

Giuseppe Calicchio and others were convicted of a criminal offense, and they bring error. Affirmed.

Olcott, Gruber, Bonyng & McManus (W. M. K. Olcott, Terence J. McManus, and Albert Levy, of counsel), for plaintiffs in error.

Henry A. Wise, U. S. Atty., and Felix Frankfurter, Asst. U. S. Atty.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. This is a writ of error to a judgment convicting Giuseppe Calicchio, Giuseppe Morello, Ignazio Lupo, Nicholas Sylvester, Antonio Cecala, Salvatore Cina, Vincenzo Giglio and Giuseppe Palermo of making counterfeits of the \$2 silver certificate of the United States and of the United States \$5 bill, in violation of section 5414, U. S. Rev. Stat. (U. S. Comp. St. 1901, p. 3662), and of making plates to do so in violation of section 5430 (page 3671), and of keeping possession of the aforesaid counterfeits in violation of section 5431 (page 3671). Cina and Giglio did not join in the writ, and no one appeared for Palermo at the hearing.

The trial occupied four weeks. The case of the government depended upon the testimony of Comito, one of the counterfeiters, who turned informer, and of his mistress, Katrina, corroborated in many particulars by other witnesses and by circumstances. There can be no doubt that there was evidence to sustain the conviction of all the defendants. The plaintiffs in error rely upon various assignments intended to show that the trial on the whole was not a fair one. It is particularly urged that Lupo and Morello could not have been convicted but for the unfair atmosphere that was created by the prosecution. As this charge of unfairness is serious and made sincerely, and the sentences imposed were severe, we shall consider the assignments relied upon seriatim. We may remark preliminarily that, while things were said and done in the long trial which are much to be regretted, they create a more violent impression when brought together on this hearing than they could have made as they occurred separately at the trial from time to time. The record shows on the whole great regard for the defendants' rights, and the charge in particular was full, clear, and unexceptionable.

First. Nicastio, a witness of defendants, examined in support of an alibi for Morello, was asked on cross-examination:

"Q. Ask him if he was arrested in January, 1905, at Bushwick and Johnston avenues, Brooklyn? Mr. Towns: Objected to as incompetent, irrelevant and immaterial. The Court: You may ask him. (Exception.)"

This exception was good, but the question was not answered. Then followed this question:

"Q. Ask him whether he knows whether he was arrested for blackmail or not by Lieut. Vacharris? Mr. Towns: Object to the form of the question. The Court: He may answer if he knows what it was for. (Exception.)"

The particular ground of objection is not intelligible to us. There is no defect in form, and if there be any error, it was apparently

harmless because the witness answered that the judge discovered "it was all lies, and he was honorably discharged."

Second. Terrenora, one of the defendants' witnesses, examined particularly as to defendant Morello, who was his stepbrother, testified that Morello was arrested in April, 1903, and that his own brother Vincent had been arrested and the whole family frequently searched by detectives. In the direct examination of this witness on these subjects, the government gave the following warning:

"Mr. Smith: I want to caution my learned friend that this is opening the door to a line of testimony that I shall go into quite exhaustively."

Upon cross-examination the government proceeded as follows:

"Q. Do you know that your brother Vincent to-day is under indictment for having in his possession counterfeit bills? Mr. Towns: Objected to as incompetent, irrelevant. The Court: Overruled. (Exception.) A. No, sir. * * * Q. Do you know that Giuseppe Morello was arrested on April 13, 1903, as the principal in the murder of Bernedetto Mardonio, who was found cut up in a barrel? Mr. Towns: Object to the form of the question as incompetent, irrelevant and immaterial. The Court: Overruled. (Exception.)"

We do not understand what is meant by the objection to the form. The substance of the question related to the arrest of Morello in April, 1903, which was brought out on direct.

"Q. Do you know that the last two people that were seen with Mardonio were Giuseppe Morello and Ignatz Lupo? A. That I don't know, and that is not true. Mr. Towns: I object. The Court: Overruled. (Exception.) Q. How do you know that is not true? A. Why did they leave them out; why didn't they keep them and give them the electric chair? Q. How do you know they were not the last men to see them? A. I don't know; I know there was about thirty arrested for that case; that I know. Mr. Towns: Objected to as incompetent, irrelevant, and immaterial, and highly prejudicial to the other defendants. The Court: Overruled. (Exception.)"

Thereupon the court said:

"I sustain the objection that it is prejudicial to the other defendants and cannot be used against them at all and must not be. You are not to assume, gentlemen, that it is true at all. I only permit it because Mr. Morello's counsel insisted upon going into this, and having done that the district attorney may ask about it."

We think this was a proper disposition of the matter. Morello's counsel had opened the door.

Third. Sylvester, one of the defendants, was asked on cross-examination:

"Q. Where were you on the 15th of December, 1909? A. December 15, 1909, I was arrested. Mr. Towns: I move to strike out. The Court: Denied. (Exception.) * * * Q. Were you arrested on the 15th day of December, 1909, for burglary in the second degree? Mr. Towns: Objection. The Court: Sustained. Mr. Towns: I move to withdraw a juror. The Court: Denied. (Exception.)"

The objection was sustained, and the question was not answered. We think the court was right in refusing to withdraw a juror.

Fourth. Oddo, a witness for defendants, called to account for

Lupo's movements, testified on direct examination that Lupo had business trouble, and did not want to meet his creditors. On cross-examination he was asked:

"Q. Did he ever tell you that Lieut. Petrosini of the New York police force went over to the dock at Hoboken and got \$30,000 worth of his goods that were being shipped to Messina? (Objection. Overruled. Exception.) Q. Did he ever tell you that? A. No, sir."

The question can be justified as relating to a subject brought out upon the direct examination, and the answer was calculated to make it harmless.

Fifth. Tali, a witness for the defendants, called to prove Morello's prolonged illness, was asked on cross-examination:

"Q. Do you know anything about Mr. Morello while he was abroad in Italy? A. No. Q. Do you know anything about his being convicted in Italy? A. No, sir. Q. Do you know anything about that? Mr. Towns: Objected to. The Court: Overruled. (Exception.)"

It will be noticed that this question was not answered, and it would not have been error to permit it to be answered inasmuch as the same question had been answered without objection immediately before.

"Q. Do you know anything about Mr. Morello while he was abroad in Italy? Mr. Towns: I take an exception to the district attorney's question as improper, incompetent, and immaterial, and framed for the purpose of having the jury in this case consider things that are not in the case, and it is not competent or pertinent here, or relevant, what Mr. Morello may have done in Italy. The Court: The district attorney has asked the question, and the jury will draw no inference because he asked such a question."

The question was never answered.

Sixth. During a heated colloquy between all concerned, the district attorney spoke of the defendants' counsel as being backed by a crowd of thugs, which remark the court ordered to be stricken out and so corrected the obvious impropriety.

Seventh. Burke, a government witness, testified that Capt. Flynn of the Secret Service, found a revolver on Cecala the day he was arrested:

"Mr. Towns: I admit the revolver was found on the defendant. Mr. Smith: Then I offer it in evidence. Mr. Towns: I object to it. I think this revolver was found on Mr. Cecala, but I object to it as being incompetent and irrelevant testimony. The Court: It may stand. This revolver was found on him when he was arrested. Mr. Towns: Exception. Revolver marked 'Exhibit 78.'"

Callaghan, a government witness, was examined as follows as to Morello:

"Q. Was there anything on that bed when he got up? A. Right under his back he was lying on a pillow, and right under his back was a .44 caliber revolver fully loaded. Mr. Towns: I move to strike out this testimony that right under his back was a .44 caliber revolver, as being incompetent, irrelevant, and prejudicial to Morello's case; in that he brings an extraneous and unrelated matter into the case. It is not claimed that he resisted the officers in any way, and I respectfully submit, if your honor please, that the introduction— Mr. Smith: It was all introduced some time ago without objection. Officer Henry testified to it without any

objection on the part of Mr. Towns. The Court: Motion denied. Mr. Towns: Exception."

Rubano, a government witness, testified that when he started to search Lupo's room, Lupo protested, saying, "What do you want?" Witness saw him reach his hand into the drawer, and witness opened the drawer and found a revolver, which he turned over to Chief Flynn. It was a Colt automatic, caliber .25.

"Received in evidence against Lupo—Exhibit 100. Revolver offered in evidence, objected to by Mr. Towns as incompetent, irrelevant and immaterial—was not found on Lupo, but found in his house. Overruled. (Exception.) Let it stand for the present against Lupo, but not against the others."

Flynn, a government witness, testified that he found a .32 caliber revolver on Cecala.

"Mr. Towns: Move to strike out the testimony with regard to his revolver. Overruled. (Exception.)"

It was of course no proof that these persons in connection with whom revolvers were found had committed the crime of counterfeiting. At the same time the fact was a part of the history of what took place, and we do not think that any one of the defendants was injured by the proof of it, or by the offer of the revolvers in evidence.

Eighth. Comito, a government witness, was asked on direct:

"Q. Did Cecala say anything to you about Morello when you left Morello's house? Mr. Towns: Objected to. I would like to know what year. Q. 1909? A. He told me this gentleman here is Giuseppe Morello and is the same man who has been implicated in the 'Barrel Murder.' Mr. Towns: I move to strike out as irrelevant, incompetent, and ask that it be stricken out. Motion denied. Mr. Towns: I move to withdraw a juror upon that statement of the district attorney. Motion denied. Mr. Byrne: I ask your honor to grant me an exception to the refusal of the court to withdraw a juror. The Court: Yes. Mr. Byrne: I ask your honor to grant my exception to a remark made in the course of this trial by the Assistant United States Attorney conducting it in which he said: 'It is a well known fact that he was'—meaning that Morello was arrested in connection with the 'Barrel Murder.' The Court: He will strike that out. The jury will disregard any reference to the barrel murder. Mr. Barra: An exception on behalf of Calicchio to the remarks of the district attorney. The Court: The jury will disregard the question entirely."

The question was improper, should not have been asked, and should have been stricken out. The arrest of Morello for the murder proved nothing. Still we think the court corrected the error by stating that the jury should disregard any reference to the barrel murder.

Ninth. Comito, a government witness, was asked on cross-examination:

"Q. Can you fix positively within three or four days, the time when you say Morello and Lupo and the rest of these defendants here assembled in the little house that you had occupied with Katrina, the first month of your living in Highlands, and when, as you say, Salvatore destroyed the bills? (Objected to as already gone over. Sustained. Exception.)"

He had already testified on cross-examination that this occurred on the last days of February or the first days of March, and it was within the discretion of the trial judge to say how often this same

matter could be gone into. The same witness on cross-examination was asked:

"Q. You have testified that you printed that two-dollar bill (showing). The Court: Never mind about that; what is your question? Mr. Byrne: That is the basis of the question, if your honor will bear with me I propose as quickly as possible to frame it. The Court: If you desire to ask any question, ask a question, and do not recite the testimony. If you cannot comply with that order, take your seat. Now go on. Mr. Byrne: I take an exception to your honor's remark. The Court: Now you may take your seat right now. Mr. Towns: Would your honor— The Court: Take your seat. Now, Mr. District Attorney, do you desire to ask this witness any further questions?"

While we think counsel should have been permitted to ask his question and to continue his cross-examination, there is nothing to show, and we cannot believe, any defendant was prejudiced by what occurred.

Tenth. Devoti, a government witness, testified on cross-examination that he had spoken to one Vassi whose house was subsequently searched and some of these counterfeit notes found there:

"Q. What did you say to Vassi and what did he say to you? Mr. Smith: Objection on the ground that it is incompetent, irrelevant, and immaterial. (Sustained. Exception.)"

If counsel had intended to rely upon such an exception as this, he should have stated some ground upon which the conversation with Vassi would be competent.

Eleventh. Henry, a government witness, was recalled for further cross-examination and this occurred:

"Q. Ever been in Illinois? (Objected to as incompetent, irrelevant, and immaterial.) The Court: I think this should have been gone over before. You cannot open up a general history of this witness now. Mr. Towns: As long as the witness is in court, I may recall him for cross-examination at any time. The Court: It is not a matter that would have escaped attention. If a man has cross-examined a witness and has inadvertently overlooked a question, the court will permit him to be recalled; but to open up wide and spend the time now is too late. (Overruled. Exception.) Q. Have you ever been in Joliet? Mr. Smith: Objected to as incompetent, irrelevant and immaterial. (Same ruling. Exception.) A. I would rather answer that question."

There was nothing in the direct examination to justify this question. Nor was there apparently any effort to show its materiality. We think it was within the discretion of the trial judge to exclude it.

Twelfth. Paradies, a witness for the government, testified that he had received a counterfeit \$5 bill in his store at Highlands in June, 1909, from an Italian, which he deposited in his bank, and which the cashier punched as counterfeit. This would of course have been irrelevant and immaterial but for the fact that the bill was subsequently identified by Special Agent Flynn as one of the counterfeits in question.

Thirteenth. Flynn, a government witness, testified that he had received from the other government agents some lithographic stones on which he had found the outline of the counterfeits. One of the stones was then submitted to the jury.

"Mr. Towns: Object to this proceeding. The Court: Mr. Reporter, take on the minutes that the jury is now permitted by the court to examine the inscription and marks upon the stone in evidence, said to have been found at Calicchio's, and said to be admitted by him to be his. The jury is now allowed to inspect those stones, and I give you an exception."

The grounds of objection are not stated, but probably were, first, that the stones had not been sufficiently identified as Calicchio's, and, second, that they had been altered; but it had been sufficiently proved by previous witnesses that these stones did come from Calicchio's room, and that the only alteration was the cleaning of them. The same witness was asked:

"Q. Tell us what attracted your attention to these particular counterfeits, or how did you first learn of their being passed? A. By complaints from banks and merchants. Mr. Towns: Objected to as irrelevant and incompetent. The Court: He may state that his attention was called to them by complaints. (Exception.) Many of them were sent to witness in response to letters and telephone calls. Mr. Towns: Move to strike out all the statement about some bills being sent to him. The Court: The \$5 bills you are referring to? A. Both twos and fives. The Court: That are charged in the indictment were sent to him? Mr. Smith: Yes. Mr. Towns: Exception. These bills came from different localities covering a radius of 100 miles. Mr. Towns: Same objection. (Same ruling and exception.)"

We discover no error in these rulings. The same witness testified that he had bought 10 of these counterfeit \$5 notes for \$17 in marked bills, and that he found three of these marked bills on the defendant Cecala when arrested:

"Q. And on the 15th, when Cecala was arrested, these three marked bills were found on his person. Is that right? A. Yes, sir. Mr. Towns: Objected to as incompetent, irrelevant, and immaterial as against any one except Cecala, and as against Cecala objected to as incompetent, irrelevant, and immaterial and not properly identified. (Overruled. Exception.) * * * Witness gave out the money on the 13th and got the counterfeits on the 15th, and on the 15th he took this marked money which he had given to the purchaser from Cecala. Mr. Towns: I object to the three bills going in evidence. The seller is a myth, and two days have elapsed when in a roll of \$221 on a man who is dealing in groceries, these three bills are alleged to have been found. The Court: Your motion is to strike out these bills that he purchased, and the three marked bills that he testified about, and the evidence regarding them on the ground that you have stated? Mr. Towns: Yes. (Denied. Exception.)"

We see no error in this.

Fourteenth. Lupo, one of the defendants, testified on direct that he had killed a man in Italy in self-defense, named Salvatore Morello. On cross-examination he was asked:

"Q. Did you ever know or learn what the action in the court of Italy was in regard to your murder of Salvatore Morello? The Court: I will not allow the word 'murder'; he says he shot him. Q. Now, did you ever hear or learn what the action of the court of Italy was in regard to your shooting a man? Mr. Towns: I object. (Overruled. Exception.) A. I don't know what they did. Q. Did you ever learn that you were convicted in Italy of a willful and deliberate murder? Mr. Towns: I move to strike out that question, and ask the court to instruct the jury to disregard it. (Motion denied. Exception.) A. I don't know it. Q. Did you ever know that proceedings were had in Italy on the 12th of March, 1890, in which

Salvatore Gonzazzo testified, M. Strazzeri, G. Angeri and V. Soudari, and after the testimony of those witnesses was given, you were convicted of a deliberate and willful murder? Mr. Towns: That I object to as being highly improper and a question based upon facts not in evidence and as a characteristic by the district attorney of something that never occurred. The Court: I don't know whether it did or did not; he may ask whether he ever learned that fact. Mr. Towns: I object to it on behalf of all the defendants. (Overruled. Exception.)"

The inquiry as to what occurred in Italy was germane to the examination in chief, though irrelevant. Moreover, the court, in his charge, corrected any prejudice on the part of the jury, saying as to Lupo:

"You must not consider the action of the authorities in Italy. Dismiss that from your minds, so far as there has been a reference to it, if you heard any reference to it."

Fifteenth. Rosalia Cina, the wife of the defendant Cina, and Giovannina Giglio, the wife of the defendant Giglio, were examined on behalf of all the defendants except their husbands, but we discover no merit in the exceptions taken to their testimony.

The record would have been much better without many of the foregoing matters, but we are satisfied that no harmful error was committed which would justify a new trial. The judgment is affirmed.

PIONEER S. S. CO. v. JENKINS.

(Circuit Court of Appeals, Sixth Circuit. July 11, 1911.)

No. 2,113.

1. SHIPPING (§ 86*)—PERSONAL INJURIES—QUESTIONS FOR JURY.

In an action by a trim operator in employ of a coal company against a steamship company for personal injuries sustained by falling into an open hatch while loading the vessel, *held*, that the court properly submitted to the jury the question of the right of the plaintiff to be on the vessel as established by custom and the defendant's knowledge of such custom.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 353-360; Dec. Dig. § 86.*]

2. APPEAL AND ERROR (§ 724*)—ASSIGNMENTS—GROUND OF OBJECTION.

Where the ground of the objection on which an assignment was based was not stated, the assignment cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2997; Dec. Dig. § 724.*]

3. SHIPPING (§ 86*)—PERSONAL INJURIES—EVIDENCE.

In an action against a steamship company for personal injuries received by plaintiff, while assisting to load a vessel, in falling into an open hatch, a question was asked as to a custom of the trim operator, such as plaintiff, going down on the deck of the boat to look after his machinery, and the answer was that it was a general custom for him to do so, and that "when he was starting a boat was practically the only time he had to look after the machinery, while it was high up out of the water, and that he did this by going down on the deck of the boat, taking advantage of that time because they would roll from 10 to 12 cars in such

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

large vessels before they shifted when they started." *Held* the answer was not immaterial nor subject to the objection that it related merely to an individual habit, and that its object was to create a right of plaintiff to be on the deck of the vessel and a correlative duty of defendant.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 353-360; Dec. Dig. § 86.*]

4. EVIDENCE (§ 147*)—ADMISSIBILITY—NEGATIVE TESTIMONY.

In an action by one injured by falling into the hatch of a vessel, testimony by witness in answer to an inquiry as to the condition of the hold with "reference to being dark or otherwise," that it was pitch dark, that you could see nothing at all, and that there were no lights down in the hold, but that afterwards when he came back he saw lights, was not merely negative.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 435-437; Dec. Dig. § 147.*]

5. SHIPPING (§ 86*)—PERSONAL INJURIES—NEGLIGENCE—QUESTION FOR JURY.

In an action against a steamship company for personal injuries from falling into an open hatch while engaged in loading the vessel, *held* that, under the evidence and circumstances, it was not error to refuse to hold as a matter of law that "an open hatchway on a ship provided with the usual coamings is not evidence of negligence," but that such question was properly submitted to the jury.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 353-360; Dec. Dig. § 86.*]

6. SHIPPING (§ 86*)—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action against a steamship company by a trim operator for injuries sustained by falling in an open hatch in loading the vessel, *held*, that the question of plaintiff's contributory negligence was for the jury.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 353-360; Dec. Dig. § 86.*]

In Error to the Circuit Court of the United States for the Northern District of Ohio.

Action by David L. Jenkins against the Pioneer Steamship Company. Judgment for plaintiff, and defendant brings error. Affirmed.

S. H. Holding (Goulder, Day, White & Garry and Holding, Masten, Duncan & Leckie, on the brief), for plaintiff in error.

R. B. Newcomb (Skiles, Green & Skiles and A. G. Newcomb, on the brief), for defendant in error.

Before SEVERENS and KNAPPEN, Circuit Judges, and SANFORD, District Judge.

KNAPPEN, Circuit Judge. The defendant in error, who was plaintiff below, sued plaintiff in error, as defendant, on account of injuries received by the plaintiff in falling through an open hatchway and into the hold of the steamship D. R. Hanna, owned by the defendant, and controlled and managed by agents doing business at Cleveland. Shortly before the accident the steamer had been made fast to the dock of the Pittsburgh Coal Company, at Cleveland, for the purpose of being there loaded by the Coal Company with a cargo of coal. The loading was being done by a machine belonging to the Coal Company and located upon its dock, by means of which machine cars of coal were dumped into a chute and carried therethrough into the hold of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the vessel. Plaintiff was trim operator, in the employ of the Coal Company, upon the loading machine, his station being upon a platform several feet above the deck and amidships; from which station the trimming was directed by means of machinery there worked by the operator in connection with a telescope communicating with the chute and extending through the hatchway. The Hanna was a large vessel, having 32 hatches, each 10 feet wide and 48 feet long, being 12 feet from center to center, with coaming about 8 inches high. The distance between two hatches with chains on was 2 feet. Each hatch cover was composed of 10 telescoping plates, 5 on each side, worked by machinery from the center toward the ends of the hatch. When the hatch was entirely open, a passageway of about 3 feet was left between the cover plates and the side of the ship. But 28 of the Hanna's hatches could be loaded without removing the boat from the slip and ending her about. Accordingly hatches 1 to 28, both inclusive (counting from the bow), were entirely open for the purpose of loading. Hatch No. 29 was open at the center for some distance, the extent being in conflict. After loading had been in progress for a few minutes, the telescope being in No. 28 hatch, where the loading began, plaintiff in coming from the side of the boat opposite the dock back to the machine, for the purpose of resuming his station upon the platform, fell through the opening in the cover of hatch 29. There was trial by jury, and verdict and judgment for plaintiff. The errors assigned relate to the questions of (1) plaintiff's right to be upon the vessel at the time of the accident; (2) defendant's alleged negligence; and (3) plaintiff's alleged contributory negligence.

1. Plaintiff's right to be upon the deck.

The petition alleges that during the work of loading it became necessary and proper for plaintiff to go aboard the boat (a) "in pursuance of the request and invitation of" the captain of the boat; (b) "in pursuance of (plaintiff's) duties in safely carrying on said work of coal loading"; and (c) "in order that the work of loading said boat could be properly, safely and expeditiously carried on to the benefit of both the Pittsburgh Coal Company and said defendant."

There was testimony tending to show that it was the duty of the trim operator, as the loading of the vessel was about to begin (or perhaps just after it started), and after the telescope had been inserted in the hatch, while the boat was still high out of the water, to descend to the deck, oil the sheaves and look after the cables and trimming machinery and see that they are in good condition; that this is practically the only time the trim operator has to perform this duty; that it was the general custom at the Pittsburgh Coal Company's dock for the trim operator to take this course; that plaintiff always did so, and that he had in that capacity trimmed the Hanna at least four times at the dock in question during the then present season and once during the previous season. The greater part of this testimony was received without objection. Plaintiff also testified that just before the loading began the master of the boat, on leaving, asked plaintiff to "keep an eye" on the mate, and that if anything should go wrong or it should be necessary to "wind" the boat around, he call the master by tele-

phone. Plaintiff further testified that immediately after the work of loading was begun the conditions proved such as to make it necessary for him to go to the deck and examine his cables; that he did so; that he found the water was being pumped too rapidly out of the boat, causing her to get "real high," and he accordingly walked over to the further side of the boat to ask the mate "to stop pumping the water, as if she got up too high we could only get a couple of cars at a time in without shifting," that the mate sent orders to the engineer accordingly; that plaintiff started back to look at the cable on the other side of the machine and to go aboard the "rigging," in doing which he walked across hatch 29 and into the opening. No motion for directed verdict was made at the close of the testimony. Defendant requested no instruction touching plaintiff's right to be upon the deck at the time of the accident.

The jury were instructed that:

"If the plaintiff had any duty which from time to time called him to the deck, whether that duty related to the care of the machine which he was operating or a conference with any of the officers of the boat, or if, in the customary way of operating the trim machine, it was the habit of the trim operator to pass from time to time upon the boat, and the defendant knew that that was the habit of the trim operator, then the duty rested upon the defendant to use ordinary care for the safety of any such person, who thus had the right, or was known to the defendant to be in the habit of passing upon the deck of the vessel"—

[the instruction regarding the custom of going aboard the boat being later in the charge limited to "a custom of going aboard to perform some work related to the matter of loading the boat or related to the matter of the loading machine," with the express instruction that, in order that such custom be effective, it must be found that the defendant knew that plaintiff had such custom, "or that the loader or the trimmer had the custom to go aboard the boat for the purpose of performing work in relation to the loading"; that the instruction was not "intended to apply to a mere custom except that which has a foundation upon the performance of some work by the trim operator in connection with the loading of coal"; and that unless the plaintiff was "rightfully" on the deck, "either by reason of some work or some known custom which he (defendant) recognized and knew of," the plaintiff could have no right to recover]. The idea of a duty owing by defendant to plaintiff as a mere volunteer was thus excluded.

[1] The only exceptions taken by defendant to the charge of the court on this branch of the case were, first, "to the submission to the jury of the right of the plaintiff to be upon the vessel as established by custom, and as to whether the defendant knew of such a custom, there being no evidence that the defendant knew of any such custom"; and, second, to the part of the charge contained above in brackets, to which counsel announced "the same exception, in that there is no evidence that the defendant had any knowledge." The evidence above stated, in our opinion, tended to show defendant's knowledge of the alleged custom. Under these two exceptions defendant assigns error upon several extracts from the charge. It is perhaps enough to say that such assignments are not based upon proper exceptions. But

assuming that they were, we think the criticisms presented are not well taken.

[2] The only remaining assignments, so far as argued, relating to this branch of the case are directed to the admission of certain testimony as to the custom in question. As to one of these assignments (the fourth) it is enough to say that the ground of the objection on which the exceptions and assignments are based was not stated. This assignment can therefore not be considered. *Burton v. Driggs*, 20 Wall. 125, 133, 22 L. Ed. 299; *Erie R. R. Co. v. Schomer*, 171 Fed. 798, 805, 96 C. C. A. 458.

The objection on which the first assignment is based was that the defendant was not apprised of the custom. This objection was not good. The question of knowledge was for the jury.

[3] The remaining assignment is based upon an objection of immateriality to a question as to the custom at the dock at the time of the accident and prior thereto, "with reference to working on the 'D. R. Hanna' and other boats of that type, with reference to the trim operator, such as Jenkins was, going down on the deck of the boat to look after his machinery, and, if so, when did he do it?" Defendant disclaimed exception to the form of the question. The answer was:

"It is a general custom and rule for the trimmer, and when he is starting a boat is practically the only time he gets to look after his machinery, on the boat, when the boat is high up out of the water, and he gets a very good chance to look at his sheaves and cables and at the machinery underneath which he cannot do at any other time. Q. How does he do that? A. He generally goes down on the deck of the boat. He takes advantage of that time, you see, because they roll from 10 to 12 cars in those large vessels before they shift when they start."

This testimony is criticised as relating merely to an individual habit, and that its object was to "create a right of plaintiff to be on the deck of the vessel and a correlative duty of defendant to have regard for such right." We do not so consider the testimony, and do not think it open to the objection of immateriality.

2. Defendant's alleged neglect of duty.

Defendant's negligence is alleged in plaintiff's petition to consist, first, "in having and permitting to exist said open hatchway immediately next to and adjacent to said coal loading machine, without having said open hatchway protected or guarded in any manner whatsoever"; and, second, in failing to warn the plaintiff in any way "of the existence of said open hatchway either by verbal notice or by the presence of lights or otherwise." There was evidence tending to show that when a vessel of the size and type of the Hanna was at a dock of the size of that here in question, there was a general custom, at the time and place in question, to open only the hatches that were immediately to be worked or filled; that the hatches which could not be worked or filled, as the vessel was then located, if open at all should be wide open; and that open hatches should be lighted by lights in the hold, if electrically lighted, otherwise by lights on deck. The object of such precautions would manifestly be to prevent one being misled by the fact of a partly open or unlighted hatch in stepping upon

it to his possible injury. Such custom would surely be a reasonable one. The testimony as to its existence was in conflict. The testimony on the part of the plaintiff tended to show that hatch 29 was open for only 4 to 6 feet of its length, thus leaving upwards of 42 feet, or seven-eighths of the hatch closed; also that this opening was not sufficiently lighted, either by lights upon the deck of the vessel or on the dock or in the hold, to enable one to discover this comparatively small opening. The reasonable inference from this testimony on the part of the plaintiff is that there was nothing in the appearance of hatch 29 to indicate to one walking thereon that it was partially open, but that one stepping upon the hatch and seeing it for the most part covered and unlighted would naturally infer, in view of the custom stated, that it was entirely covered and safe to walk upon. Plaintiff testified that as he started to go across hatch 29 a member of the crew was standing thereon. There was also testimony that after plaintiff fell through the hatch, the operator on the coal tippie, who was attracted by plaintiff's cries, himself fell into the same opening, and that two others barely escaped the same mishap. On the other hand, the testimony of the defendant tended to show that the custom referred to did not exist; that the hatch in question was kept open according to general custom for purposes of ventilation, as well as to afford a view of the cargo, hold floor and water compartment; that the hatch was open for one-half to two-thirds of its length and easily seen by means of lights upon both dock and deck, as well as lights burning in the hold. The defendant requested no instructions regarding the alleged custom of keeping unused hatches closed or lighted during the process of loading. It presented, however, request No. 1, as follows:

"Plaintiff cannot recover in this action unless defendant were guilty of some breach of duty which it owed plaintiff. It did not owe plaintiff any duty to keep covered 29 hatch nor to wholly uncover it. An open hatchway on a ship, when provided with the usual coamings, is not evidence of negligence on the part of the shipowner."

This request was denied. The court, after stating plaintiff's contentions as to the existence of the custom respecting the closing of unused hatches in the process of loading, and their opening to the full extent when open at all, said:

"If there was no custom at all of either of these sorts, then plaintiff is not entitled to recover here, because he predicates his claim upon the proposition that there was a custom which gave rise to a duty with respect to the method of dealing with these hatch covers, and that the defendant did not perform that duty which it owed to him. So that, if you find there was not any such custom, then the plaintiff is not entitled to recover in this case, for you would not have an establishment by a preponderance of the proof of the defendant's negligence."

Immediately following the paragraph just quoted the court said:

"It is contended by the plaintiff that there were insufficient lights about these hatchways, and, on the other hand, it is contended by defendant that the lights were ample. Upon that the proof is in conflict. It is for you to say, under all of the testimony that has been presented to you, what, in your good judgment, the truth is. What were the lights that were there? Were they such as under all the circumstances and surroundings,

as they have been presented to you in the proof, a reasonably prudent man would ordinarily put in such a situation, having regard to the safety of persons like the plaintiff who might have a right to be there, if you find that he had such a right? If the provisions by way of light and so on were such as a person of ordinary prudence would customarily furnish under such circumstances, then there would not be any negligence because the legal duty resting upon the defendant there would have been performed."

Exception is taken and error assigned upon the giving of the first paragraph of the charge above set out. Exception was also taken "to the submission to the jury as to whether the lights were sufficient lights." The principal argument in support of the exception to the first paragraph of the charge quoted is that the existence of the alleged custom is denied by a number of witnesses better qualified by experience and observation than were those testifying to the existence of the custom; and that in these circumstances it was error to submit to the jury the question whether the claimed custom was established; in other words, that the proof so clearly preponderated against the existence of the alleged custom that it would be the duty of the court to set aside a verdict based upon such custom. A number of authorities are cited in support of that proposition. Passing the fact that no motion or request for direction of verdict was made, we are unable to say that the testimony of the nonexistence of the alleged custom is given by witnesses of qualification and experience superior to that possessed by those who testified to the existence of the alleged custom, nor that the evidence of the nonexistence of the custom in any way preponderated over the evidence in favor of its existence.

The submission of the question whether there were sufficient lights to disclose the opening in the hatch is criticised upon the proposition that the Hanna carried the usual lights upon vessels of her type. But while there was no testimony that provision for such lights upon this vessel was not made, there was testimony from which the jury might properly infer that neither the dock lights nor the deck lights sufficiently disclosed the hatch opening, and that the lights in the vessel's hold were not such as sufficiently to light the opening, whether from the failure of the light below the hatch in question to be in commission or from other causes. Not only was there testimony that the four people, two of whom fell through the hatch opening and the other two of whom barely escaped that experience, saw no light therein, but such experience had some tendency to show the absence of sufficient light.

[4] It is urged, however, that the testimony of the absence of light is negative, and so, under the well-known rule, cannot be allowed to prevail against positive testimony of those having means of information and personal knowledge. The testimony of the operator of the tippie, in answer to an inquiry as to the condition of the hold with "reference to being dark or otherwise" testified "It was pitch dark; you couldn't see nothing at all. * * * You could not see the opening at all;" and in answer to the question, "Were there any lights down in the hold of the boat?" answered "None that I seen at all then," adding that, "After I come back from supper, after supper

hour, it was lit up then;" and in answer to the question "The time you fell in, there was no light in the hold?" said, "There was no lights there at that present time." The testimony, therefore, as to the insufficient lighting of the hatch opening was not merely negative. See *Baltimore & O. R. Co. v. O'Neill* (C. C. A.) 186 Fed. 13, recently decided by this court.

The refusal to give defendant's request No. 1 is alleged as error, especially upon two propositions, first, that the plaintiff had no implied invitation to go upon the deck of the vessel; and secondly, that an open hatchway on a ship, when provided with the usual coamings, is not evidence of neglect of duty on the part of the shipowner. In support of the first of these grounds counsel cite *The Rochambeau* (D. C.) 176 Fed. 826, and the decision of this court in *Cyborowski v. Transit Co.*, 179 Fed. 440, 445, 102 C. C. A. 586. We think this ground is not well assigned, in view of the evidence which we have set out. See *Pioneer S. S. Co. v. McCann*, 170 Fed. 873, 96 C. C. A. 49, where the question of invitation is discussed and pertinent authorities cited.

In support of the second ground counsel cite, among other cases, *Horne v. Hammond Co.*, 71 Fed. 314, 316, 18 C. C. A. 54. In the latter case it was held that:

"An open hatchway on a ship, provided with the usual coamings, is not *ordinarily* evidence of negligence on the part of the shipowner as regards one employed in loading a vessel." (Italics ours.)

What is said in that case must be considered with reference to its peculiar facts. That the case is distinguishable from the one we are considering appears by the following extract from the opinion:

"The necessities and usages of commerce, and the uniform testimony by the admiralty courts to the existence of this rule, alike when it is in issue and when it is not, so support it, not only with reference to the main deck, but also with reference to between-decks, that it cannot be gainsaid. Of course, like all rules disposing of issues of mixed law and fact, the courts are not permitted to follow it implicitly except in what may be classed as ordinary cases. That the case at bar is of that character is plain, unless it be for the fact that the person who left the hatchway open did not leave any light in its neighborhood. The cases are at variance as to the effect of a circumstance of this character. *The Gladius* (C. C.) 22 Fed. 454, 456; *The Victoria* (C. C.) 13 Fed. 43, 44; *The Argonaut* (D. C.) 61 Fed. 517, 518. We are, however, relieved from determining whether this fact makes the circumstances of the case extraordinary, because, when the defendant's employes came up through the hatchway, they found the stevedores about it with lamps and candles, as already stated; and there is no evidence from which the jury could find that it was not lighted as well as customary or practicable, or whether the deceased fell by reason of the want of light or through his own haste and inattention."

[5] It is clear to our minds that the court did not err in refusing the requested instruction, first, because we think the jury would naturally and properly have understood that the defendant would not be liable from the mere fact that No. 29 hatch was open, provided notice of the same was sufficiently indicated by lights; and second, because the requested instruction ignored both the alleged custom regarding the

closing and lighting of unused hatches during the process of loading, and the testimony of insufficient lighting. In view of this testimony, we think defendant was not entitled to an instruction that, as matter of law, it owed plaintiff no duty to "keep covered 29 hatch nor to wholly uncover it"; nor, as matter of law, that an open hatchway, under the testimony presented as to custom and insufficient lighting, furnished no evidence of negligence. See, in this connection, *Burrell v. Fleming*, 109 Fed. 489, 47 C. C. A. 598; *West India & P. S. S. Co., Ltd., v. Weibel*, 113 Fed. 169, 51 C. C. A. 116. The question whose admission is made the subject of an assignment relating to this branch of the case is not supported by statement of ground of objection, and so cannot be considered.

3. *Plaintiff's alleged contributory negligence.*

Defendant presented the following requests:

"(2) If you find that hatch No. 29 was so lighted that its condition could have been observed by plaintiff before he walked into it, as claimed by him, he cannot recover in this action, and your verdict will be for defendant.

"(3) It is in evidence that plaintiff had been engaged upon the Pittsburgh coal dock for several years previous to the accident, and he must be presumed to have possessed on the night of the accident knowledge in regard to the position of the hatches of the D. R. Hanna. And if you find that he proceeded across hatch No. 29 when it was so dark that he could not see whether the hatch was open or closed, then he ought not to have proceeded across the hatch without a light, and having so proceeded he was guilty of contributory negligence and cannot recover in this action."

These requests were refused, and errors assigned thereon. The jury were instructed as follows:

"But even though you should find that the plaintiff had a right to be on this deck; even though you should find that, as respects the plaintiff having a right to be on this deck (as I am assuming you will have found, on this theory), there was a failure on the part of the defendant to properly deal with the subject of opening that hatchway; and even though you found that it did not furnish sufficient light to justify the conclusion that it had performed its duty, as I have defined its duty, still the plaintiff would not be entitled to recover in this case unless, in respect to the matter of falling through this hatchway, he himself was at that time in the exercise of ordinary care for his own safety; for one has no right to recover who himself contributes to the injury which he receives by his own failure to exercise proper care, which is ordinary care for his own safety. If, in passing along from the northwest corner of No. 29—if that is the corner at which he was standing just before the accident—he, in passing on top of the hatch cover of No. 29, going over towards his machine, was not exercising reasonable care for his own safety, and, in consequence of that failure on his part to exercise ordinary care for his own safety, fell into this open hatchway and was hurt, he has no right to recover."

Plaintiff in reply to the question what there was to prevent his walking between 29 hatch and 28 hatch had testified:

"I thought it was the safest way to walk across 29 hatch, for the simple reason it was dark on that side of the machine—there was no light there—and it was made dark by the pan and the telescope being down, and I did not want to walk along in between there because the space is narrow and there is chains in there, and also clamps that they clamp on the

hatches and a fellow might tumble and go down in the hold, so I walked across 29 hatch."

It is clear that the second request presents too strict a rule of diligence on plaintiff's part, in that it eliminates the consideration of due care, and makes the plaintiff negligent in case he could by any means have discovered the fact that the hatch was open.

[6] In view of the charge of the court as actually given, and in view of the testimony of the plaintiff just quoted, as well as the other testimony in the case to which we have before referred, including the evidence of the alleged custom and the fact that a member of the crew was standing upon hatch 29 at or about the time plaintiff started to cross the same, we think the trial court would not have been justified in holding, as matter of law, that plaintiff was guilty of contributory negligence in proceeding to cross the hatch when it was so dark that he could not see whether it was opened or closed.

We have carefully considered all the assignments properly raised and so far as argued, and are of opinion that no error is shown.

The judgment of the Circuit Court must accordingly be affirmed.

RUST LAND & LUMBER CO. v. WHEELER et al.†

(Circuit Court of Appeals, Eighth Circuit. May 1, 1911.)

No. 3,477.

1. LOGS AND LOGGING (§ 3*)—CONTRACT FOR SALE OF TIMBER—COVENANT OF WARRANTY.

Plaintiff and defendants entered into a contract which recited that plaintiff was the owner of a tract of land described, and of the cypress timber on other lands adjacent, with the right to cut and remove the same; that in consideration of \$34,000. to be paid as specified, plaintiff agreed to sell defendants all of the timber on said tract owned by it, and all of such cypress timber on the other lands, with the right to at once enter upon the premises and cut the timber and manufacture it into lumber; that the lumber should remain the property of plaintiff, but should be released in lots of 1,000,000 feet and become the property of defendants when certain payments were made on the contract. It further provided that when the purchase price of \$34,000 should be fully paid plaintiff would convey to defendants by quitclaim deed, "all the timber and timber rights held by it on the lands herein above described," and it covenanted to forever warrant and defend "the title to the property herein conveyed" against the lawful claims of all persons whomsoever. *Held* that, such contract was not one for the conveyance only of such title or interest as plaintiff might have in the timber, but an unqualified agreement to convey the full title to such timber on full payment and to warrant and defend such title.

[Ed. Note.—For other cases, see Logs and Logging, Dec. Dig. § 3.*]

2. DEEDS (§ 121*)—ESTATES AND INTERESTS CREATED—OPERATION OF QUITCLAIM.

The title to real property or to an interest therein may be as effectually conveyed or transferred by deed of quitclaim as by any other form of conveyance.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 394-400; Dec. Dig. § 121.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied August 21, 1911.

3. JUDGMENT (§ 699*)—PERSONS CONCLUDED—PERSONS ULTIMATELY LIABLE—NOTICE AND OPPORTUNITY TO DEFEND.

A judgment against a defendant who has a right of action over against a third party because thereof, is conclusive upon the latter, where it had notice of the action and took full charge of the defense, upon every issue involved therein.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1223, 1224; Dec. Dig. § 699.*]

4. JUDGMENT (§ 699*)—LOGS AND LOGGING (§ 3*)—SALE OF STANDING TIMBER—BREACH OF WARRANTY OF TITLE—MEASURE OF DAMAGES.

Plaintiff sold to defendants the timber on certain lands with a covenant of warranty of title. In an action brought by a third party against defendants, which was defended by plaintiff, defendant was compelled to pay for the timber from one tract practically all of which defendants had removed. *Held* that, as between plaintiff and defendants the judgment was conclusive as to the quantity of such timber, but that the value fixed by such judgment was not the measure of defendants' right of recovery against plaintiff for breach of warranty, which was the same proportion of the entire purchase money as the quantity of timber lost by the suit was of the entire quantity contracted for.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 699; * Logs and Logging, Dec. Dig. § 3.*]

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

Suit in equity by the Rust Land & Lumber Company against J. W. Wheeler, H. B. Wheeler, L. C. Wheeler, and C. B. Paul, doing business as copartners under the name of J. W. Wheeler & Co. Decree for defendants, and complainant appeals. Affirmed.

This suit is by the appellant, the Rust Land & Lumber Company, a Wisconsin corporation, which will be called the Land Company, to recover of the appellees as copartners, \$6,000 and 6 per cent. interest thereon from May 9, 1905, upon their promissory note for that amount made to the Land Company May 9, 1902, and to establish a vendor's lien upon certain property described in the bill for which it is alleged said note was given in part payment. Upon the final hearing the Circuit Court rendered a decree for the defendants, to reverse which the Land Company prosecutes this appeal.

The facts as shown by the testimony, and found by the Circuit Court, are, in substance: That on May 9, 1902, the Land Company then claiming to be the absolute owner of the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 4, township 17, range 4 west, in Ashley county, Ark., and the cypress timber then standing upon certain other lands in that county with the right to cut and remove said timber therefrom, sold to the defendants Wheeler & Co. all of the timber upon the tract of land described, and the cypress timber upon said other lands at the agreed price of \$34,000 to be paid as specified in a written contract for such sale and purchase that day made between the Land Company and Wheeler & Co., which contract recites that the Land Company is the owner of the land, timber and rights above mentioned; that the second party, Wheeler & Co., desires to purchase from the first party all the cypress timber, rights and privileges enumerated, as well as the timber upon the lands owned by the said first party, and that in consideration of the sum of \$5,000 cash in hand paid by the second party to the first party, and the further sum of \$29,000 to be paid as evidenced by five promissory notes of even date herewith, with interest from date at 6 per cent. per annum payable annually; one for \$5,000 in six months, and the remaining four notes being for \$6,000 each, payable respectively on November 9, 1903, 1904, 1905, and 1906, the first party hereby agrees:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"(1) That the second party may at any time after date enter upon the above-described premises or upon any part thereof in the usual manner of logging, * * * and cut and remove therefrom to their sawmill plant in said county all of the timber hereinabove mentioned, and manufacture said logs and timber into lumber.

"(2) The said first party further agrees that from time to time during the period of this contract, whenever the payments of principal made to it by the said second party * * * exclusive of the first payment, shall amount to more than four dollars per thousand feet, board measure, for the lumber so manufactured, * * * it will, upon the request of such party release in lots of not less than one million feet at any one time, said lumber, which shall thereupon become and be the absolute property of said second party; but it is expressly agreed and understood that until such release is executed, the title to said timber, logs and lumber remains in the first party.

"(3) When the purchase price of \$34,000 with interest, shall have been fully paid, and the second party shall have performed all the conditions herein required by them to be performed, the first party will, by quitclaim deed, convey to the second party all the timber and timber rights held by it on the lands hereinabove described.

"(4) The first party covenants that it will forever warrant and defend the title to the property herein conveyed against the lawful claims of all persons whomsoever.

"And on the part of the second parties it is agreed: (1) That they will well and truly pay the purchase price hereinabove specified and in the manner required. * * * " (Signed by the respective parties.)

The defendants, pursuant to said contract, cut and removed from the lands described therein the greater part of the timber growing thereon at the time of the contract. In September, 1903, a Mrs. M. E. Foote brought suit in the chancery court of Ashley county, Ark., against the defendants to recover from them the possession of said N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 4, and the value of the timber cut and removed therefrom by them, claiming that she was the absolute owner of said land and timber. Upon being served with summons in that suit, the defendants gave to the Land Company notice thereof, and requested it to defend the same because of its covenant to warrant to them the title to said timber. The Land Company thereupon undertook the defense of said suit in the name of the defendants; employed counsel who took exclusive charge and control thereof, alleged that the Land Company was the lawful owner of said 40-acre tract of land, and of the timber thereon, which timber it sold to Wheeler & Co., and authorized them to cut and remove the same from the land. But upon the trial Mrs. Foote was adjudged to be the absolute owner of said land, and of the timber removed therefrom by the defendants; and judgment was rendered in her favor for the possession of the land, and \$6,556.66 as the value of the timber; the quantity of such timber being found by the court to be 1,333,333 $\frac{1}{3}$ feet of cypress, and 40,000 feet of oak, logs. The judgment was affirmed by the Supreme Court of Arkansas November 5, 1906, upon appeal thereto by the Land Company in the name of the defendants. January 31st following, William A. Gilchrist, who was the vice president of the Land Company and the manager of its lands in Arkansas, paid said judgment in full, and took an assignment thereof in his own name for the benefit of the Land Company, caused execution to issue thereon against the defendants, and placed the same in the hands of a sheriff to be levied upon, and satisfied from, their property; and the execution was so levied by said sheriff.

Wheeler & Co. paid their notes to the Land Company as they matured except the one last maturing, which is the note in suit, and upon that had paid the interest to May 9, 1905, at the time of the Foote judgment, and afterwards offered to pay the remainder, upon satisfaction by the Land Company or Gilchrist of that judgment, which they refused to do. Upon final hearing the Circuit Court found the facts to be substantially as above stated; also that the quantity of timber taken by the defendants from said 40-acre tract as found by the state court, viz., 1,373,333 feet of logs, was 15.6 per cent. of the entire quantity of timber sold by the Land Company

to the defendants for \$34,000; that defendants were entitled to recoup or recover from the Land Company that per cent. of said \$34,000 with interest, which amount it found to be \$7,849.92, and dismissed for want of equity the original bill of the Land Company at its costs, and upon defendants' cross-bill adjudged that upon payment by Wheeler & Co., to Gilchrist, within 40 days, the sum of \$7,840 with interest thereon at 6 per cent. (being the amount then due upon the unpaid note of Wheeler & Co., to the Land Company) less the costs of this suit, that the Land Company, Gilchrist and the sheriff be perpetually enjoined from collecting the Foote judgment from Wheeler & Co., and awarded Wheeler & Co. judgment for their costs.

J. M. Moore and John B. Jones (W. B. Smith, J. Merrick Moore, and W. H. Fitzhugh, on the brief), for appellant.

N. W. Norton (Norton & Hughes, on the brief), for appellees.

Before HOOK, Circuit Judge, and RINER and REED, District Judges.

REED, District Judge (after stating the facts as above). The assignments of error urged in the brief of appellant's counsel are that appellant's warranty in the contract of May 9th is void; or, if it is not, that the court erred in holding the decree of the state court in the Foote suit to be conclusive upon the appellant; and in the amount of damage it awarded defendants for the alleged breach of said warranty.

[1] The contention of the appellant that its agreement of warranty is void and of no effect rests upon the ground that a covenant of warranty in a conveyance of real or personal property is no part of the conveyance, is independent thereof, and does not enlarge the estate granted; that by its contract appellant only agreed, upon payment of the purchase price of the timber, to convey by "quitclaim deed" to defendants such title or interest as it had therein; and inasmuch as it was determined by the judgment and decree of the state court in the Foote suit that it had no interest in or title to such timber, if that is the effect of that decision, there was nothing to which its agreement of warranty would attach, and it is, therefore, void—citing, in support of such contention, *Kountz v. Davis*, 34 Ark. 596, *Reynolds v. Shaver*, 59 Ark. 302, 27 S. W. 78, 43 Am. St. Rep. 36, and cases of like import. But in those cases the quitclaims were only of the right, title, or interest, of the grantors in the property, and not conveyances of the property itself.

We do not agree with appellant that by its contract of May 9th, it only agreed to quitclaim to Wheeler & Co. such title or interest as it might have in the timber it sold them. In determining the meaning of that contract it must be considered as a whole. It recites that the appellant is the owner of the 40-acre tract of land described (which, of course, includes the timber standing and growing thereon) and also all of the cypress timber, upon what is called a cypress brake which included said 40-acre tract, with the right to enter upon and cut and remove the timber therefrom; that the second party desires to purchase all of such cypress timber, as well as the timber upon the 40-acre tract owned by appellant; and in consideration of the sum of \$34,000, to be paid as specified, the appellant agrees that the second

party may at any time after the date of the contract enter upon said premises and cut and remove all of the timber therefrom and manufacture the same into lumber; and upon making certain of the payments as agreed the first party will release said lumber in lots of one million feet, which shall then become and be the absolute property of the second party; and when the purchase price of \$34,000 with interest shall have been fully paid, the first party will by quitclaim deed convey to the second party all of said timber, and that "the first party covenants that it will forever warrant and defend *the title to the property herein conveyed* against the lawful claims of all persons whomsoever." This language cannot, rightly, be construed to mean that the appellant agreed to convey only such title or interest as it might have in the timber; for it is an unqualified agreement to convey the full title to the timber upon payment by Wheeler & Co. of the agreed purchase price, and to warrant the same against the lawful claims of all persons whomsoever.

[2] It is said that a sale of growing timber upon land in Arkansas is regarded as a sale of an interest in the land upon which it stands. *King-Ryder Lumber Co. v. Scott*, 73 Ark. 329, 84 S. W. 487, 70 L. R. A. 873. This may be conceded. But the title to real property may be as effectually conveyed or transferred by deed of quitclaim as by any other form of conveyance. This was so at common law (3 Washb. Real Prop. [3d Ed.] 311), and is now the settled doctrine of the national courts, though it may not always have been, and of many of the state courts.

In *Moelle v. Sherwood*, 148 U. S. 21, 13 Sup. Ct. 426, 37 L. Ed. 350, a question arose whether or not a deed in the chain of title to real property in Nebraska, in which the grantor for a recited consideration of \$100 sold, conveyed and quitclaimed "all his right, title and interest in and to" the property, describing it, was a conveyance of the property, or only a relinquishment of some interest of the grantor therein. Mr. Justice Field, speaking for the Supreme Court, said:

"In many parts of the country a quitclaim or simple conveyance of the grantor's interest is the common form in which the transfer of real estate is made. A deed in that form is, in such cases, as effectual to divest and transfer a complete title as any other form of conveyance. There is in this country no difference in their efficacy and operative force between conveyances in the form of release and quitclaim and those in the form of grant, bargain and sale. * * * Covenants of warranty do not constitute any operative part of the instrument in transferring the title. That passes independently of them. They are separate contracts, intended only as guaranties against future contingencies."

A quitclaim deed is a substantive form of conveyance of real property in Arkansas, and is as effectual to convey the estate of a grantor as a deed with full covenants of warranty; *Bagley v. Fletcher*, 44 Ark. 153; and a grantee under such a deed may be entitled to protection as a bona fide purchaser. *McDonald v. Belding*, 145 U. S. 492-496, 12 Sup. Ct. 892, 36 L. Ed. 788; *Boynton v. Haggart*, 120 Fed. 820-823, 57 C. C. A. 301; *Prentice v. Duluth Storage, etc., Co.*, 58 Fed. 437-448, 7 C. C. A. 293. It is true that in these cases the principal question for determination was: Is a grantee for value under a quit-

claim deed entitled to protection as a bona fide purchaser, the requisites of such a purchase, other than the mere form of the conveyance, being shown? But in *Prentice v. Duluth Storage, etc., Co.*, above, this court held that a deed which "remised, released, and quitclaimed" certain lands, describing them, was a conveyance of the land, and not merely a release or transfer of such interest therein as the grantor might have. And see *Spreckels v. Brown*, 212 U. S. 208-210, 211, 29 Sup. Ct. 256, 53 L. Ed. 476; *United States v. California & O. Land Co.*, 148 U. S. 31-46, 47, 13 Sup. Ct. 458, 37 L. Ed. 354; *Sibley v. Bullis*, 40 Iowa, 429, 430; *Wilson v. Irish*, 62 Iowa, 260-266, 17 N. W. 511; *Garrett v. Christopher*, 74 Tex. 453, 454, 12 S. W. 67, 15 Am. St. Rep. 850, 851. No question is made of the good faith of the purchase by *Wheeler & Co.*, or that they did not pay the full value of the timber. We have no doubt that the contract of May 9th is an agreement by the appellant to convey to *Wheeler & Co.* the timber and the title thereto upon payment of the purchase price, and not merely a release of such interest as it then had therein, and that its agreement to warrant that title is a valid and binding contract upon its part.

[3] That there has been a breach of that warranty is not disputed by the appellant, if it is held to be valid, nor could it be successfully, for it was adjudged by a court of competent jurisdiction in the suit of *Mrs. Foote* against *Wheeler & Co.* that the appellant was not the owner of the timber when it sold it to *Wheeler & Co.*, and that *Mrs. Foote* was. The appellant contends that it is not concluded by that decree; and that aside therefrom there is nothing to show the quantity of the timber removed by *Wheeler & Co.* from the 40-acre tract, the value of which was recovered by *Mrs. Foote*, nor the price that they were to pay therefor. The appellant was notified by *Wheeler & Co.* of the bringing of the suit by *Mrs. Foote* against them and requested to defend it. It did so at its own expense, but unsuccessfully. Under such circumstances it is concluded by that judgment upon every issue involved therein relative to the right and title of *Mrs. Foote* to the timber, and the quantity thereof; for a judgment against a defendant who has a right of action over against a third party because thereof, is conclusive upon the latter, if he has had notice of, and full opportunity to defend the action in which the judgment is rendered. In such case he is not regarded as a stranger to that suit, because he has the same means of controverting the same as if he were the actual party upon the record. *Lovejoy v. Murray*, 3 Wall. 1-19, 18 L. Ed. 129; *Washington Gaslight Co. v. District of Columbia*, 161 U. S. 316-330, 16 Sup. Ct. 564, 40 L. Ed. 712; *Roth Tool Co. v. New Amsterdam Casualty Co.*, 161 Fed. 709-711, 88 C. C. A. 569; *United States Fidelity & Guaranty Co. v. Haggart*, 163 Fed. 801-808, 91 C. C. A. 289.

[4] The quantity of timber taken by *Wheeler & Co.* from the 40-acre tract was necessarily involved in the suit of *Mrs. Foote*, and was put directly in issue by the pleadings therein; and such quantity was found and determined to be 1,373,333 feet, of the value of \$6,556.66. That decree is, therefore, conclusive upon the appellant on that question. *Dowell v. Applegate*, 152 U. S. 327-341, 343, 345,

14 Sup. Ct. 611, 38 L. Ed. 463; *Linton v. Insurance Company*, 104 Fed. 584-587, 44 C. C. A. 54; *Manhattan Trust Company v. Trust Company of North America*, 107 Fed. 328-332, 46 C. C. A. 322. But the amount of the recovery by Mrs. Foote is not necessarily the measure of defendant's recovery against the appellant. The measure of that recovery is the consideration paid by them for the timber lost to Mrs. Foote with interest from the date of the contract. *Logan v. Moulder*, 1 Ark. 313, 33 Am. Dec. 338, 344, 345; *Griffin v. Reynolds*, 17 How. 608-611, 15 L. Ed. 229; *Paper Co. v. Eaton*, 65 N. H. 13, 18 Atl. 171, 172. The decree in the Foote Case does not determine what consideration Wheeler & Co. paid, or were to pay, for the timber upon the 40-acre tract, the entire quantity of timber they purchased from appellant, nor the proportion that the quantity for which she recovered her judgment bore to the entire quantity purchased; for those questions were not involved in that suit, and were not necessary to its determination. As to them that decree is not conclusive upon the appellant. But the consideration Wheeler & Co. paid, and were to pay for the entire quantity of timber, is shown in this suit by the contract of May 9th, and admitted by the pleadings, to be \$34,000; and presumptively that is its value. Other proofs on the part of the defendants show that the entire quantity purchased was 8,784,963 feet, and that it was of uniform quality and value. These proofs furnish a sufficient basis for computing the amount Wheeler & Co. are entitled to recover from the appellant. A computation shows that the quantity of timber, for which Mrs. Foote recovered her judgment, viz., 1,373,333 feet, is a little more than 15.6 per cent. of the 8,784,963 feet that Wheeler & Co. purchased; and that per cent., or that proportion of the entire purchase price of \$34,000 with the interest upon such proportionate part, is the amount Wheeler & Co. are entitled to recover. *Alexander v. Bridgford*, 59 Ark. 211, 27 S. W. 69; *Paper Co. v. Eaton*, 65 N. H. 13, 18 Atl. 171, 172; *Beaupland v. McKeen*, 28 Pa. 124, 70 Am. Dec. 115-120; *Morris v. Phelps*, 5 Johns. (N. Y.) 49, 4 Am. Dec. 323-324; *Conklin v. Hancock*, 67 Ohio St. 455, 66 N. E. 518; *Tone v. Wilson*, 81 Ill. 529-532. The Circuit Court adopted this rule, made the computation accordingly, and found it to be \$7,849.92. It also computed the amount due upon the unpaid note of Wheeler & Co. to be \$7,840, a little less than they were entitled to recover from the appellant. The correctness of these computations is not challenged.

Some other errors are assigned, but we have examined the record relating to them, and deem them to be without substantial merit.

The decree of the Circuit Court is therefore affirmed.

NORTHERN PAC. RY. CO. v. MARINOVICH.

(Circuit Court of Appeals, Ninth Circuit. May 15, 1911.)

No. 1,934.

1. CARRIERS (§ 320*)—INJURY TO PASSENGERS—FLAG STATION—CREATION OF RELATION—REASONABLE TIME.

Plaintiff, desiring to take a train at a flag station where the defendant maintained no agent, inquired at a store when the next train would arrive, and was told that it would come along some time. He went to the waiting room 4 hours and 45 minutes before the train was due to leave, and while there was injured by logs falling from a freight train, which struck the station building and demolished it. *Held*, that the court properly submitted to the jury whether, under all the circumstances, plaintiff went to the station a reasonable time before train time, so as to be entitled to the rights of a passenger.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 320.*]

2. CARRIERS (§ 246*)—INJURIES TO PASSENGERS—EVIDENCE.

Where, in an action for injuries to a passenger while waiting for a train in a flag station, defendant denied that plaintiff intended to become a passenger on its train, and attempted to show that he was a mendicant, and while waiting for a train, as he claimed, had asked for money from a fellow countryman, the court did not err in permitting proof that plaintiff had \$25 on his person at the time, was possessed of \$300 or \$400 in money, owned land in Austria, and to prove by receipts that he had made remittances to his wife there.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1284; Dec. Dig. § 246.*]

In Error to the Circuit Court of the United States for the Western Division of the Western District of Washington.

Action by John Marinovich against the Northern Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Geo. T. Reid, J. W. Quick, and L. B. Da Ponte, for plaintiff in error.

Gordon & Askren, David & Westcott, and J. H. Easterday, for defendant in error.

Before GILBERT and MORROW, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge. The defendant in error lived at Wilkeson, a station on a branch line of the plaintiff in error's railroad. On the morning of May 12, 1910, he went from Wilkeson by train to South Prairie, 5 miles distant. From there he walked westward on the line of the railroad, a distance of 11 miles, to McMillan, for the purpose, as he testified, of looking at the country with a view to purchasing a piece of land. He arrived at McMillan about noon. At that station there were two stores, and there was a small waiting room for passengers, situated on the right of way of the railroad company. There was no station agent in charge of the waiting room, but in one of the stores the railroad company had an agent, who sold tickets to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

intending passengers on the road. There was no sign on the store to indicate the presence of such an agent. The defendant in error entered the other store, purchased a luncheon, and inquired when a train would return to South Prairie, and he testified that he was told that it would come along some time. He testified that he did not know about the time of trains going through there, and that he wanted to take the first train to South Prairie. He then went and sat inside the little station house to await the coming of a train, intending, as he said, to become a passenger on the first train to South Prairie. While waiting there, a freight train loaded with logs came by, and when opposite the station a log fell from one of the cars, the forward end of which struck the ground, and the other end remaining on the car, pushed the logs off the car and off the following cars, and some of the logs struck the station building, demolishing it, and severely injuring the defendant in error. For these injuries, the defendant in error recovered a judgment in the court below, on a complaint which alleged that he intended to become a passenger upon the next south-bound train, and that he went to the station for that purpose, and while there waiting for the train, without any fault or negligence on his part, the plaintiff in error carelessly and negligently so operated a train loaded with logs that he sustained serious physical injuries.

[1] Error is assigned to the refusal of the court at the close of the testimony to instruct the jury to return a verdict for the plaintiff in error. The assignment raises the question whether or not the defendant in error was, at the time when he was injured, a prospective passenger, and as such entitled to the rights and the remedies of a passenger upon the road of the plaintiff in error. Upon this question the trial court instructed the jury as follows:

"It is not the policy of the law to require railroad companies to maintain their station facilities for the benefit of persons who at some future time expect to become passengers. There must be some limit as to the right of a person to use a station, with the obligations, or rather with the rights, of a passenger. Now, the law does not fix that limit by any number of minutes, or any number of hours, or in any other way. It says a reasonable time. What is a reasonable time is a question in this case of fact for you to determine. It depends upon the circumstances of the case. The circumstances here are more or less contested. I will not undertake to state the circumstances pro and con. They have been argued by counsel and appear in the evidence. It is for you to say, under all those circumstances, whether, at the time of the occurrence, it was a reasonable time for the plaintiff to be there intending to take passage upon the next train."

No exception was taken to the instruction; but the plaintiff in error, in support of its contention that the court erred in denying its motion for an instructed verdict, points to the fact that the next train from McMillan to South Prairie was not due until 4 hours and 45 minutes after the time when the defendant in error went to the station, and cites cases which tend to show that a railroad company is not bound to furnish a place of entertainment for persons who may intend, at some future time, to become passengers over its road, and that the relation of carrier and passenger does not begin until within a reasonable time prior to the time fixed for the departure of the train which the prospective passenger intends to take. Thus, in Fre-

mont, E. & M. V. R. Co. v. Hagblad, 72 Neb. 773, 101 N. W. 1033, 106 N. W. 1041, 4 L. R. A. (N. S.) 254, it was held that where a person, intending to take passage upon a train, goes into a station within a reasonable time prior to the hour of the departure of the train, in a proper manner, and there, either by the purchase of a ticket, or in some other manner, indicates to the carrier his intention to take passage, from that time on, by waiting for his train, he is entitled to the acknowledged rights and privileges of a passenger. In Illinois Central R. Co. v. Laloge, 113 Ky. 896, 69 S. W. 795, 62 L. R. A. 405, the plaintiff went to the depot at 8 o'clock in the evening, and was informed that a train would not be due until 1:05 in the morning. At 10 o'clock he was assaulted in the depot. The court held it was the duty of a carrier to provide facilities for intending passengers within a reasonable time before the departure of its trains, and that by going to the station 5 hours before the schedule time the plaintiff did not become a passenger. In Andrews v. Yazoo & M. V. R. Co., 86 Miss. 129, 38 South. 773, it was held that where one who intended to take a train not due for an hour or more, and who had purchased no ticket, but who had obtained permission from the station agent to do some writing in the office of the station, and while there became involved in an altercation with the agent and was assaulted, the relation of passenger and carrier did not exist.

The cases cited are all cases in which the prospective passenger had the opportunity to know at what time the train which he intended to take would start, and they were all cases in which the station was in charge of an agent, from whom such information could be obtained. In the case at bar, no such information was afforded. The defendant in error testified that he was not acquainted with the time schedule of the trains. There was evidence that he had made some effort to ascertain at one of the stores at what time the train would leave; but the information which he seems to have obtained was such as to lead him to believe that the trains were running irregularly, and that a train might come at any time. The railroad company had not placed an agent in charge of the station, and had not taken the trouble to post any notice to advise prospective passengers where information could be obtained. Under all the circumstances, therefore, we are not convinced that the court erred in submitting to the jury the question whether or not the defendant in error took his place at the station within a reasonable time. What is a reasonable time must depend upon the circumstances in the case. The defendant in error had indicated his purpose to become a passenger, by taking his place in the station to await the coming of the train which he intended to take, and on which he was prepared to pay for his passage. His intention was not made known to the carrier, for the reason that the carrier had no agent at the station to represent it. It had not refused him transportation, and it cannot be said that it had not acquiesced in his intention to become a passenger. Its open, unoccupied station house was in itself an invitation to prospective passengers.

[2] Counsel for the defendant in error, in order to show that his client had at the time of the accident money with which to pay for

his ticket, elicited the testimony that the defendant in error had \$25 upon his person at that time, and that he possessed \$300 or \$400 in money, and owned some land in Austria, and that he had sent money to his wife in Austria, and to establish that fact he offered in evidence receipts of three such transmissions of money through the post office department. Objection was made to the evidence of the receipts and the ruling of the court admitting the same is assigned as error. The transcript does not inform us at what time the moneys were sent, or what was the amount thereof. It could hardly be said that the admission of such testimony in such a case would be reversible error. But it is clear, in view of the issues and the testimony, that its admission in this case was not error for which the judgment should be reversed. The plaintiff in error, in its answer to the complaint, denied that the defendant in error had intended to become a passenger upon its train, and in the course of the trial had attempted to show that he was a mendicant, and that while he was at McMillan he had asked money of a fellow countryman of his. It was not improper, therefore, to show that the defendant in error was not a trespasser on the property of the railroad company, that he had the means wherewith to purchase a ticket, and, as tending to establish the fact that he had earned and possessed money, to prove by the receipts that he had made remittances to his wife in Austria.

The judgment is affirmed.

UNITED STATES v. TWENTY CASES OF GRAPE JUICE.

(Circuit Court of Appeals, Second Circuit. May 8, 1911.)

No. 261.

FOOD (§§ 19, 24*)—FOOD AND DRUGS ACT—SUIT FOR CONDEMNATION—CONDITIONS PRECEDENT.

The provision of Food and Drugs Act June 30, 1906, c. 3915, § 5, 34 Stat. 769 (U. S. Comp. St. Supp. 1909, p. 1189), making it the duty of the district attorney to commence appropriate proceedings for the enforcement of penalties for violation of the act, when such violation shall be reported by the Secretary of Agriculture, contemplates that the report of the Secretary shall be the one provided for by section 4 of the act, which is only to be made after an examination of samples, and a hearing on notice of the person from whom the samples were taken; and such a notice and hearing are conditions precedent to the institution of either a criminal prosecution under section 2 or condemnation proceedings under section 10, where they are based on a report from the Secretary.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 17; Dec. Dig. §§ 19, 24.*]

Appeal from the District Court of the United States for the Western District of New York.

Libel by the United States against Twenty Cases of Grape Juice; S. M. Flickinger & Co., claimants. Decree for claimants, and the United States appeals. Affirmed.

Appeal from a decree of the District Court, Western District of New York, entered upon the verdict of a jury rendered in accordance with the direction

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the Court in proceedings instituted by the Government for the condemnation, as being adulterated and misbranded, of certain cases of grape juice under the provisions of Food & Drugs Act June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1909, p. 1187), of which act the relevant portions are printed in the footnote.¹

It was stipulated upon the hearing of the appeal in this court that the proceedings were instituted by the district attorney for the Western district of New York solely upon and by reason of a report made to him by the Secre-

1 "Sec. 2. * * * any person who shall ship or deliver for shipment from any state or territory or the District of Columbia to any other state or territory, or the District of Columbia, or to a foreign country, or who shall receive * * * any such article so adulterated or misbranded within the meaning of this act * * * shall be guilty of a misdemeanor, and for such offense be fined not exceeding \$200 for the first offense, and upon conviction for each subsequent offense not exceeding \$300, or be imprisoned not exceeding one year, or both, in the discretion of the court. * * *

"Sec. 4. That the examinations of specimens of foods and drugs shall be made in the Bureau of Chemistry of the Department of Agriculture, or under the direction and supervision of such bureau, for the purpose of determining from such examinations whether such articles are adulterated or misbranded within the meaning of this act; and if it shall appear from any such examination that any of such specimens is adulterated or misbranded within the meaning of this act, the Secretary of Agriculture shall cause notice thereof to be given to the party from whom such sample was obtained. Any party so notified shall be given an opportunity to be heard under such rules and regulations as may be prescribed as aforesaid, and if it appears that any of the provisions of this act have been violated by such party, then the Secretary of Agriculture shall at once certify the facts to the proper United States district attorney, with a copy of the results of the analysis or the examination of such article duly authenticated by the analyst or officer making such examination, under the authority of such officer. After judgment of the court, notice shall be given by publication in such manner as may be prescribed by the rules and regulations aforesaid."

"Sec. 5. That it shall be the duty of each district attorney to whom the Secretary of Agriculture shall report any violation of this act, or to whom any health or food or drug officer or agent of any state, territory, or the District of Columbia shall present satisfactory evidence of any such violation to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States, without delay, for the enforcement of the penalties as in such case herein provided."

"Sec. 10. That any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this act, and is being transported from one state, territory, district, or insular possession to another for sale, or, having been transported, remains unloaded, unsold or in original unbroken packages * * * shall be liable to be proceeded against in any District Court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. And if such article is condemned as being adulterated or misbranded, or of a poisonous or deleterious character, within the meaning of this act, the same shall be disposed of by destruction or sale, as the said court may direct, and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the treasury of the United States, but such goods shall not be sold in any jurisdiction contrary to the provisions of this act or the laws of that jurisdiction: Provided, however, that upon the payment of the costs of such libel proceedings and the execution and delivery of a good and sufficient bond to the effect that such articles shall not be sold or otherwise disposed of contrary to the provisions of this act, * * * the court may by order direct that such articles be delivered to the owner thereof. The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States."

tary of Agriculture of a violation of said act. It was also conceded that the steps prescribed in section 4 of said act with respect to notice and hearing had not been taken as a basis for the report made by the Secretary of Agriculture. The District Judge ruled that it was a condition precedent to the institution of proceedings under section 10 of the act upon a report from the Secretary of Agriculture that said steps prescribed in section 4 should have been taken and, consequently, directed a verdict for the respondents.

John Lord O'Brian, U. S. Atty.

Adelbert Moot and Helen Z. M. Rodgers, for appellees.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). The different sections of the food and drugs act while relating to different subjects are consistent and, in many respects, interdependent. The second section—the relevant portions of which have been shown—provides that any person violating the provisions of the act shall be guilty of a misdemeanor and subject to fine and imprisonment. The tenth section provides that articles sold or transported in violation of the provisions of the act shall be liable to seizure and condemnation. Both sections relate to penalties for violations of the act. The penalty under one section is a fine and imprisonment. The penalty under the other section is the forfeiture of the misbranded or adulterated goods. Both sections are penal in their nature. Punishment is as well inflicted by the forfeiture and loss of property as by a fine. The two sections taken together (with the first section which relates to manufacture in territories) cover the subject of the punishment imposed for breaches of the provisions of the statute.

Section 5 of the act must also be read in connection with sections 2 and 10. The latter, as we have seen, relate to penalties. The former provides for the enforcement of such penalties. It makes it the duty of the proper district attorney upon the presentation of "satisfactory evidence" of a violation of the act by any state health or food officer to cause appropriate proceedings to be instituted and prosecuted. It also provides that the district attorney shall institute such proceedings in case the Secretary of Agriculture shall report to him any violations of the act. But in this case it is not required that evidence of a violation of the act shall be presented. The report of the Secretary is in itself made the basis of proceedings.

Now, if section 5 stood apart from other provisions of the statute it would contravene a practice so long and well established as almost to amount to a fundamental right, viz.: That proceedings for the punishment of the citizen shall be instituted only after investigation by some public official. To compel a district attorney to institute proceedings upon the report of another official without requiring the latter to investigate before making such report would be most extraordinary. And this act does not so require. It is made the duty of the district attorney to act upon the report of the Secretary of Agriculture without the presentation of evidence required in other cases only because section 4 of the act throws the duty of making investigation upon the Secretary before he makes his report. The preliminary ex-

amination in such case is made by the Secretary instead of the district attorney. The sections are interdependent and must be read together, and when so read they are found to present an orderly and a just procedure. As then the "report" of the Secretary of Agriculture referred to in section 5 is the certificate of facts which he is required to make under section 4, it necessarily follows that the steps required to be taken preliminary to certifying the facts—including notice and hearing—must be taken before such a report as the law requires can be made. And it also follows, upon principles already considered, that when such report is at all a prerequisite to proceedings under section 5, it is as necessary to proceedings for the enforcement of penalties by way of forfeiture as by way of fine or imprisonment.

Looking at the question involved from a slightly different point of view the same conclusion must be reached. Section 4 of the act—as we have seen—provides for the examination of articles by the Bureau of Chemistry of the Department of Agriculture for the purpose of determining whether they are adulterated or misbranded. If they are found to be adulterated or misbranded notice and an opportunity to be heard must be given to the party from whom they were obtained. If it then appears that the act has been violated the Secretary of Agriculture must certify the facts to the proper district attorney. This is the only report of the violation of the act which the statute requires the Secretary to make. When made it affords, without further investigation, the basis for the institution by the district attorney of appropriate proceedings for the enforcement of the penalties prescribed in the act. But it is just as necessary that the report which is the basis for the condemnation proceedings should be made according to law as it is that such report should be a lawful one when it affords the basis for a criminal prosecution.

It must be distinctly borne in mind that the requirement of a preliminary investigation including notice and hearing applies only when the district attorney acts upon the report of the Secretary of Agriculture. It is not required when he acts upon evidence furnished by any state health officer and undoubtedly would not be required in proceedings taken at his own initiative.² Apparently the statute does not contemplate reports by the Secretary except when due examinations have been made, and leaves the ordinary cases requiring immediate prosecution or seizure to the action of local authorities. We perceive no ground whatever for the contention of the government that if its position in this case be not sustained section 10 of the act may as well be treated as a dead letter.

² It is not necessary to be determined in this case whether section 5 of the act in any way limits district attorneys in their right as the prosecuting officers of the United States to institute criminal proceedings or proceedings in rem when satisfied by satisfactory evidence obtained from other persons than health officers that the provisions of the act have been violated; and nothing in this opinion is to be considered as holding that the proceedings in this case could not have been taken by the district attorney as the result of his own investigation. Our opinion is based wholly upon the stipulation that the district attorney acted altogether in pursuance of the report of the Secretary of Agriculture.

We are aware that decisions have been rendered in several District Courts contrary to the conclusions reached in this opinion. It is sufficient to say that the reasoning of those cases does not commend itself to our approval and that we are unable to follow them.

The decree of the District Court is affirmed.

BOLOGNESI et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 8, 1911.)

No. 238.

1. POST OFFICE (§ 18*)—MONEY ORDERS—CHARACTER OF INSTRUMENT—"NEGOTIABLE INSTRUMENTS."

In the establishment and operation of the postal money order system, the government is not engaging in commercial transactions, but exercises a governmental power for the public benefit; and it follows that money orders are not negotiable instruments, subject to the defenses permitted to bona fide holders for value by the law merchant. The statute also imposes limitations and restrictions inconsistent with negotiability.

[Ed. Note.—For other cases, see Post Office, Dec. Dig. § 18.*

For other definitions, see Words and Phrases, vol. 5, pp. 4767-4770; vol. 8, p. 7731.]

2. POST OFFICE (§ 18*)—MONEY ORDERS—FRAUDULENT ISSUANCE—RECOVERY OF PAYMENT.

Under Rev. St. § 4057 (U. S. Comp. St. 1901, p. 2756), which provides that in all cases where money of the Post Office Department "has been paid to any person in consequence of fraudulent representations, or by the mistake, collusion, or misconduct of any officer or other employé in the postal service, the Postmaster General shall cause suit to be brought to recover such wrong or fraudulent payment or excess," the United States may recover the amount paid out on money orders fraudulently issued from the persons to whom it was paid, and the good faith of such persons in acquiring the orders is immaterial.

[Ed. Note.—For other cases, see Post Office, Dec. Dig. § 18.*]

In Error to the Circuit Court of the United States for the Southern District of New York.

Action at law by the United States against Alessandro Bolognesi and William Hartfield, trading as Bolognesi, Hartfield & Co. Judgment (169 Fed. 1013) for plaintiff, and defendants bring error. Affirmed.

Writ of error to review a judgment of the Circuit Court, Southern District of New York, in favor of the defendant in error who was the plaintiff below. In the opinion following the parties are designated as in the Circuit Court.

The United States brought an action against the defendants to recover moneys collected by them upon 128 money orders, amounting to \$12,800, fraudulently issued by one Marone, a clerk in charge of a sub-station of the Brooklyn, N. Y., post office, less the amount collected upon Marone's bond.

Upon the trial the government proved the fraudulent issue of the money orders in question and their collection by the defendants. The defendants then offered evidence tending to show that they received the fraudulent money orders in good faith and paid full value for them.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Upon motion of the government the trial judge directed a verdict for the United States for the full amount claimed and the defendants have brought this writ of error.

The question of primary importance which the defendants present to this court is thus stated at the conclusion of their brief:

"The question to be determined by the court is whether, assuming that the plaintiffs in error have adduced proof of their absolute innocence and good faith, the government is entitled to recover on the theory that the orders being in fact fraudulent the plaintiffs in error must suffer the loss and not the government."

In the following opinion this question will be first considered. If it is answered in the affirmative no examination of the facts assumed to be established in it will be required. If it is answered in the negative such examination will be necessary.

Mayer & Gilbert (A. S. Gilbert and Julius M. Mayer, of counsel), for plaintiffs in error.

Henry A. Wise, U. S. Atty., and Felix Frankfurter, Asst. U. S. Atty.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). [1] The act of 1872¹ establishing a money order system in the United States, provided in its first section (Rev. St. § 4027 [U. S. Comp. St. 1901, p. 2741]):

"To promote public convenience, and to insure greater security in the transfer of money through the mail, the Postmaster-General may establish and maintain, under such rules and regulations as he may deem expedient, a uniform money order system, at all suitable post offices, which shall be designated as 'money order offices.'"

Thus in the introduction to the act is the source of congressional authority to enact it disclosed. That which promotes the public convenience and provides for the transfer of money by mail is undoubtedly a proper exercise of the power conferred upon Congress by the Constitution "to establish post offices and post roads." Const. art. 1, § 8.

In the establishment and operation of the money order system the government exercises a governmental power for the public benefit. It serves the public by furnishing a safe and cheap method for transmitting small sums of money. It carries on the system not for gain, but to supply a public need. It does not engage in business, but stands in its position of sovereignty. Consequently the principles which govern commercial transactions between individuals have little application in this case and the cases are not in point which hold that "if it [the Government] comes down from its position of sovereignty and enters the domain of commerce it subjects itself to the same laws which govern individuals there." *Cooke v. United States*, 91 U. S. 396, 23 L. Ed. 237.

It follows as a corollary to the conclusion that the government in issuing money orders exercises a governmental function and does not engage in a commercial transaction that money orders are not nego-

¹ This act was apparently modeled after the English money order acts of 3 & 4 Vict. c. 96, and 11 & 12 Vict. c. 88.

liable instruments subject to the defenses permitted by the law merchant to bona fide holders for value. They stand in marked contrast to notes or similar obligations which the government might issue to obtain money for its own use and upon which it might incur all the responsibilities of a private person.

Moreover, the restrictions and limitations which the postal laws and regulations place upon money orders are inconsistent with the character of negotiable instruments. Thus:

(1) The cashing of a money order cannot, under ordinary circumstances, be made in advance of the receipt of the corresponding advice. Postal Laws and Regulations, § 1002.

(2) More than one indorsement of a money order invalidates it. *Id.* § 1007.

(3) After an order has once been paid by whomsoever presented, the department will not be further liable. *Id.* § 1009.

(4) Payment of orders will be withheld under a variety of circumstances.

In view of these regulations which have been made in accordance with acts of Congress it is apparent that no such unconditional promise of payment and freedom of circulation attach to money orders as to make them negotiable instruments.²

The conclusion that money orders are not negotiable instruments is also to be reached upon authority. In *United States v. Stockgrowers' Natl. Bank* (C. C.) 30 Fed. 912, 914, Mr. Justice Brewer, then Circuit Judge, said:

"It is undoubtedly true, as settled by the case of *Cooke v. United States*, 91 U. S. 389 [23 L. Ed. 237] that when the government descends from its position as sovereign and deals in commercial paper, it subjects itself to the ordinary rules controlling commercial paper the same as any individual. But these post office money orders are not commercial paper; they are orders drawn by one postmaster upon another, payable to a particular person named in the order itself, unknown save as to the particular parties to the transaction—the two postmasters and the party who obtains them—so that the protection which the rules applicable to negotiable paper would lay around many transactions do not avail the defendant in this case."

While the form of money orders has been changed since the decision in the *Stockgrowers' Bank Case*, there is, in our opinion, nothing in such changes to impair the authority of that decision to the effect that money orders are not negotiable instruments.

As, then, we are of the opinion that money orders are not negotiable instruments, we are not called upon to determine whether in case they were such instruments a bona fide holder thereof would be protected against the want of authority to issue them. This case must,

² In view of the fact already noticed that the money order system in this country was apparently modeled after that of England, it is of interest to note that in *Fine Art Society v. Union Bank*, L. R. 17 Q. B. D. 705, English post office orders were held not to possess the character of negotiable instruments. Indeed it was taken for granted that they were in fact not such instruments, but it was contended that they had been treated as such by the post office, bankers, and other parties. The Master of the Rolls, however, said, in substance, that money orders were so different from negotiable instruments that they could not be regarded as such even upon principles of estoppel.

in our opinion, be determined upon principles other than those of the law merchant, and the defenses which that law would afford a bona fide holder for value of commercial paper do not come up for consideration.

[2] The money orders in this case were fraudulently issued and the defendants obtained the money upon them. The next question is whether the government is entitled to get it back.

Section 4057 of the Revised Statutes (U. S. Comp. St. 1901, p. 2756) provides:

"In all cases where money has been paid out of the funds of the Post Office Department under the pretense that service has been performed therefor, when, in fact, such service has not been performed, or as additional allowance for increased service actually rendered, when the additional allowance exceeds the sum which, according to law, might rightfully have been allowed therefor, and *in all other cases where money of the department has been paid to any person in consequence of fraudulent representations, or by the mistake, collusion, or misconduct of any officer or other employé in the postal service*, the Postmaster-General shall cause suit to be brought to recover such wrong or fraudulent payment or excess, with interest thereon." (Italics ours.)

As, therefore, it appeared in this case that money of the Post Office Department had been paid to the defendants through the misconduct of an officer or employé of the postal service, the government was entitled to recover the same and the verdict was properly directed in its favor; the good faith of the defendants, upon the principles already considered, affording them no protection.³

Our conclusion in this case has been reached along broad lines. We fully appreciate that in effect we hold that if it have responsible persons to look to, the government cannot lose in the operation of the money order system—that whatever may be the fraudulent conduct of its officers or employés the loss must fall upon the individual. And the principle underlying this conclusion is that any other rule—any rule which would make the government bear the burden of the malfeasance of its officers in the operation of a governmental department and permit individuals, however innocent, to obtain its moneys without responsibility—would entail endless difficulties and losses; would be inimical to the public interest and contrary to public policy.

The judgment of the Circuit Court is affirmed.

³ By sustaining the government's right to recover by virtue of R. S. § 4057, we are not to be considered as negating the contention of the government that it might recover in the absence of such a statute in the common-law action of *indebitatus assumpsit*.

We also think the fact that the statute (section 4057) was originally enacted before the establishment of the money order system immaterial.

UNITED STATES FIDELITY & GUARANTY CO. v. UNITED STATES
ex rel. BARTLETT.UNITED STATES ex rel. BARTLETT v. UNITED STATES FIDELITY
& GUARANTY CO. et al.

(Circuit Court of Appeals, Second Circuit. May 8, 1911.)

No. 269.

1. UNITED STATES (§ 67*)—BONDS OF CONTRACTORS FOR PUBLIC WORK—CONSTRUCTION—"PROSECUTION OF THE WORK."

A bond given by a contractor with the United States for the construction of a riprap breakwater, and conditioned as required by Act Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), for the payment by the contractor of persons "supplying him with labor or materials in the prosecution of the work," covers the claims of laborers employed by him in quarrying the stone used and in transporting it to the breakwater, regardless of whether the work was done near by or at a distance.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. § 67.*]

2. ASSIGNMENTS (§ 31*)—MODE AND SUFFICIENCY.

Where plaintiff furnished supplies to laborers employed by a contractor for public work, under an arrangement that the amount of the accounts should be paid by the contractor and deducted from the wages of the men, the approval of such accounts by the men after the wages were earned was a sufficient assignment to support an action by plaintiff against the contractor and the sureties on his bond.

[Ed. Note.—For other cases, see Assignments, Dec. Dig. § 31.*]

3. ACTION (§ 12*)—DEFENSES—DELAY IN COMMENCING.

The defense of laches, not amounting to that of limitation, is not available in an action at law.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 12.*]

In Error to the Circuit Court of the United States for the Southern District of New York.

Action at law by the United States, on the relation of Frank P. Bartlett, against the United States Fidelity & Guaranty Company. Judgment for relator, and defendant brings error. Affirmed.

Writ of error to review a judgment of the Circuit Court, Southern District of New York, in favor of the defendant in error which was the plaintiff below.¹ In the statement and opinion following the parties will be designated as in the Circuit Court and although the United States is the nominal plaintiff the person for whose use and benefit the action was brought—Frank P. Bartlett—will be called the plaintiff.

The plaintiff sued John F. Donovan (who, however, was not summoned) as principal and the defendant as surety upon a contractor's bond given pursuant to Act Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), to recover upon assigned claims of laborers for services rendered at a quarry in Sachems Head, Conn., in getting out stone to be used under a contract between said Donovan and the United States for constructing a riprap breakwater extending out from the shore of Point Judith, R. I. The particu-

¹ A cross writ of error was also taken by the plaintiff to review the judgment because it did not include interest, but such writ of error was abandoned upon the hearing in this court and may be dismissed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

lar provision of the bond upon which the plaintiff based his right of recovery is as follows:

"Now, therefore, if the above bounden John F. Donovan * * * shall promptly make full payments to all persons supplying him labor or materials in the prosecution of the work provided for in the contract the above obligation shall be void and of no effect; otherwise to remain in full force and effect."

The following are among the facts which were not disputed upon the trial: The contract was made in the name of said Donovan who, however, did not own any plant and who made an arrangement with the firm of Hughes Bros. & Bangs—with whom he was connected—to do the work in his name.

The stone used in the performance of the contract was quarried at Sachems Head, Conn., and was thence taken by water to Point Judith, some 50 or 60 miles distant.

The plaintiff furnished supplies for the laborers at the quarry under an arrangement with Donovan that the amounts of their respective monthly accounts should be deducted from the payroll; and at the end of each month the accounts with such deductions were submitted to the men and were approved by them.

The laborers employed at the quarry engaged in the pursuits and operations necessary to the operation of a quarry including the loading of the stone on barges and scows.

When the scows were loaded they were towed to Point Judith and the stone was there dumped on the breakwater.

The principal contentions of the defendant upon this writ of error as stated in its brief are as follows:

(1) The terms of the bond do not warrant a recovery for the labor employed in operating the quarry because the contract provides only for the furnishing and placing of the stone in a breakwater 50 miles distant therefrom.

(2) No assignment of the men's wages was shown sufficient to sustain an action at law;

(3) The plaintiff's claim was fraudulent;

(4) The trial court erred in the rulings upon evidence.

Leonidas Dennis (Emanuel J. Myers and Gordon S. P. Kleeborg, of counsel), for United States Fidelity & Guaranty Co.

Edward W. Norris (H. L. Cheyney, of counsel), for F. P. Bartlett.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). [1] The labor required in getting out the stone at the quarry and loading it for transportation was undoubtedly the principal element in "the work to be done" under the contract. Most of the stone was merely dumped upon the breakwater. The labor there was inconsiderable. If, then, the bond cover only labor at the breakwater, it affords no protection to the men who in reality contributed most to the work. And if the statute leave such laborers without protection, it discriminates against them in favor of material men, for there can be no question that a claim of a sub-contractor for stone (in which labor would be the principal element of cost) used in a public work, would come within its provisions.

In our opinion the statute should receive no such narrow construction. As said by the Supreme Court of the United States in *Hill v. American Surety Co.*, 200 U. S. 197, 204, 26 Sup. Ct. 168, 170, 50 L. Ed. 437:

"Language could hardly be plainer to evidence the intention of Congress to protect those whose labor or material has contributed to the prosecution of the work."

We find nothing in the statute to support the contention made in this case that the bond given in accordance with its provisions covered only the labor performed at the breakwater itself. Had there been a quarry at the shore end of the breakwater and had the stone been wheeled out from such quarry in wheelbarrows and dumped, it could hardly be claimed that the laborers who got out the stone or hauled it were not engaged in the prosecution of the work. And the fact that a quarry might be 50 miles instead of 50 yards away from the dumping place should make no difference. We think that the bond in question covered the labor which the contractor was obliged to furnish to fulfill his contract with the government whether it was performed at the particular place where the stone was finally placed or elsewhere; that the quarrying of the stone, its transportation and dumping should be regarded as a continuous operation contributing in its entire progress to the prosecution of the work. We therefore hold that the instruction of the trial court that the labor at the quarry "was work done in the prosecution of the work" was correct and within the principle of the decisions in *Hill v. American Surety Co.*, supra; as well as in *City Trust Co. v. United States*, 147 Fed. 155, 77 C. C. A. 397, *Guaranty, etc., Co. v. Puget Sound Engineering Works*, 163 Fed. 168, 89 C. C. A. 618, and *American Surety Co. v. Lawrenceville Cement Co.* (C. C.) 110 Fed. 717.

The case of *Munroe v. Clark* (Maine Sup. Ct., 1910) 77 Atl. 696, 30 L. R. A. (N. S.) 82, which the defendant cites and quotes from at length, is not in conflict with, but rather supports, the conclusions we have reached. In that case the court, in speaking of a state lien law, said:

"The distinction is clear. Where one engages to erect a building, or to do certain things in the erection of the building, as, for example, the carpenter work, or the painting, or the plumbing, or the granite work, his employes have liens for their labor in doing these things. And if, in connection with doing these things, he agrees to furnish, and does furnish, the materials, the result is the same. It is not necessary that all of the labor should actually be done on the structure itself. To illustrate: The doors and windows may be made at the shop, the boards may be sawed and planed at the mill, or the iron work done at the blacksmith shop. These processes are all a part of the erection of the building. The work so done, in the contemplation of the statute, is done 'in the erection of a building.' *Webster v. Real Estate Improvement Co.*, 140 Mass. 526, 6 N. E. 71.

"But where one contracts to furnish completed articles for a building, and is to have no part in the erection of the building, his employes have no lien for their labor in preparing and completing the articles. Their labor is in no proper sense performed 'in the erection of the building.'"

In the present case the contractor was not merely to furnish the stone and to have no part in the erection of the breakwater. Like the builder whose laborers worked in shop or mill to get out the material and whose work in the contemplation of the state statute was done "in the erection of the building" this contractor was, under his contract, both to furnish the material and put it in place, and his laborers

who worked to get out such material contributed to the "prosecution of the work" within the meaning of the federal statute.

[2] The second contention of the defendant is that the plaintiff showed only an equitable, as distinguished from a legal, assignment of the laborers' wages. We think this contention without foundation. While the original agreement, made at the time the laborers were employed, may have amounted only to an agreement to assign, the act of the laborers after the wages were earned in going over the accounts and in approving the deductions was sufficient, in connection with the original agreement, to amount to a legal assignment.

[3] The third contention of the defendant is that the plaintiff's claim was a fraud in law because (1) he made an exaggerated and unreasonable demand; (2) his demand was "inextricably confounded" with items for which the surety was not liable, and (3) he was guilty of laches and delay.

With respect to these contentions it is sufficient to say that the defense of laches not amounting to that of the statute of limitations is not available in actions at law; that a person does not forfeit what is due him by demanding more, and that it is not shown that the accounts were "inextricably confounded."

The remaining contentions relate to rulings upon the trial. The admission of the leading questions and the answers thereto was, however, within the discretion of the trial judge and the defendant was not prejudiced by the admission of the statements made by Hughes Bros. & Bangs.

The judgment of the Circuit Court is affirmed.

ENOS v. KENTUCKY DISTILLERIES & WAREHOUSE CO. et al.

(Circuit Court of Appeals, Sixth Circuit. July 11, 1911.)

No. 2,089.

1. REMOVAL OF CAUSES (§ 107*)—PARTIES—FRAUDULENT JOINDER—BURDEN OF PROOF.

Where a petition for removal stated sufficient grounds therefor and charged a fraudulent joinder of parties to prevent removal, on plaintiff's denial, the burden of proof of fraudulent joinder was on the removing defendants.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 230; Dec. Dig. § 107.*]

Fraudulent joinder of parties to prevent removal of cause, see note to *Offner v. Chicago & E. R. Co.*, 78 C. C. A. 362.]

2. REMOVAL OF CAUSES (§ 36*)—PARTIES—FRAUDULENT JOINDER—PERSONS ENGAGED IN SUPERINTENDENCE.

Decedent was killed by falling down an open elevator shaft in a distillery in Kentucky belonging to and operated by nonresident defendants. Defendants, H. & B., who were residents of Kentucky, were, respectively, the superintendent and foreman of the distillery at the time of the accident. The foreman under the superintendent's direction employed decedent as well as the other hands working in the distillery. The fore-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r indexes.

man under the superintendent's orders had taken out the elevator and had removed the guards or barriers at the shaft opening, which the removal of the elevator and the repair work made necessary. The elevator had been out of service for several weeks, and a carpenter had been employed to work thereon who had used a plank across the elevator shaft while at work, and left it there from at least the day before the accident. The plank was across the opening on the morning of the accident when decedent was engaged in lowering barrels from the fifth floor with the knowledge of the foreman and presumably of the superintendent, and while so engaged decedent and the plank in some way fell through the opening to the bottom of the shaft. Negligence was alleged jointly in removing the elevator and in substituting the block and tackle for the lowering of the barrels, in allowing the loose plank to lie across the elevator shaft opening, and in failing to provide a guard or protection around the shaft. *Held*, that since, if the nonresident corporations owning and operating the distillery were liable, it was solely because of the negligence of the resident defendants, one or both, and under Kentucky law a servant whose negligent acts cause liability of the corporation may, as matter of right, be joined as defendant with the corporation, the complaint, alleging such facts, did not show a fraudulent joinder of parties authorizing the removal of the case to the federal court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 79; Dec. Dig. § 36.*]

3. REMOVAL OF CAUSES (§ 36*)—PARTIES—FRAUDULENT JOINDER.

The rule permitting removal to the federal court in case of a fraudulent joinder of a defendant whose presence destroys diversity of citizenship cannot be extended to authorize an inference of such fraudulent joinder from the fact only that no cause of action is found to exist against any defendant, resident or nonresident, or permitting removal in a case where the negligence of a corporation defendant can be made out only by proof of negligence of the servant alleged to have been fraudulently joined, but against whom a cause of action is stated.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 79; Dec. Dig. § 36.*]

4. COURTS (§ 406*)—JURISDICTION—REVIEW.

Where a case was improperly removed to the federal court, and such court had no jurisdiction for lack of diversity of citizenship, the Court of Appeals on a writ of error was bound to declare such lack of jurisdiction, and remand the case to the Circuit Court, with directions to remand to the state court, without determining any other questions.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 406.*]

In Error to the Circuit Court of the United States for the Western District of Kentucky.

Action by Fannie Enos, administratrix of the estate of Charles Thomas Enos, deceased, against the Kentucky Distilleries & Warehouse Company and others. Judgment for defendants, and plaintiff brings error. Reversed.

A. E. Richards (O'Doherty & Yonts, on the brief), for plaintiff in error.

E. P. Humphrey (Bennett H. Young and Marion P. Humphrey, on the brief), for defendants in error.

Before SEVERENS and KNAPPEN, Circuit Judges, and DENISON, District Judge.

KNAPPEN, Circuit Judge. The plaintiff in error brought suit in the circuit court for Jefferson county, Ky., for the recovery of damages on account of injuries, resulting in death, received by decedent in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

falling down an open elevator shaft in the John G. Roach Distillery at Louisville, Ky., while decedent was employed therein. The suit was brought against the defendants above named, with whom were joined George A. McCran, W. J. O'Hearn, and Martin Bittner. The Distilleries & Warehouse Company is a New Jersey corporation and the owner of the distillery. Julius Kessler & Co. is a West Virginia corporation which was operating the distillery at the time of the accident in question. The whisky was being made in the name of Julius Kessler (who was a citizen of Illinois) under a government regulation requiring the brands to be taken out in the name of individuals. Shipman's relation is immaterial. He was a citizen of New York. Until a short time before the accident, the whisky had been made in McCran's name. O'Hearn and Bittner were, respectively, the superintendent and foreman of the distillery at the time of the accident. Both they and McCran were citizens of Kentucky. Some weeks before the accident an elevator which operated from the basement to the sixth floor of the distillery was taken out for repairs. The guard rails which had surrounded the elevator opening on the fifth floor were taken away at the same time. In connection with the work of repairing a plank had been in use, extending across the opening of the shaft on the fifth floor. At the time of the accident decedent was engaged, at the opening of the shaft on the fifth floor, in fastening a tackle to barrels, preparatory to lowering the same to the basement by means of a block and tackle operated by workmen upon the sixth floor. In connection with this work the decedent and the plank across the opening of the shaft in some way fell through the opening to the bottom of the shaft. Decedent's death was caused by the injuries thus received.

The defendants were alleged to be jointly and concurrently negligent, first, in removing the elevator and substituting the block and tackle therefor; second, in allowing the loose plank to lie at the elevator shaft opening, and in the absence of sufficient light; and, third, in failing to provide a guard or protection around the shaft opening.

The defendant corporations and the individual defendants Kessler and Shipman joined in a petition for removal of the cause to the federal court, alleging that no cause of action was stated against the resident defendants McCran, O'Hearn, and Bittner; that the allegations charging these defendants with negligence were untrue, and were known by the plaintiff to be untrue when she instituted her suit; that she did not then and does not now expect to prove any of said allegations or to obtain a verdict and judgment against the resident defendants named; and that the latter were joined with the nonresident defendants for the sole and fraudulent purpose of defeating the removal of the cause. The state court approved the removal bond, but refused to order the removal. The transcript being filed in the federal court, a motion to remand was made, issue being joined upon the material allegations in the petition for removal. Testimony upon the issue thus raised was presented by oral examination of witnesses. The circuit court found that McCran's connection with the distillery had entirely ceased previous to the accident, and that he was thus fraudulently joined for the purpose of preventing a removal of the cause.

The court further found that the plaintiff had no right to recover against either O'Hearn or Bittner, this conclusion being based upon the propositions that the place where decedent was working became unsafe, if at all, by the negligent performance of the work in hand; that decedent had assumed the risk, and that it was fairly open to conjecture that his negligence was the cause of the accident; that Bittner's duty was not shown to include the putting in of an elevator instead of a block and tackle; and that O'Hearn was absent from the warehouse on the day of the accident, and gave no directions and did no act which would entitle the plaintiff to believe that she had any cause of action against him. The court further expressed the opinion that had plaintiff before commencing suit made earnest inquiry as to the exact facts she would have so discovered, and that she had no right to shut her eyes and refrain from such inquiry, and that from such facts and from her failure to testify as to her good faith in joining O'Hearn and Bittner as defendants it was fairly presumable that they were joined as defendants with the like fraudulent purpose of preventing removal. The motion to remand was accordingly denied. At the conclusion of a trial upon the merits verdict and judgment were directed in favor of the defendants. The assignments argued here relate to the refusal to remand and to the direction of verdict and judgment.

[1] Assuming that the petition for removal stated sufficient ground therefor, upon the plaintiff's denial of the allegations of fraudulent joinder, the burden of proof was upon the removing defendants to establish the fact of fraudulent joinder. See *Hunter v. Illinois Central R. R. Co.*, 188 Fed. 645 (decided by this court June 6, 1911). The parties recognized this condition, the only testimony upon the hearing of the motion to remand being presented by defendants.

[2] It affirmatively appeared that O'Hearn and Bittner were in the employ of Kessler & Co.; that O'Hearn was superintendent of the distillery and hired Bittner, the foreman, and that the latter under the superintendent's direction employed decedent as well as the other hands at work in the distillery; that the superintendent ordered the taking out of the elevator; that the foreman took it out, taking away in that connection the guards or barriers at the shaft opening, which the removal of the elevator and the repair work made necessary; that the elevator had been out of service for several weeks; that the foreman employed the carpenter who was at work on the elevator; that this carpenter used the plank across the elevator shaft while at work, and left it there from at least the day before the accident, if not for a longer period; that the plank was across the opening on the morning of the accident, and the work of lowering the barrels entered upon, all with the knowledge of the foreman, and, in large part, presumably with that of the superintendent; and that the foreman, with this knowledge and under the circumstances stated, assigned decedent to his work on the fifth floor at the elevator shaft, as well as those assisting with the block and tackle on the floor above. From these facts it is apparent that, if the Distillery Company and Julius Kessler & Co. were liable for decedent's injuries, it is because of the negligent acts of O'Hearn and Bittner, one or both. In other words, if neither of

them was negligent, defendants would not be liable; and, if either were properly joined, the case was not removable. According to the settled law in Kentucky, the servant whose negligent act creates the liability of the corporation may, as a matter of right be joined as defendant with the corporation. *Cincinnati & T. P. Ry. Co. v. Bohon*, 200 U. S. 221, 223, 26 Sup. Ct. 166, 50 L. Ed. 448; *Winston's Adm'r v. Illinois Central R. R. Co.*, 111 Ky. 954, 957, 65 S. W. 13, 55 L. R. A. 603. To assert, therefore, that O'Hearn and Bittner were not liable for the decedent's injuries is but another way of asserting that neither the Distillery Company nor Kessler & Co. were liable. Indeed, the circuit court in denying the motion to remand practically found that plaintiff was affirmatively shown to have no cause of action against any of the defendants. The assertion of fraudulent joinder of O'Hearn and Bittner necessarily involves the proposition that the cause of action against even the resident defendants was fraudulently asserted.

[3] But the rule which permits a removal to the federal court in case of the fraudulent joinder of defendants whose presence destroys diversity of citizenship cannot be carried to the extent of permitting such fraudulent joinder to be inferred from the fact only that no cause of action is found to exist against any defendant, resident or nonresident, or of permitting removal in a case where the negligence of the corporate defendant can be made out only by proof of negligence of the servant alleged to be fraudulently joined, but against whom a cause of action is stated.

In *Illinois Central R. R. Co. v. Sheegog*, 215 U. S. 308, 318, 30 Sup. Ct. 101, 103 (54 L. Ed. 208), the court, in considering the alleged fraudulent joinder of the lessor railroad with the lessee railroad, said:

"The joint liability arising from the fault of the Illinois Central Road gave the plaintiff an absolute option to sue both if he preferred, and no motive could make his choice a fraud. The only way in which fraud could be made out would be by establishing that the allegation of a cause of action against the Illinois Central Railroad was fraudulent, or at least any part of it for which its lessor possibly could be held. But it seems to us that to allow that to be done on such a petition as is before us would be going too far in an effort to counteract evasions of federal jurisdiction."

In *Willard v. Chicago, B. & Q. R. Co.*, 165 Fed. 181, 91 C. C. A. 215, suit was brought charging joint negligence and joint liability against both the lessor and the lessee railroad. The lessee railroad removed the cause to the federal court upon the ground that the lessor road was fraudulently joined as a party defendant. The Court of Appeals of the Seventh Circuit said that:

"The good faith of the plaintiff, in such joinder of the lessor corporation, is fully vindicated by the conceded fact of an established rule in Illinois which authorizes joinder and joint recovery, under such circumstances, in the state forum."

Upon a review of this case in the Supreme Court it was said:

"It cannot be predicated of the plaintiff that he fraudulently and improperly made the Illinois corporation a codefendant with the Iowa corporation when such a charge is negatived, *as matter of law*, by the fact that the plaintiff was, as we have seen, entitled under the laws of Illinois, where the cause of action originated, and within which the road in question

was located, to bring joint action against the Illinois and Iowa companies. *Illinois Central R. R. Co. v. Sheegog*, 215 U. S. 308, 316 [30 Sup. Ct. 101, 54 L. Ed. 208]. He may have preferred to have the case tried in the state court, just as the Iowa corporation preferred the federal court, but these preferences or motives, not fraudulent or unnatural, were of no consequence. They were immaterial in determining whether the plaintiff had a legal right to bring a joint action against the lessor and the lessee companies and to carry it on in that form to a conclusion." (*Italics are ours.*) *Chicago, B. & Q. Ry. Co. v. Willard*, 220 U. S. 413, 30 Sup. Ct. 460, 55 L. Ed. 521, decided April 10, 1911.

We agree with the circuit court that the plaintiff's petition stated a cause of action against all the defendants. We are therefore constrained to hold that under the undisputed facts of the case Bittner and O'Hearn were, as matter of law, properly joined, and thus the allegations of fraudulent joinder as to those defendants were not sustained.

[4] This being so, and they being proper defendants, the federal court had no jurisdiction of the case for lack of diversity of citizenship. This court therefore not only has the power, but is under a positive duty to declare the lack of jurisdiction of the court below, and to dispose of the case accordingly. See *Willard v. Chicago, B. & Q. Ry. Co.*, *supra*, 165 Fed. 182, 91 C. C. A. 215.

Having reached this conclusion, it is unnecessary to determine whether the circuit court was right in holding that McCran was fraudulently joined as a defendant, for the circuit court had no jurisdiction of the case if either Bittner or O'Hearn were properly joined. The same consideration makes it unnecessary to consider the probative effect of plaintiff's failure to testify to her good faith in joining the resident defendants, or of the fact that suit was originally brought against the Distilleries Company alone, and upon its removal to the federal court the suit now here instituted.

The question raised as to the effect of the error in the transcript sent up by the clerk of the state court, by which it was made to appear that defendant Kessler was a citizen of Kentucky, is immaterial.

As under the conclusion we have reached the circuit court had no jurisdiction of the controversy, we cannot consider the alleged error in directing a verdict and judgment for the defendant.

For lack of jurisdiction in the trial court the judgment is reversed and the cause remanded to the Circuit Court of the United States for the Western District of Kentucky, with direction to remand the same to the circuit court for Jefferson county, Ky.

ROBINSON v. MUTUAL RESERVE LIFE INS. CO.

SCOVILL v. SAME.

(Circuit Court of Appeals, Second Circuit. July 17, 1911.)

Nos. 289, 290, 292.

1. INSURANCE (§ 72*)—MUTUAL COMPANIES—DISSOLUTION—DISTRIBUTION OF ASSETS.

Under the laws of New York, a mutual insurance company may create a reserve fund immune against claims of general creditors in the nature

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of a trust to be devoted to the payment of "assessments" thus benefiting living members, or to the payment of "death losses," thus benefiting beneficiaries, and persons giving credit to such corporation are chargeable with knowledge that certain parts of its income may be set aside.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 72.*]

2. INSURANCE (§ 72*)—MUTUAL COMPANIES—SOLVENCY—DISTRIBUTION OF ASSETS.

Where, in proceedings involving the distribution of the funds of an insolvent insurance company, a beneficiary intervened "on her own behalf and on behalf of any and all persons similarly situated," and no one else intervened in support of this class who secured an advantageous disposition of their claims, the court would, if it deemed the controversy so complicated and the interests so involved that the claims of such particular beneficiaries would not otherwise have been properly represented, have discretionary power to allow claims for legal services for counsel representing such interests to be paid out of the funds.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 72.*]

Noyes, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Suits by James C. Robinson and by Reuben O. Scovill against the Mutual Reserve Life Insurance Company. Appeal from a final decree distributing the funds of defendant. Affirmed.

This cause comes here upon appeal from final decree distributing the funds of defendant, an insolvent insurance company, among the several claimants. The company is the one which was before the Supreme Court in *Polk v. Mutual Reserve Life Insurance Company*, 207 U. S. 310, 28 Sup. Ct. 65, 55 L. Ed. 222. The opinions of the Circuit Judge dealing with the questions raised on this appeal are reported in 175 Fed. 624, and 182 Fed. 850.

See, also, 175 Fed. 629.

Sewell T. Tyng and John T. McGovern, for appellants Turley & Turley, Loring, and others.

Charles T. B. Rowe (Frederick A. Card, of counsel), for appellants Carroll and Fitzgerald.

Gilbert E. Roe (Roe & McCombs, of counsel), for appellant Dogge.

Miles M. Dawson, for appellant Campbell.

Van Iderstine & Barker, for appellants Robinson, Whipple, and others.

Thomas Carmody, Atty. Gen., and William A. McQuaid and Robert P. Beyer, Deputy Attys. Gen., for the People.

Wm. Beverly Winslow, for appellees Robinson and Scovill.

John M. Scoble, for appellees Catoe and others.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. [1] The special master's report has marshaled the facts exhaustively; his report and the two opinions of Judge Ward contain all that it is necessary to say, since we concur fully in the conclusions expressed in the decree. Upon the argument our first impression was rather adverse to the proposition that the reserve fund created by the members of the old association could be made immune as against the claims of general creditors. But

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

an examination of the various New York authorities which have been cited satisfies us that associations such as this may, if they choose, create just such a trust which shall be devoted to the payment of "assessments," thus benefiting living members, or to the payment of "death losses," thus benefiting beneficiaries. All persons giving credit to such a corporation are chargeable with knowledge that a certain part of its income from assessments may be thus set aside. These authorities further indicate that the question whether or not such a trust has been created is one to be determined in each case from an examination of the Constitutions, by-laws, certificates, etc., of the particular company under consideration. The analysis of these documents in the special master's report fully supports the conclusion that the funds, identifiable as part of the old reserve fund, which have come into the possession of the receiver, are pledged first to pay death claimants under assessment policies. We are not persuaded that by misapplication of funds received from the members who came in after reorganization under the level premium plan, the latter or their beneficiaries have by subrogation acquired any rights against that specific fund; the evidence fails satisfactorily to show such diversions.

As to the claims against the general funds, presented by the death claimants in both classes, the living policy holders, the general creditors, and the state of New York for franchise tax and certain disbursements, we fully concur with the circuit court.

As to the claim for allowances for legal services and disbursements of counsel who represented Christina S. Dogge, we understand the Circuit Court to have refused to make any such allowance solely on the ground of lack of power. Mrs. Dogge was a beneficiary under an assessment policy and was allowed to intervene "on her own behalf and on behalf of any and all other persons similarly situated." No one else intervened in support of this class of claimants, who have secured an advantageous disposition of their claims. It is no doubt true that the services did not increase the assets in the hands of receivers, and it is equally true that, under the authorities, the court cannot require the other claimants of the same class who did not join with Mrs. Dogge and contribute to the expense, to give up part of their claim in order to create a fund to pay for the services, but it does not follow that the court is powerless to compensate, if in its sound judgment compensation is due.

[2] Where a complicated controversy involving many different interests in a fund is before the court, and some particular interest is not so represented that the facts supporting its claim are likely to be fully brought out and properly presented, we know no reason why the court may not assign some competent person to do such work and compensate him, as receivers' counsel are compensated, viz., out of the funds in the hands of receivers. We think it would be unfortunate if the courts did not possess such power, because the receivers necessarily represent so many different interests that they must generally stand neutral, and there will be many occasions where correct conclu-

sions can be reached only after all sides of the controversy have been vigorously presented.

Whether this be such a case or not is a question to be left to the sound discretion of the circuit judge; the affirmance of this decree is not to be taken as foreclosing him from allowing Mrs. Dogge's claim to be again presented him, if he thinks it a proper one to be reconsidered.

NOYES, Circuit Judge (dissenting). A man must be just before he is generous; much more, if his charity begin at home. He may put aside moneys and agree with himself that they shall be used only for particular purposes; but still his creditors may seize them. He may die and leave a will creating funds for many objects; but he cannot thereby defeat the demands of his creditors. That which a man has the right to reserve either for his uses or charities is that which remains after his debts are paid.

A corporation may create special funds for the benefit of its stockholders or members; but it must first meet its obligations to its creditors. The courts have many times said that the assets of a corporation constitute a trust fund for the payment of its debts.¹ And this is true whether the corporation have, or have not, capital stock.

The primary reason why the stockholders or members of an insolvent corporation cannot appropriate its property and leave its debts unpaid is that they, in reality, *are* the corporation. They cannot pay themselves at the expense of their creditors. And this reason is quite as strong and the principle quite as applicable in the case of an insolvent co-operative insurance corporation as in any other case. Manifestly, the assets of such a corporation which the members have the right to divide, are those only which remain after general creditors are paid.

The beneficiaries of deceased members of a co-operative insurance corporation stand in a position similar to that of legatees under a will. They take by and through the member as the legatee takes through the testator, and are subject to the limitations attaching to the member. And while their rights may be vested and they may sue on the policy, they must look, as must the legatee, to the assets remaining after the payment of debts. In one sense they are creditors, but they are not like the general or outside creditors. Their rights are subject to the rules and regulations of the corporation because they take through them. The outside creditors deal with the corporation at arm's length.

It follows then that if the reserve fund in question in this case constitute part of the assets of this insolvent corporation, it must first be applied to the payment of the general creditors. And as such fund was created out of the moneys of the corporation, it does constitute a part of its assets unless in one of two contingencies:

(1) Unless the state of New York which created the corporation

¹ However the trust fund doctrine may be regarded all the discussion of it serves to emphasize the proposition that when the affairs of a corporation are being wound up distribution must be made to the creditors before stockholders or members receive anything.

has expressly provided by statute that reserve accumulations of co-operative insurance corporations shall not constitute a part of their assets and shall be free from the charge of their debts;

(2) Unless the reserve fund constituted a valid trust fund.

Now the only New York statute upon the subject to which attention has been directed is the act which provides that nothing in it shall prevent the creation of a reserve fund for the payment of assessments or death losses. Manifestly this statute, considered as a positive grant of authority, falls far short of providing that a reserve fund if created shall not, in respect of general creditors, constitute a part of the assets of the corporation. The statutory provisions are consistent with the creation of a fund for the purpose stated, but subject to the payment of debts.

The reserve fund did not constitute a trust fund because, in the first place, the corporation did not part with dominion over it. The moneys were merely placed in the hands of a custodian and were not altogether kept there. In the second place there was no trust because there was no designated beneficiary. The fund was to be distributed among members or "as the court shall direct." In the third place if there were a trust at all, it was for the benefit of the members of the corporation—in reality the corporation itself—and was, consequently, invalid as to outside creditors.

For these reasons I am of the opinion that, with respect to the general creditors, the reserve fund in question constituted a part of the assets of the corporation to which they had the right to look for the payment of their debts before it could be distributed to the members or their beneficiaries. While I have reached this conclusion merely by applying what would seem to be elementary legal principles, I think that it is not in conflict with, but is rather supported by, the decisions of the New York Court of Appeals which have been referred to.

For the reasons stated in the opinion in *Matter of Traders' & Travelers' Accident Co.*, 68 Misc. Rep. 440, 125 N. Y. Supp. 85, which I approve, I think that the claim of the state of New York is entitled to a preference.

In my opinion the decree of the circuit court should be reversed with respect to the claims of the general creditors and the claim of the state of New York.

UNITED STATES v. 300 CANS OF FROZEN EGGS.

(Circuit Court of Appeals, Second Circuit. June 6, 1911.)

No. 291.

1. FOOD (§ 24*)—DECOMPOSED FOOD—CONFISCATION—STATUTES—JURISDICTION.

Under Food & Drugs Act of June 30, 1906, c. 3915, § 10. 34 Stat. 771 (U. S. Comp. St. Supp. 1909, p. 1193), providing for the forfeiture and destruction of food transported in interstate commerce for sale, or having been transported, remains unloaded, unsold or in original unbroken packages, where a libel alleged that certain frozen eggs had been transported in interstate commerce and were, at the time of the service of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the libel, in whole or in part filthy, putrid or decomposed, and remained unsold in original unbroken packages in a warehouse in New York City, the libel was not fatally defective for failure to charge that the eggs had been transported for sale.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 17; Dec. Dig. § 24.*

What constitutes a violation of pure food regulations, see note to *Brina v. United States*, 105 C. C. A. 559.]

2. Food (§ 24*)—CONDEMNATION—FORFEITURE—LIBEL.

Where a libel against frozen eggs described them as articles of food, it was not objectionable for failure to negative that the eggs were intended for other than good uses.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 24.*]

3. Food (§ 24*)—INTERSTATE COMMERCE—CONSIGNMENT BY SHIPPER TO ITSELF.

The fact that frozen eggs, against which a libel was instituted, had been shipped from one state to another, consigned by the shipper to itself, did not indicate that they had not been transported in interstate commerce.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 24.*]

Appeal from the District Court of the United States for the Southern District of New York.

Libel by the United States against 300 cans of frozen eggs claimed by the European Egg Company. From a judgment sustaining exceptions to the libel, the government appeals. Reversed.

Henry A. Wise, U. S. Atty. (J. N. Boyle, Asst. U. S. Atty., of counsel), for the United States.

Olcott, Gruber, Bonyng & McManus (S. C. Nussbaum, of counsel), for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. This is a libel filed by the United States for the condemnation of 300 cans of frozen eggs under section 10 of the food and drugs act of June 30, 1906, c. 3915, 34 Stat. 771 (U. S. Comp. St. Supp. 1909, p. 1193). The material allegations are as follows:

"(1) This libel is filed by the United States of America in its own right, and prays seizure for condemnation of certain articles of food as hereinafter particularly set forth in accordance with the food and drugs act of Congress, approved June 30, 1906, 34 Stat. 768.

"(2) Your libelant represents to the court, that in the city, county and Southern district of New York, and within the jurisdiction of this honorable court, there are owned by the European Egg Company and stored at the Harrison Street Cold Storage Warehouse, No. 7 Harrison street, borough of Manhattan, city of New York, 300 cans, each containing an article of food, to wit, frozen eggs, each weighing approximately 28 pounds.

"(3) Your libelant further represents that said articles of food so as aforesaid particularly described are illegally held within the jurisdiction of this honorable court, and are liable to condemnation and confiscation, as provided in the said act of Congress:

"In that each of the said 300 cans contains an article of food, to wit, frozen eggs, which being animal substance, is in whole or in part filthy, putrid, and decomposed, contrary to the provisions of subdivision 6 of section 7 of the act of June 30, 1906.

"Your libelant further represents that the said articles were shipped from South Omaha, Nebraska, by the European Egg Company, on or about the 3d

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

day of October, 1910, via the Chicago, Burlington & Quincy Railroad Company, the Chicago, Indiana & Southern Railroad Company, and the Erie Despatch, and were thereafter transported and delivered to said European Egg Company at the Harrison Street Cold Storage Warehouse, No. 7 Harrison street, at the borough of Manhattan, in the city of New York, on or about the 8th day of October, 1910, and that the said articles remain unsold in their original unbroken packages in the said city, county and state of New York and in the Southern district of New York."

The European Egg Company, claimant, filed exceptions to the libel as follows:

"First Exception. That this honorable court has no jurisdiction of the matters contained in said libel, the same not being matters that come under the food and drugs act of Congress, approved June 30, 1906.

"Second Exception. For that the said libelant has not well and sufficiently set forth evidence to warrant the issuance of said libel, in so far as it does not state that said frozen eggs were seized while being used in interstate commerce."

The District Judge sustained the exceptions to the libel, saying:

"I think that *Hipolite Egg Co. v. United States*, 220 U. S. 45, 31 Sup. Ct. 364, 55 L. Ed. 364, covers this case if the eggs had been alleged to have been shipped 'for sale.' The statute (section 10) says 'transported * * * for sale,' and the libel does not follow the statute, though it does say that they remain unsold. That is hardly enough. It is not necessary to consider the power of Congress if the transportation was not for sale, but for aught that appears these eggs were not to be sold either as eggs or in any other form. Therefore the libelant must amend. Exceptions sustained."

The United States having failed to amend the libel, it was dismissed and this appeal taken from the decree.

We think the learned judge erred in treating the charge in the libel as against the cases while being transported. The second exception seems to proceed on this ground. The act expressly describes the guilty goods in such a case as "being transported * * * for sale." But the charge was against the goods in the original packages after transportation was over. The applicable words of the act are "or having been transported remains unloaded, unsold or in original unbroken packages." The allegations as to the carriage of the goods between Nebraska and New York were made for the purpose of showing that they were a subject of interstate commerce. It would be a very natural construction to hold that the words "for sale" describing the goods seized in course of transportation are to be carried forward to the goods in the next category seized after transportation is over as the claimant contends under the first exception. Indeed, this was the construction adopted by Sater, J., in *United States v. 46 Bags of Sugar* (D. C.) 183 Fed. 642. But the decision of the Supreme Court in *Hipolite Egg Co., Claimant of 500 Cases of Preserved Eggs, v. United States*, decided March 13, 1911, makes this construction impossible. The opinion of Mr. Justice McKenna and the transcript of record in that case shows that Thomas & Clarke (for whom the Hipolite Egg Company was substituted as claimant) were the owners of 370 cases of "preserved whole eggs" in a cold storage warehouse at St. Louis, Mo., which they had previously bought from the Hipolite Egg Company of that city; that Thomas & Clarke shipped

50 cases of these eggs from St. Louis to themselves at Peoria, Ill., to be used in their business as manufacturing bakers which were the cans seized in the original packages on their premises after the transportation was over. The charge in the libel was:

"That the said fifty cans, more or less, containing said food product and so adulterated as above set forth, have been transported from the city of St. Louis, in the state of Missouri, to the city of Peoria, in the state of Illinois, in the division and district aforesaid, and remain unsold in this district in the original and unbroken package, in the possession of Thomas & Clarke in the city of Peoria, in violation of the said act approved June 30, 1906."

Although the District Judge found that the eggs were not transported for sale, but for use by the consignees in their business, he entered a decree of condemnation which the Supreme Court confirmed. The case is precisely similar to the one under consideration. Mr. Justice McKenna states the claimant's contention as follows:

"(1) Section 10 of the food and drugs act does not apply to an article of food which has not been shipped for sale but which has been shipped solely for use as raw material in the manufacture of some other product."

He then goes on to say after considering Judge Sater's opinion, *supra*:

"The object of the law is to keep adulterated articles out of the channels of interstate commerce, or, if they enter such commerce, to condemn them while being transported or when they have reached their destination, provided they remain unloaded, unsold or in original unbroken packages. These situations are clearly separate, and we cannot unite or qualify them by the purpose of the owner to be a sale. It, indeed, may be asked in what manner a sale? The question suggests that we might accept the condition, and yet the instances of this record be within the statute. All articles, compound or single, not intended for consumption by the producer, are designed for sale, and, because they are, it is the concern of the law to have them pure. It is, however, insisted that 'the proceedings in personam authorized by the law was intended to, and no doubt is, capable of giving full force and effect to the law'; and, further, that a producer in a state is not interested in an article shipped from another state which is not intended to be sold or offered for consumption until it is manufactured into something else. The argument is peculiar. It is certainly to the interest of a producer or consumer that the article which he receives, no matter whence it come, shall be pure, and the law seeks to secure that interest, not only through personal penalties but through the condemnation of the article if impure. There is nothing inconsistent in the remedies, nor are they dependent. The *Three Friends*, 166 U. S. 1, 49, 17 Sup. Ct. 495, 41 L. Ed. 897. The first contention of the Egg Company is, therefore, untenable."

The District Judge dismissed the libel because it did not describe the goods as transported "for sale," whereas this exception should have been overruled. Willard, J., has come to conclusions similar to ours in *United States v. Two Barrels of Desicated Eggs* (D. C.) 185 Fed. 302, 307.

[2] It was further suggested at the hearing that these eggs might have been intended for other uses than food uses and that the libel should have alleged that they were to be used for food purposes. It does describe the goods as articles of food and this is quite sufficient to withstand these general exceptions.

[3] Finally, it is said that as the Egg Company shipped to itself, without sale, the packages were never a part of interstate commerce. We know of no authority for such a proposition. Certainly the case of Hipolite Egg Company is not such.

The decree is reversed.

THE CHARLES J. SENFF.

(Circuit Court of Appeals, Second Circuit. May 8, 1911.)

No. 267.

COLLISION (§ 95*)—STEAM TUGS CROSSING—FAULT.

A tug, with a car float alongside, proceeding up the Hudson at night, *held* not in fault for a collision between her tow and a tug coming down on a crossing course from her starboard side, and which failed to hold her speed after the exchange of passing signals.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200-202; Dec. Dig. § 95.*

Signals of meeting vessels, see note to The New York, 30 C. C. A. 630.]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty for collision by Owen J. McWilliams, as owner of the tug Zouave, against the tug Charles J. Senff; the Brooklyn Eastern District Terminal Company, claimant. Decree for claimant, and libellant appeals. Affirmed.

The suit was brought to recover damages for a collision between the libellant's steam tug Zouave and a car floated in tow of the steam tug, Charles H. Senff, which occurred in the North River on June 8, 1907, about 2 o'clock in the morning.

At the time of the collision the Zouave was proceeding down stream on the New Jersey side of the river and the Senff was proceeding up the river with a car float upon her port side projecting about 100 feet ahead of her. Those in charge of the Senff assert that when they first observed the Zouave they saw her red light on the starboard bow of the Senff about or less than 1,000 feet away; that immediately upon such light coming into view, the vessels exchanged signals of one whistle, and that soon afterwards the Senff stopped and reversed her engines.

Those in charge of the Zouave assert that they first saw the green light of the Senff on the Zouave's port bow when about a mile and a quarter away, and that the vessels then exchanged a one-whistle signal and afterwards exchanged another similar signal.

It appears that the Zouave failed to hold her speed and slowed down shortly before the collision. The port corner of the car float struck the port side of the Zouave inflicting damage. Both vessels appear to have blown alarm whistles.

The principal questions of fact upon the trial related to the courses of the vessels; the distance of the Zouave out in the river, and the distance between the vessels when first seen.

The District Judge who heard and saw the witnesses said that it was doubtful whether the Zouave was far out enough in the river when coming down to make the starboard hand rule applicable and that the cause seemed to be one for the rule of "special circumstances." But he further held that if the starboard hand rule were applicable, the Zouave failed to fulfill her

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

duty under it because she failed to hold her course and speed, and, consequently, he dismissed the libel.

De Lagnel Berier and James J. Macklin, for appellant.

Samuel Park and Carpenter & Park, for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). Both alternatives in this case seem to lead to the same result. If the Senff were not the burdened vessel, it is not apparent how she was in fault. Stopping and reversing when the Zouave was seen was undoubtedly the proper way to obey the signals and avoid a collision, and the testimony does not warrant a finding that there was negligence in failing to see the Zouave sooner. If, on the other hand, the Senff were the burdened vessel, the same course was proper to keep out of the way of the Zouave. The latter as the privileged vessel was the one at fault because she reversed her engines and slowed down instead of holding her speed. We think the District Judge fully warranted in saying that "that slowing probably brought about the collision."

The libelant, however, contends that the Senff as the burdened vessel was at fault for unnecessarily misleading the Zouave. This contention is based upon the theory that the Senff should have seen the Zouave while quite a long distance away and, instead of holding her course and stopping, should have ported her helm and thus have indicated clearly her intention to avoid the Zouave. But with the car float alongside and projecting ahead and the vessels as near as we think the weight of testimony places them, we are by no means satisfied that this would have been the wisest course for the Senff to take to avoid a collision, and her failure to take it cannot be regarded as unnecessarily misleading the Zouave.

The libelant also contends that the stopping and backing of the Zouave was not a fault but an error in extremis. It is, of course, true as stated in *The Oregon*, 158 U. S. 186, 204, 15 Sup. Ct. 804, 812, 39 L. Ed. 943—from which the libelant quotes—that "when the master of a vessel is confronted with a sudden peril caused by the action of another vessel so that he is justified in believing that collision is inevitable," his error in the exercise of his best judgment will not be regarded as a fault. But we think there is nothing in the present case calling for the application of this principle. We perceive no sudden peril into which the master of the Zouave was led by the action of the Senff.

The decree of the District Court is affirmed with costs.

ASHLEY v. SAMUEL C. TATUM CO.

(Circuit Court of Appeals, Second Circuit. June 6, 1911.)

No. 213.

PATENTS (§ 328*)—INVENTION—INKSTAND.

The Ashley patent, No. 829,752, for an inkstand which is made of glass, having a square or angular base and a substantially flat top with a circular reservoir therein, the glass being turned in to form a dome shaped cover to the reservoir leaving an opening in the center is void for lack of invention in view of the prior art.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Suit in equity by Frank M. Ashley against the Samuel C. Tatum Company. Decree for complainant, and defendant appeals. Reversed.

See, also, 181 Fed. 840, and 186 Fed. 339.

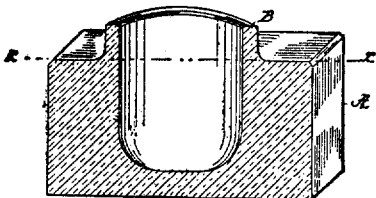
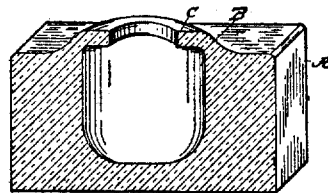
Wood & Wood, for appellant.

A. T. Scharps and Frank M. Ashley, for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The patent is No. 829,752, issued to complainant January 12, 1906; the design patent was issued August 8, 1905. The specification of No. 829,752 states that the invention relates particularly to that type of inkstands which is pressed in iron molds and has a base portion of a different form from the ink-well therein, and particularly to a square inkstand having a circular well formed therein and made of pressed glass. "The square glass inkstands made of pressed glass are generally formed by an iron mold and a round plunger is forced into the mold when the glass is in a molten state, and as the glass sets or crystallizes the plunger is withdrawn and the glass turned out of the mold, leaving a base square in cross section and a circular opening usually beginning flush with the surface of the square, as indicated by line *xx* on Figure 1 of the drawings."

The drawings are here reproduced:

Fig. 1.*Fig. 2.*

The specifications proceed:

"Therefore when the bases are used for the automatic type of inkstand which use floats of hard rubber, and are of a much smaller diameter than the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

opening of the well proper, it is necessary to use an extra top disc of hard rubber as a cover for the reservoir and to support the float and other parts of the automatic combination. By my invention I obviate the necessity of using this extra disc cover and have conceived a method of construction, as well as a new construction which makes a far better, cheaper and handsomer and more durable stand of this form than has heretofore been constructed.

"The object of my invention is to provide an inkstand base of square or irregular cross-section having a circular reservoir and a turned-in glass top or cover for the reservoir formed integral with the base and turned in toward the center of the stand at a point directly above the square of the base."

Referring to the drawings the patentee states that:

"Fig. 1 is a vertical sectional view showing the shape of the glass as it comes from the mold, and Fig. 2 is a vertical sectional view showing the stand with the top turned in. A indicates the square base, B the top ring as it is first formed and C shows the stand after the ring B has been turned in while in a molten condition."

The claims are as follows:

"(1) An inkstand made in a single piece, having a body angular in cross section and provided with a substantially flat top, a circular reservoir therein, and a turned-in portion directly above the top forming a low dome, substantially as shown and described.

"(2) An inkstand having a reservoir body with thickened walls and a dome-shaped cover therefor made integral therewith and of less diameter than the body, and having its wall of less thickness than the body portion.

"(3) An inkstand having a reservoir body with thickened walls and a cover therefor made integral therewith and of less diameter than the body, and having its wall of less thickness than the body portion, and formed above the body portion and provided with an opening, substantially as described."

The patentee was not the first to turn in the projecting ring formed on the top of a molded glass inkstand so that it would partially cover the reservoir and would reach in far enough to support an automatic float. We understand that he undertakes to differentiate the prior art by the suggestion that, "the turned-in portion of the earlier stands was at a considerable distance above the thickened cylindrical walls." We cannot find in the lower dome of his patent combined with a square base any useful function, although the appearance of the completed structure may be more artistic and attractive; but that element would be the subject of a design patent.

From the account which he gives of his invention it appears that when he first ordered an inkstand of the glassmakers they insisted that it could not be done. The process is first to form the base with an upstanding ring; then after it has cooled the ring portion is heated to a degree which will permit the ring to be spun inward toward the center; the glass being in a sufficiently heated condition at its top end to permit the spinning of this collar inward, while maintaining the body portion in a comparatively cooler condition, so that in holding the same, the holding implement will not deform the body portion. This method was in use for spinning-in the high collars of the prior art. The glassmakers insisted that it could not be employed with Ashley's short-necked collar because the heated portion of the collar was so close to the square top of the square base that the dome portion would crack loose from the base portion in cooling. The glassmakers turned out to be correct, for this very thing happened

in the first attempts to make these stands. The patentee thereupon devised a plan to meet this difficulty. He had the molds altered so as to form a fillet at the base of the collar where it joined the top of the reservoir. He also supplemented the old process, after the top had been turned in, by "immediately thereafter placing the entire stand in an annealing oven and re-heating the same to a red heat to remove the stresses set up in the pressing operation, and allowing the stand to gradually cool, so that the lower portion would become cold about as fast quickly as the cover portion." These modifications of the old process remedied the difficulty and made it possible to construct inkstands having the square base and low dome of the patent without cracking. It may be that the patentee invented a novel and useful process for making glass inkstands, but his specification did not disclose it to the world, and his claims cannot thereby be sustained. Indeed the specification states that "those skilled in the art will have no difficulty in making the stand from the drawings." He explains this by stating that before he filed his application he had imparted to the molders who were making stands for him all the necessary steps of his improved process.

We are satisfied that the inkstand itself as a completed structure exhibits no invention, and for that reason the patent is invalid.

Decree reversed and cause remanded, with instructions to dismiss the bill.

VICTOR TALKING MACHINE CO. v. AMERICAN GRAPHOPHONE CO.

(Circuit Court, S. D. New York. March 27, 1911.)

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—RECORD FOR TALKING MACHINES.

The Johnson patent, No. 896,059, for a record for talking machines and method of making the same, which consists of a laterally undulating record of constant depth in which the groove is formed by cutting out and removing the material of the disk by a cutting tool instead of being displaced by a needle point tool, and in which the side walls of the groove are clearly defined and smooth surfaces, and in the preferred form diverge from the bottom to the surface of the record, was properly granted in the discretion of the Patent Office on a divisional application, and was not anticipated by the Jones patent, No. 688,739, and discloses invention; also held infringed.

2. PATENTS (§ 229*)—SUIT FOR INFRINGEMENT—DEFENSES—ESTOPPEL.

A patent for a process consisting of a number of steps may be valid, although each of the steps was old, and a decree finding infringement of such a patent does not estop the defendant from claiming a valid patent himself for one of such steps, nor from maintaining a suit against the complainant for its infringement.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 229.*]

3. JUDGMENT (§ 701*)—PERSONS CONCLUDED—STOCKHOLDER IN CORPORATION DEFENDANT.

A stockholder in a corporation which is sued for infringement of a patent, although owning a majority of its stock, has not the legal right to control the defense in such suit, nor to intervene and make a separate

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

defense, and is not bound individually as a party or privy by the decree therein, where he does not in fact assume such defense.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1226; Dec. Dig. § 701.*]

4. PATENTS (§ 129*)—VALIDITY—ESTOPPEL TO DENY—LICENSEE.

A licensee under a patent is not estopped to purchase a valid patent subsequently issued to another on an application pending when the prior patent was issued, and which, if asserted, shows the prior patent under which the license was taken to have been invalid for anticipation, nor to assert his patent by suit against all infringers including his licensee.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 182½-186; Dec. Dig. § 129.*]

5. ESTOPPEL (§ 118*)—EQUITABLE ESTOPPEL—PROOF OF FRAUD.

In the absence of expressly proved fraud, there can be no estoppel based on the acts and conduct of the party sought to be estopped, where such acts and conduct are as consistent with honest purpose and absence of negligence, as with their opposites, and the facts constituting the estoppel must be clearly and distinctly and satisfactorily proved.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 306, 308; Dec. Dig. § 118.*]

In Equity. Suit by the Victor Talking Machine Company against the American Graphophone Company. Decree for complainant.

Suit in equity to restrain alleged infringement of United States letters patent No. 896,059, dated August 11, 1903, "record for talking machine," and for an accounting.

Horace Pettit, for complainant.

Philip Mauro, Reeve Lewis, and C. A. L. Massie (Ralph L. Scott, of counsel), for defendant.

RAY, District Judge. [1] The patent in suit, "record for talking machines," was granted to Eldridge R. Johnson, assignor to Victor Machine Company, August 11, 1908, on divisional application filed November 12, 1904, original application filed August 16, 1898. While the complainant alleges in a general way that substantially all the claims are infringed, it points out and specifically alleges infringement of claims 2, 3, 4, 8, 14, and 23. These claims read as follows:

"2. A disk sound record, having a cut laterally undulatory groove of substantially constant depth, the walls of said groove diverging from the bottom of the same to the surface of the record.

"3. The method of producing sound records consisting in cutting as distinguished from marking or tracing upon a tablet of suitable material by means of the lateral vibrations of a suitable stylus a record groove of appreciable and substantially uniform depth having lateral undulations corresponding to the sound waves.

"4. A sound record made from a cut laterally undulatory groove of substantially constant depth, the walls of said groove diverging from the bottom of the same to the surface of the record tablet. * * *

"8. A disk sound record comprising a spirally disposed laterally undulatory groove of substantially constant depth in which the record groove was formed by cutting out and removing the material in forming the record groove, substantially as described. * * *

"14. In the art of recording and reproducing sounds, the method of cutting out a laterally undulatory groove of substantially constant depth in a tablet of suitable material by vibrating laterally a cutting stylus

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

through the medium of sound waves and then forming a duplicate thereof. * * *

"23. The method of producing sound records consisting in cutting out the material in forming the record groove as distinguished from marking or tracing, upon a tablet of wax or other suitable material by means of the lateral vibrations of a suitable cutting stylus, and forming a record groove of appreciable and substantially uniform depth having lateral undulations corresponding to the sound waves, and then reproducing a sound record from the original record groove so cut."

The specifications of the patent in suit say:

"My invention relates to improvements in sound records of either the cylindrical or disk type, and has for its object to provide an improved record such that the walls of the groove shall be so formed as to reproduce the sounds of the record in tones more clear and distinct than has heretofore been possible from records of prior construction.

"In forming records upon sound recording machines for use in talking machines, such as the gramophone, where the sound waves are recorded in the form of a groove of even depth having lateral undulations as distinguished from an undulatory groove of varying depth, as in the type of machines of which the phonograph is an illustration, it is essential, in order to produce a clear record, that the material be neatly and cleanly cut from the grooves in the process of recording so that smooth, well-defined surfaces be formed in the walls of a well defined groove.

"In the art of making sound records, comparatively little attention has been paid to the finishing and the forming of the surfaces of the walls of the record groove. The vertical groove has heretofore been cut by a recording tool, which, owing to the character of the groove and the shape of the tool, has not only had a tendency to tear the material of the record, or distort the same, so as to form roughnesses which, in the reproduction of the record or its duplicate, cause disagreeable sounds, owing to the harsh vibrations of the diaphragm caused thereby, but also, among other things, in the vertical type of record, the resistance on the cutting stylus in gouging out the material increases in proportion to the depth, which objection is overcome in my cut laterally undulating record groove, where the resistance to the force exerted by the cutting stylus is uniform and even.

"I have discovered by careful experiments that the best results are obtained in a cut out laterally undulatory groove of substantially constant depth in a record tablet, preferably of wax or other suitable material, and furthermore, when the walls of the groove diverge from the bottom of the same to the surface of the record, or, more specifically, when the walls of the groove are formed by surfaces which in cross section give the lines of a segment of an ellipse, the groove being widest at its mouth, and gradually diminishing in its width toward the bottom. By this construction, the material is neatly and accurately cut out, and forms a groove having smooth and well-defined walls; the recording needle has greater freedom of oscillation, and by reason of the relative contour of the walls of the groove with the outline of the needle, this construction prevents any binding effect and secures a maximum ease of movement of the needle with a minimum of wear upon the record."

Mr. R. M. Hunter, complainant's expert, says:

"(8) I understand that the broad invention comprehended by the patentee is embodied in the method of producing a laterally undulating record of constant depth when the groove is formed by cutting out and removing the material, and in which the side walls of the groove are clearly defined and smooth surfaces produced by the cutting or engraving action of the stylus during the formation of the cut-out groove, whereas in the pre-

ferred form of the invention the side walls of the groove diverge from the bottom of the same to the surface of the record.'

"(9) The invention described in the patent embodies a method of forming an engraved or cut-out record and also the making of a commercial record from the cut-out record; also the structure comprising a disc having a cut-out laterally undulatory groove with or without diverging side walls; and, finally, a sound record made from the cut-out laterally undulatory groove of constant depth, and which sound record preferably is provided with diverging side walls. The first of these improvements is defined in claims 3, 14, and 23 of the patent in suit, the second is comprised in claims 2 and 8 thereof, and the third is comprised in claim 4 thereof."

In what is called the parent patent, patent to Eldridge R. Johnson, assignor to Victor Talking Machine Company, No. 778,975, dated January 3, 1905, application filed August 16, 1898, the claim made was for "cutting-tool for sound-recording machines." Johnson tells how to make or form a cut-out record. He says, after telling how to cut out and form a record:

"It is understood that in reproducing the record thus formed may be used for reproducing purposes directly, or a more durable and indestructible record may be reproduced by various processes from the original record. This feature, however, forms no part of my present invention herein described."

Earlier in the specifications of such parent patent, No. 778,975, he said:

"In producing records upon sound-recording machines for use upon talking-machines, such as the gramophones, where the sound-waves are recorded in the sides of the groove in the record instead of in the base, as in the type of machine of which the phonograph is an illustration, it is essential in order to produce a clear record that the material be cleanly and neatly cut from the groove in the process of recording, so that sharp well-defined lines will be formed in the walls of the groove. I have discovered that, in order to produce the best results, these side walls of the groove must be at a slight angle to the face of the plate or record, and the groove must be widest at the mouth. Where the walls are perpendicular or slightly wider at a point below the mouth of the groove, inferior results are produced, and the record is by no means as durable.

"The object of my present invention is to provide a cutting tool for cutting grooves in wax or other suitable material for recording sound waves of the construction above referred to, my aim being to provide a tool of microscopic proportions peculiarly formed with a flat face of substantially oval form, the edges of the oval being cutting edges to cleanly cut the material from the resultant groove, leaving sharp, smooth, well-defined edges, the flat face being preferably obliquely disposed to the axial line of the tool, so that when in position in operation to present a cutting-face substantially perpendicular.

"It is clear that my invention may also be applicable to other constructions of recording machines than that hereinbefore more particularly referred to."

Having said this, Johnson then described the tool for doing the work, how to use it, the method of doing the work, and the result. It is seen, however, that the record and method claims were not filed until November 12, 1904, six years after the filing of the "parent patent." I do not think there was an abuse of discretion in the Patent Office in allowing a division of the application in this case. In Stein-

metz v. Allen, 192 U. S. 543, 24 Sup. Ct. 416, 48 L. Ed. 555, the court, speaking of the division of applications, said:

"Without that rule (rule 41 held to be a hard and fast rule), the action of the Patent Office can be accommodated to the character of inventions and discretion can be exercised, and, when exercised, we may say in passing, except in cases of clear abuse, the courts will not review it."

Jones Patent.

November 19, 1897, Joseph W. Jones filed an application for a patent in this same art, and which the defendant claims fully covered this same invention described in the Johnson patent in suit and a patent issued thereon on the 10th day of December, 1901, for "production of sound records," No. 688,739. That patent has been the subject of considerable litigation. See *American Graphophone Co. v. Leeds & C. Co.* (C. C.) 131 Fed. 281; *Id.* (C. C.) 140 Fed. 981; *Same v. Universal Talking Machine Co.* (C. C.) 145 Fed. 636; *Same v. American Record Co.* (C. C.) 145 Fed. 643; *Same v. Universal Talking Machine Co.*, 151 Fed. 595, 81 C. C. A. 139; *Same v. International Record Co.* (C. C.) 155 Fed. 427; *Same v. Leeds & C. Co.*, 170 Fed. 327, 95 C. C. A. 511.

It is important to know what Jones invented when he made his invention and what he covers by his claims, and it is also important to know when Johnson made his invention described both in the so-called parent patent and the patent in suit. Jones antedates Johnson's first application by about nine months. The claims of the Jones patent read as follows:

"1. The herein-described method of producing sound records, which consist in cutting or engraving upon a tablet of suitable material, by means of the lateral vibrations of a suitable stylus, a record-groove of appreciable and practically uniform depth and having lateral undulations corresponding to the sound waves, next coating the same with a conducting material, then forming a matrix thereon by electrolysis, and finally separating this matrix and pressing the same into a tablet of suitable material, substantially as described.

"2. The process of producing commercial sound records of the type indicated, which consists of first preparing a flat tablet or disk of soft wax-like material, then engraving thereon by means of the lateral vibrations of a suitable stylus a record-groove of appreciable and uniform depth and having lateral undulations corresponding to sound-waves, next rendering the surface thereof electrically conductive, then forming a matrix thereon by electrolysis, next separating the matrix from the original record disk without the use of heat, and finally impressing said matrix into a disk of suitable material to form the ultimate record, substantially as described."

In his specifications Jones says:

"My invention relates to the commercial production of sound records, and has for its object the production of a number of copies of an original record characterized by lateral undulations of substantially uniform depth."

He then points out the so-called etching process of the prior art, and then says:

"I avoid these objections by producing in the first instance a fully-finished original record whose grooves are of the final depth required, slight but appreciable, thus doing away with the necessity for etching and the subsequent smoothing made necessary thereby. The original records

made by this process are electroplated and the electroplate matrix used as a die in the ordinary manner.

"In carrying out my invention, I employ a disk or tablet, of suitable recording material (as wax or a wax-like composition, preferably rendered sufficiently hard, as by an admixture of rosin, to withstand the treatment employed in giving it an electrical conducting-surface). Upon the surface of this tablet I then form by the use of a sound-recording machine in a well-known manner a spiral groove of practically uniform depth that contains lateral sinuosities or irregularities corresponding to or representing the sound waves recorded. This cutting or engraving of a record groove by the lateral movement of the stylus differs from the operation of the well-known graphophone system in that the resistance offered the stylus of a graphophone in cutting downward to produce the vertical irregularities characteristic of that system varies practically as the cube of the length of the vibrations of the diaphragm and stylus, whereas in producing my original records the resistance encountered by my recording-stylus is exactly equal to the length of the vibrations. On account of this difference in principle I am enabled to obtain more accurate, and therefore better, records of the original sounds. The original record so formed is an exact copy of the record to be used for reproducing. It is a complete and finished record, its grooves being of a slight yet appreciable depth, and no deepening or retouching by an etching fluid or in any other manner is required."

He then points out his electroplate process for the commercial production of sound records:

"I am aware that it has been proposed to make duplicates of sound records of the vertically-undulated character, the type generally known as 'graphophone-records,' by first coating the surface of such sound record with a conducting material, next depositing an electroplate thereon to form a die, and then pressing this die into some suitable material. This process is impracticable and unsuccessful for two reasons. First, when the conducting material (as plumbago) is deposited upon the vertical irregularities that are the very essence of this kind of record it forms a covering that resembles on a minute scale a light fall of snow over a landscape. The sharp contours of the vertical irregularities are rounded (the more delicate and minute irregularities being filled in and completely obliterated), with a resulting mutilation of the record. Again, when the electroplate die is pressed into the surface to be stamped any inequality in the material being stamped would cause unequal impressions to be made, some deeper than others, which is fatal to the accuracy of a record, whose very existence lies in the comparative depths and heights (vertical) of the irregularities. Furthermore, the presence (between the die and the material being stamped) of minute particles of dust or other foreign matter, or even of particles of air (air bubbles), would to that extent still further distort and disfigure the impressions stamped by an already inaccurate die, whereas in the laterally-undulated records any vertical deformation (whether due to the causes just pointed out or to any other cause) does not in the slightest degree affect the accuracy of the record, the essence of which lies in its lateral undulations, for the deposit of a film of conducting material does not modify the lateral outline, but only the vertical irregularities, and the deformations caused by the presence of foreign particles in the stamping or pressing process are vertical, and consequently do not affect a record that depends upon its lateral and not its vertical outline."

He then concludes his specifications as follows:

"For the foregoing reasons I do not claim my new process in connection with sound records characterized by vertical irregularities, but limit it to records characterized by lateral undulations of practically uniform depth."

It is obvious from the specifications of the Jones patent that he did not claim the discovery or use of any new or improved mode or method of "cutting or engraving" the spiral grooves, the laterally undulating grooves, in the wax or wax like tablet. He plainly recognized that this had been done before, and that there was more than one way of doing it. After describing his disk or tablet of suitable recording material, he specifically says:

"Upon the surface of this tablet I then form by the use of a sound-recording machine in a well-known manner a spiral groove of practically uniform depth that contains lateral sinuosities or irregularities corresponding to or representing the sound-waves recorded."

In short, he cuts or engraves his spiral groove in "a well-known manner."

In *American Graphophone Company v. Universal Talking Machine Company*, 151 Fed. 595, 81 C. C. A. 139, the Circuit Court of Appeals in this, the Second circuit, Judge Townsend writing the opinion, upheld the validity of the Jones patent as disclosing invention in the mode or method of making commercial sound records by (1) cutting or engraving a record groove of uniform depth by means of the lateral vibrations of a suitable stylus upon a disk of wax like material; (2) coating the same with a conducting material; (3) then forming a matrix thereon by electrolysis; (4) then making therefrom duplicate records by impression. This case was decided January 14, 1907. I find no reference in that case to the then pending application of Johnson for the patent in suit, issued in August of the next year, 1908. Judge Townsend refers to the Bell and Tainter patent, No. 341,214, claim 9 of which was for "the method of forming a sound or speech record which consists in engraving or cutting the same in wax or a wax like composition, substantially as described." Of this Judge Townsend said:

"An examination of the Bell and Tainter patent shows that the assumptions as to its broad scope are without foundation. There is not a word of reference in the specifications to the engraving laterally of undulating records, or of any records of uniform depth."

This indicates a departure by Jones from Bell and Tainter in both these respects, as, indeed, the specifications and claims of Jones show. Clearly Jones cut or engraved on his tablet a record-groove "of appreciable and practically uniform depth" having "lateral undulations corresponding to the sound waves." From the opinion of Judge Townsend we would infer that it was here that he found patentable invention in the Jones method. The distinction drawn between Bell and Tainter and Jones seems to have been that Bell and Tainter cut or engraved sound grooves on cylinders or on tablets vertically instead of laterally and without regard to uniformity in depth.

Patent Office.

After Johnson had divided his original application and filed his application for the patent in suit, November 12, 1904 (serial No. 232,389), the principal examiner finally April 3, 1903, rejected claims 1, 2, 3, and 9 (which seem to be the same as claims 1, 2, 3, and 4 of

the patent in suit), and the claimant appealed to the board of examiners in chief April 8, 1908. Amongst others the Jones patent in question here was cited. July 7, 1908, the board of examiners reversed the examiner in chief. It was held that Johnson was rightfully in the Patent Office with his divisional claims, and that Jones did not anticipate as he had filed and abandoned claims for the same subject-matter as is embraced in the claims before the board of the patent in suit. Amongst other things on this subject the board said:

"Jones has no more equity against the applicant's right to a patent for the subject-matter of the appealed claims, nor, if possible, even as much as Clark and Johnson, No. 624,625, May 9, 1899, have, upon whose patent Jones claims for the subject matter here appealed were rejected."

The board of examiners also said:

"It will be observed from the foregoing that the application discloses and claims a method of producing a sound record by cutting out the grooves, or by 'cutting' as it is named in claim 3, and a sound record in which the grooves are 'cut' or cut out. The claims will be treated in this decision as if they read cutting out and cut out, as an examination of the application reveals that the terms 'cutting' and 'cut' mean, respectively, cutting out and cut out.

"The prior state of the art of record shows that a 'cut' groove with diverging walls was old prior to August 16, 1898 (Bell & Tainter), and that a 'tracer' laterally undulatory groove of substantially constant depth, the walls diverging from the bottom of the groove to the surface of the record, was old (British patent No. 15,206). This latter statement is based on the holding that the pointed tracer—having walls sloping to a point—in the British patent will cause a groove to be formed with sloping or diverging walls. The record also shows that a 'cut' laterally undulatory groove of constant depth, with vertical walls, was old (application, page 1, line 29); and both etched (Berliner, No. 382,790) and pressed (ibid. No. 548,623), laterally undulatory grooves of constant depth was old, and that the walls of the etched groove were treated for smoothness.

"Reading into claims 1, 2, and 9 after the word 'cut' the word 'out,' as we do, it is found that the record defined therein differs, among other features, from the record in the prior art, in that the lateral groove in the record in the claims is cut out; in other words, the record pointed out by claims 2 and 9 differs from a cut laterally undulatory groove of substantially constant depth and diverging walls—record in the fact, among other things, that the groove in the record in these two claims is cut out. Or that the record in claims 2 and 9 differs from a cut out vertically undulatory groove with diverging walls, in that in the record in the claims the groove is lateral as distinguished from vertical, and is also of constant depth. The features of lateralness, constant depth, and diverging walls conjointly in one and the same record are not original with the applicant, as the art of record shows, nor is the separate feature of the cut out of the groove new with him, except applied to a laterally undulatory groove. The sound record in claim 1 differs from the cut lateral groove record of the British patent No. 15,206, in that the material is cut out instead of traced or divided, and 'by a tool having edges so sharpened and inclined as to cut (out) the material.' It is not original with the applicant to cut out the material of the tablet to form a groove 'by a tool having edges so sharpened,' etc. (Bell & Tainter), except as to the lateral groove. It will be seen that neither the tool specified, the diverging walls, nor the constant depth separately can serve to point out a record with lateral grooves new with the applicant, but that if the record defined in the claims can be said to be patentable it must be so in the fact of the feature of the cut out of the laterally undulatory

groove, as dominating its fellow features and making out and defining the sound record as a unitary article."

Johnson's Idea in 1898.

I think it quite clear from the prior art, the proceedings in the Patent Office, the exhibits and testimony that Johnson had clearly in mind the actual cutting out and removal from the groove of a part of the substance of the disk or tablet on which the original record was to be made in the art of making sound records upon tablets of wax or other suitable material of the laterally undulatory groove type, and that he was the first to conceive this idea and reduce it to practice. In August, 1898, he said:

"It is essential in order to produce a clear record that the material be cleanly and neatly cut from the groove in the process of recording so that sharp well-defined lines will be formed in the walls of the groove."

In describing his tool and its operation he says:

"These edges *a'* are carefully formed to present a cutting edge, so that as the moving record is traveled against the face *a* of the tool *A* when held in position, as indicated in Fig. 1, the knife edges *a'* will clearly cut the material from the record, forming a clean-cut groove, with the undulation or sound waves produced by the vibration of the stylus formed in the record, as shown in Fig. 5 and illustrated in cross-section in Fig. 3."

His Fig. 1 of the parent patent shows the knife, or cutting tool, at work. Fig. 5 shows the groove on the tablet, and Fig. 6 shows the record groove with the laterally undulatory sound waves in the sides thereof. This is beyond anything shown or described in the prior art, or in Jones, and I think was beyond anything Jones had in mind when he applied for his patent, although Jones, broadly speaking, described it, aside from the peculiar form of the groove, elliptical form. Did this originate with Johnson in 1896, as he claims, and before Jones filed his application?

Was Johnson Prior to Jones?

It is clear that Johnson had been at work in this field, this art, and this particular branch of it, prior to August, 1898, when he filed his application and claimed the cutting tool. It is not therefore improbable that he made his discovery in 1896 when he says he did. It is clear that he knew all about it August 16, 1898, for, as stated, he then had invented and then claimed and later was granted a patent for the cutting tool that would do the work which he described. I think it may be well doubted that Johnson appreciated that, in view of the prior art, he had made a patentable invention in producing a disk sound record such as he described in his parent patent of January 3, 1905, applied for in 1898; that is:

"A disk sound record having a cut out laterally undulatory groove of substantially constant or even depth, such lateral undulations corresponding to the sound waves."

However, he clearly reserved the right to claim it, for he said:

"It is understood that in reproducing the record thus formed may be used for reproducing purposes directly (that is, reproducing the sounds) or

a more durable and indestructible record may be reproduced by various processes from the original record. (That is duplicates might be made by various processes.) This feature, however, forms no part of my present invention herein described."

That is, he did not go into the feature of a duplication of the original for commercial purposes.

If Johnson himself and his witnesses C. K. Haddon, B. G. Royal, W. H. Nafey, A. C. Middleton, and A. A. DuBois are to be credited—in fact, unless their statements are to be rejected—Johnson made and completed this invention (now held to be an invention) in the early summer or fall of 1896, which included the making of the lateral undulating record of even depth cut in a plate of wax-like material and the making of an electroplate upon such record of wax like material by covering it with plumbago and making it electro-conductive. If this was done, he demonstrated that a matrix made by such process of electroplating the record could be obtained for making duplicate commercial records.

If the testimony is to be credited, Johnson proceeded with due diligence, but did not put out to the public or sell any of his records until about October, 1900, owing to circumstances and conditions fully explained. The Patent Office has decided that Johnson was within his rights under the statutes and rules in delaying his divisional application for the claims in question from 1898 until November 12, 1904. In the meantime Jones was in the field with his application, which was subsequently granted, and from 1900 to 1904 Johnson was putting his records on the market. It may not be out of place to quote the language of the Circuit Court of Appeals in the case of the Columbia Motor Car Co. and Geo. B. Selden v. C. A. Duerr & Co. et al. (the automobile case) 184 Fed. 893, on this question of delay. The court in regard to the Selden patent said:

"This patent was applied for in 1879 and granted in 1895. For over 16 years the application lay in the Patent Office, and the applicant took full advantage of the periods of inactivity permitted by the rules and statutes. It is apparent that he delayed just as long as possible the issue of the patent to him. During this long time the automobile art made marked advances along different lines, and, when in 1895 the patent was granted, it disclosed nothing new. Others had then made the patentee's discovery, and had reduced it to practice in ignorance of what he had done. While he withheld his patent, the public learned from independent inventors all that it could teach. For the monopoly granted by his patent he had nothing to offer in return. The public gained absolutely nothing from his invention whatever it was. From the point of view of public interest it were no better that the patent had never been granted. * * *

"If the statutes and rules permit unnecessary delays, they should be changed, but we reject the view that this court owes any duty to relieve against their operation. This patent, even if it be useful only for tribute, must be viewed without prejudice and with absolute judicial impartiality."

I do not think it necessary here to go into details of the evidence which leads me to the conclusion that Johnson, corroborated as he is, made this invention in 1896. He either did or he, Haddon, and others have concocted a plausible story, and committed deliberate perjury. I cannot find anything in the case to justify a conclusion that he got

his ideas, incorporated in the specifications of the so called parent patent, from Jones. On the other hand, while there is no evidence that Jones got his ideas from Johnson, he did not seem to appreciate, and certainly did not claim, that he had made any discovery in cutting his groove into not out of the wax-like tablet. He said nothing about actually cutting out a groove by the lateral or zigzag movement of the stylus. In fact, it does not appear from the Jones patent that he did in fact cut out a spiral groove of practically uniform depth containing lateral sinuosities or irregularities corresponding to or representing the sound waves recorded. He claimed nothing of the kind as a discovery or invention, or, if he did, it was rejected and in the rejection he acquiesced. It is easily seen that such a groove as Jones described might have been produced in a soft wax-like material without cutting out any of the material. Such a groove could have been made by displacement, and mere cutting is quite different from cutting out and removing a part of the material. The Jones patent did not issue until December, 1901, and the Johnson cut-out discs were quite well known in 1900. It was easy thereafter to follow the Johnson records as a clean cut-out would, of course, be preferred to a groove of the kind described made by mere displacement. If Jones had in mind a cutting out and removal of any part of the material, it seems to me strange he did not mention it and claim and insist upon a claim for a record made in that way and the method of doing it. All he did claim, or has claimed, and insisted upon was a method for producing commercial sound records which method included the making of an original and then coating it with a conducting material, and then forming a matrix thereon by electrolysis, and then separating this matrix and pressing same into a tablet of suitable material to form the duplicate or commercial records. He placed no stress upon anything else.

In *American Graphophone Co. v. Leeds Catlin & Co.*, 170 Fed. 327, 328, 329, 95 C. C. A. 511, Cox, C. J., with his well-known accuracy, has fully described and analyzed the Jones patent, and claims and held that Jones is not anticipated by the Adams Randall British patent of July 10, 1888, No. 9,996.

However, it is perfectly clear that Jones was not the inventor of the cutting out process in either the flat disk or the cylindrical sound records. January 9, 1897, 11 months before Jones filed his application, Alfred Coening Clark and said Eldridge R. Johnson filed an application for a patent for a "Sound Recording and Reproducing Machine," which the specifications expressly state was adapted to make records upon either rotating disks or revolving cylinders and the original sound reproduced therefrom. The specifications, after describing the machine and its operation, and the cutting tool or needle point (whichever it was desirable to use), say:

"Our invention is adapted to sound recording and reproducing machines where the records are made upon rotating disks or revolving cylinders and the original sound reproduced therefrom, and is not limited to any particular pattern of machine."

Before that, in describing the machine and its parts, the Clark & Johnson specifications say:

"The stylus bar *D* at its lower end is preferably longitudinally bored and provided with a thumb-screw *d* for the reception and security of a removable needle-point *d'*, or cutting tool."

Then, later, comes a description of this cutting tool, viz.:

"This cutting tool *g* is of the ordinary construction of a cutting tool adapted in producing records upon the record-plates *to remove the material in the form of a shaving* where the material is desired to be removed."

This is the cutting-out process by the vibrating stylus having the cutting tool, instead of a mere needle point pure and simple. The needle point would simply cut and divide and displace the wax-like material of the disk revolved against it and vibrating laterally, if made to vibrate laterally, and would, of course, make a clean zigzag cut merely, but use the cutting tool and machine described and vibrate the tool laterally you would have a clean cut-out groove of even depth with bottom and sides both cleanly cut. You could not cut out a shaving without forming such a groove. If impelled by the diaphragm vertically, the cutting tool would make a cut-out groove with an undulatory bottom, not of even depth, but corresponding to the sound waves, while, if so constructed that the cutting tool would respond to this diaphragm laterally, the cut-out groove would be of even depth and zigzag or one with lateral undulations. This patent shows both the use of a needle point *d'* for merely cutting or tracing and the use of a cutting tool *g* for cutting out a portion of the material. Who first resorted to the lateral movement of the cutting tool in response to the vibrations of the diaphragm in making a sound record of the disc type that of the cut out laterally zigzag groove of even depth so as to have the sound waves recorded in the sides of the groove and in a disc of wax-like material? Clark and Johnson had everything except this, if not this. Then is it at all improbable that Johnson in his efforts to improve did just what he says he did in 1896?

Infringement by Defendant.

The record substantially concedes infringement by defendant, assuming the Johnson patent to be valid, and no time need be spent on that question, although I am of the opinion that sustaining the Johnson patent in suit does not destroy the Jones patent. I think both are valid, but that Jones includes and uses what belongs to Johnson. In short, should Johnson do just what the Jones patent describes, and all that it describes, he would infringe Jones, while Jones in doing what he does infringes Johnson.

Defenses.

The defendant presents and urges the following defenses in the following order:

"(1) That complainant is estopped by a decree of this court from asserting that Johnson (or any other person except defendant's patentee Jones) is the inventor of the subject-matter of the patent in suit, is estopped to dispute complainant's ownership of the invention in controversy, and, *a fortiori*, is estopped to assert ownership thereof.

"(2) That defendant has a license under the patent in suit by estoppel.

"(3) That the patent in suit is invalid by reason of two years' prior public use of the invention described and claimed therein.

"(4) That the patent in suit is invalid by reason of direct anticipation."

Claims 2, 3, and 4, I agree with the Patent Office, must have read into them the word "out" so as to read "cut out laterally undulating groove," and "cutting out the laterally undulating groove."

Estoppel by Judgment.

[2] The defendant claims that estoppel by judgment is made out for the reasons: (1) That there is substantial identity of the subject-matter of the patent in suit with that of the Jones patent, prior both in date of actual application therefor and in issue; and (2) that the present complainant, Victor Talking Machine Company, was a party or privy to the suit between the American Graphophone Company and the Universal Talking Machine Manufacturing Company before referred to, and wherein, it is said, the Jones patent was adjudged to be (1) a good and valid patent; (2) wherein Jones was adjudged to be the first and original inventor of the said Jones invention, whatever it was, and the subject-matter being the same the invention was the same; and (3) wherein it was adjudged that the defendant American Graphophone Company is the owner of the Jones patent and of the invention described therein and covered thereby. I do not regard the invention described in the Jones patent as the same described in the Johnson patent in suit. As stated, the Jones patent does not cover a flat disc with a cut-out laterally undulating or zigzag groove of even depth recording the sound in the sides of such groove. In both claims it covers a method of producing commercial sound records as fully described and pointed out by Judge Coxe in *American Graphophone Co. v. Leeds & Catlin Co.*, 170 Fed. 330, 331, 95 C. C. A. 511, and before referred to, embracing four steps, each of which steps of itself may have been old and patentable or even patented to some person other than Jones. Judge Coxe says:

"The process of the invention is sufficiently disclosed by the claims, and is as follows: First. Engraving upon a tablet of soft wax-like material by means of lateral vibrations a record groove of uniform depth and having lateral undulations corresponding to the sound waves. Second. Coating the tablet with a conducting material. Third. Forming a matrix thereon by electrolysis. Fourth. Separating the matrix from the original record-disk without the use of heat, and pressing it into a tablet of suitable material to form the ultimate commercial record. It will be observed that the patent relates to disk and not cylindrical records, to soft and not hard recording materials, to record grooves having lateral, and not vertical undulations and to the multiplication of hard copies from the soft original and not a plurality of hard originals. Speaking broadly, it is these distinctions which separate the method of Jones from the prior art."

This process was the Jones invention. It does not follow that the first step, viz., "engraving upon a tablet of soft wax-like material by means of lateral vibrations a record-groove of uniform depth and having lateral undulations corresponding to the sound waves," was not patentable, was not invented by Johnson, and the subject of a valid patent to him.

That the Jones process or method had nothing to do with actually cutting out from a tablet or disc of soft wax-like material, by means of the lateral vibrations, a record groove of uniform depth, and having lateral undulations corresponding to the sound waves, is shown by the evidence of S. T. Cameron, expert for the American Graphophone Company, given in the suit of that company against the Universal Talking Machine Manufacturing Company, hereinbefore referred to and made the basis of this defense of prior adjudication or estoppel by judgment. After describing the etching process by which records of hard material with lateral or zigzag undulations, and having the sound reproduced from the sides of the record groove eaten or etched into such hard substance or metal were made, he fully described the Jones process, and in such description said:

"Instead of etching a zigzag record groove in a metal plate, he embeds the point of a sharp pointed stylus to a predetermined depth in the surface of a tablet of some suitable material, such as wax or a wax-like substance, and forms a zigzag groove of even depth and with smooth walls in said surface by means of a sound recorder."

Again, in defining the claims and specifications, he says:

"By 'cutting' is understood the production of a sound groove by the direct action of a sharp stylus constantly embedded and vibrating laterally in a tablet of wax like material, as distinguished from the indirect operation of first tracing a zigzag line in an etching film spread upon glass or metal and then subjecting the tablet to the action of an acid bath."

But leaving out of question for the time the want of identity between the first step of the Jones process and the corresponding step of the Johnson patent made the subject of specific claims and the only subject thereof, is it true that the adjudication in the case of *American Graphophone Co. v. Universal Talking Machine Mfg. Co.* did settle as to any one that Jones was the first to discover or invent the process or method of (quoting Judge Coxe) "engraving upon a tablet of soft waxlike material by means of lateral vibrations a record groove of uniform depth and having lateral undulations corresponding to the sound waves?"

Would the defendant have defended successfully the said suit for infringement had it proved and established that it was the first to discover, invent if you please, and reduce to successful practice that step in the process or method of making an original sound record? If the Johnson patent had then been issued on the claims for making an original record, and the American Graphophone Company, in its process of making commercial records, had used that step or process to make its original record, it would have infringed the Johnson patent. But Johnson, even if a party defendant, was not suing for infringement. On the other hand (assuming Johnson had not invented Jones' entire process of making commercial records of this type), if Johnson, with his patent for the claims for making the original record, had made duplicates or commercial records by the Jones process, he would have infringed Jones, assuming the validity of the Jones patent.

It is the Jones process as a whole that gives his patent validity and each of the four steps pointed out by Judge Coxe may have been old and still the patent valid. That a defendant in a suit by Jones for a clear infringement of his process had a valid patent for one of those steps used in the Jones patent, the making of the original record, would not necessarily have defeated Jones in his suit for infringement of his process of making duplicate, or, rather, commercial sound records, unless on the theory that a complainant must come into court with clean hands. Was it necessarily decided in the suit referred to that Jones was the first to invent the method of cutting out from a tablet of wax or wax-like material a groove of substantially even depth with lateral undulations corresponding to the sound waves? I cannot see in view of the Jones patent and the evidence of Mr. Cameron that the point was necessarily involved in that case.

How was Johnson Involved in That Case?

[3] Johnson was not a party thereto. He did not assume the defense of it. The defendant here contends that the record shows (1) that Johnson organized the Victor Talking Machine Company and has ever since held a majority of its capital stock and controlled its operations and that therefore Johnson and this complainant are identical in interest; (2) that Johnson, as trustee for the Victor Company, acquired the stock of the Universal Talking Machine Company, and has ever since continued to own and control the same as such trustee; (3) that the said Universal Talking Machine Company was the actual defendant in such prior suit, the defendant here having been complainant there; (4) that as result of these facts both Johnson and the Victor Talking Machine Company were directly interested in such prior litigation, and are bound thereby.

The facts or main part of them are set forth in a stipulation, pages 9 and 10 of defendant's record, from which it appears: (A) That on or about the latter part of September, 1900, Johnson commenced the manufacture and sale of disc talking machines and disc sound records such as are described and set forth in the patent in suit. (B) Johnson and others organized the Victor Talking Machine Company October 5, 1901, and said company thereupon acquired the business and good will of Johnson. Down to February 9, 1905, at least, Johnson owned and controlled a majority of the stock of such company. (C) In July, 1903, Johnson obtained a controlling interest in the stock of the Universal Talking Machine Manufacturing Company as trustee for the said Victor Talking Machine Company, and still holds same as such trustee. (D) The suit referred to, on the Jones patent against the Universal Talking Machine Manufacturing Company, was commenced about January 6, 1902, by Jones, and by supplemental bill the American Graphophone Company which had acquired the Jones patent subsequently became complainant. Therefore, when the suit was commenced by the American Graphophone Company, complainant, against the Universal Talking Machine Manufacturing Company, defendant, for the alleged infringement by it of the Jones patent, hereinbefore referred to, and during its progress

Johnson not only held as trustee for the Victor Company a majority of the stock of the said defendant company, but owned a majority of the stock of the said Victor Company. Johnson was not a defendant in that suit, and it was not alleged or proved that he was a contributory infringer. The same is true of the Victor Company. The validity of the Jones patent was in issue, and it was held valid. Does that adjudication bind the Victor Company, which was not a defendant, but, of course, interested in the litigation? Did that adjudication bind Johnson who was not a party, but, of course, interested in the litigation? No judgment or decree could have been pronounced in that suit against either Johnson or the Victor Company. In legal effect the Victor Company was a majority stockholder in the defendant company in that suit. When that suit was commenced January 6, 1902, Johnson had not filed his divisional application for the patent in suit, and, of course, it had not issued. However, Johnson had been making and selling and the Victor Company was then making and selling disc records of the kind described in the Johnson patent now in suit. There is no evidence that those particular records were being made and sold, or made, or sold by the defendant in that suit, the Universal Talking Machine Manufacturing Company.

Is a stockholder in a company individually bound and concluded on the same question by a judgment or decree against his company or corporation? Clearly, neither Johnson individually, nor as trustee, nor the Victor Company was a party to the former suit relied on. Were they or either of them a privy thereto in the legal sense? "The term 'parties' within the meaning of the rule that only parties and privies are concluded by a judgment or a decree includes all those persons who are directly interested in the subject-matter, and who have the right to make defense, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment. Persons not having these rights substantially are regarded as strangers to the cause." *Robbins v. Chicago*, 4 Wall. 657, 18 L. Ed. 427; *Green v. Bogue*, 158 U. S. 478, 15 Sup. Ct. 975, 39 L. Ed. 1061; *Litchfield v. Goodnow*, 123 U. S. 549, 8 Sup. Ct. 210, 31 L. Ed. 199; 1 Greenl. Ev. § 535.

I am of the opinion that a mere stockholder in a company or a corporation has no right to make the defense or intervene and make a separate defense, or to control the proceedings, defense, etc. If a party makes and sells to the trade an article which infringes a patent, and a retailer sells again to a user and such retailer or user is sued for infringement, and the maker comes in and defends, assumes the defense, controls the proceedings in defense where he may examine and cross-examine witnesses, he is a privy and within the rule stated bound by the decree.

Here the defendant claims that Johnson or the Victor Company, one or both, did come in and defend the suit referred to, furnish witnesses, and examine and cross-examine. I am referred in the evidence of Johnson to cross-question 54 and the answer as follows:

"Please state how Mr. Pettit came into the defense of that suit against the Universal Talking Machine Manufacturing Company on defendant's

Jones patent? A. About July, 1903, I secured control of the capital stock of the Universal Talking Machine Manufacturing Company, and the officers of that company employed Mr. Horace Pettit as counsel for the company; not on this exact date, but Mr. Pettit was acting as counsel for that company during the year 1905."

In the other reference it appears that Mr. Pettit did go to Mr. Johnson for information on a certain subject, and was referred by him to a Mr. Nafey and perhaps others.

This falls short of showing that either Johnson or the Victor Company assumed or took charge of that defense so as to become a privy or bound by the decree. Assuming that Johnson recommended Pettit, who was his attorney, he did not, so far as appears, employ or pay him or assume control of the defense, nor did the Victor Company. The officers of the defendant company were in control. I do not find that Mr. Nafey was a witness in that prior suit. I think under the circumstances the Victor Company, owning as it did a majority of the stock of the Universal Talking Machine Manufacturing Company, could have assumed the defense with the consent of the real defendant, but the evidence fails to show that it did. The same is true of Johnson. Johnson made it clear in answer to cross-question 140 that in the suit against the Universal Talking Machine Manufacturing Company, he depended on the officers of that company, and that they conducted the defense. Estoppels must be mutual, and the assumption of the defense must have been open and avowed. *Lane v. Welds*, 99 Fed. R. 286, 39 C. C. A. 528; *Cramer v. Singer*, 93 Fed. 636, 35 C. C. A. 508.

License and Estoppel by Consent.

We come then to the question of the license.

[4] It appears from the evidence of Mr. Johnson as follows:

"Q. 108. Do you know why the Victor Talking Machine Company took a license under the Jones patent No. 688,739? A. At the time the Jones patent was issued the Victor Company had a large quantity of goods on the market. We had no opportunity of avoiding this patent because we did not know of its existence. I therefore sought a license as a matter of insurance. I felt that such course was necessary because of the great value of the goods in question. I never infringe a patent or run the risk of an adverse patent decision where any other course is possible."

On cross-examination (C. Q. 142) he made the same statement as to reason for taking the license. Johnson also says his patent here in suit, No. 896,059 had not issued when such license was taken, and that neither he nor the Victor Company had any assurance it would issue. The license, whatever it was, is not in evidence. Its terms and conditions are not before this court. I am unable to see how a license under the Jones patent to the Victor Company taken before the patent in suit to Johnson had issued and when it was not known it would issue and obtained by Johnson for the Victor Company estops either the Victor Company or Johnson from asserting their rights under the Johnson patent when it did issue, even if its assertion amounts to a repudiation of the validity of the Jones patent. I am not aware that a licensee under a patent is estopped to

purchase a valid patent subsequently issued to another, and which, if asserted, shows the prior patent under which the license was taken to have been invalid and anticipated, and then assert such patent by suit against all infringers including the licensor. I am not pointed to any case so deciding. It is true that a licensee in a suit for royalties agreed to be paid cannot set up and prove as a defense the invalidity of the patent, assuming there is no outstanding decision against the validity of such patent. *United States v. Harvey Steel Co.*, 196 U. S. 310, 25 Sup. Ct. 240, 49 L. Ed. 492; *Kinsman et al. v. Parkhurst*, 18 How. 289, 292, 293, 15 L. Ed. 385; *Eureka Company v. Bailey Company*, 11 Wall. 488, 20 L. Ed. 209. However this does not decide that a licensee cannot become the owner of a valid patent covering the same invention after he takes his license, and prosecute all infringers. It would seem to me clear that, if Johnson had retained title to this patent here in suit, he could have prosecuted the Victor Company for infringing it, or any other company or corporation in which he held stock (assuming they actually infringed). His owning stock in such a corporation or a majority of the stock would not carry to it the right to use his inventions except with his consent. He could transfer his patent or inventions to the Victor Company as he did, and it seems to me the rights of that company under it are not affected by the license referred to, the terms of which do not appear. True, this suit is an indirect attack on the Jones patent. But Johnson had no property right in his invention which he could enforce prior to the issue of this patent in 1908. *Gayler v. Wilder*, 10 How. 477, 493, 13 L. Ed. 504; *Marsh v. Nichols Shepard & Co.*, 128 U. S. 605, 612, 9 Sup. Ct. 168, 32 L. Ed. 538. I have no doubt that the question of Johnson's priority of invention could have been set up in the suit referred to on the Jones patent. But it was not pleaded or made an issue and as the defendant there did not own the invention, and the Victor Company did not, and Johnson was a mere stockholder and did not assume the defense, and the patent had not issued, I am unable to see that this complainant, the Victor Talking Machine Company, is estopped to assert the Johnson patent because of its position as licensee under the Jones patent.

Globe Record Company Transaction.

[5] The second ground of alleged estoppel is based on the transfer to the American Graphophone Company of a plant, etc., on the 13th day of February, 1902, said to be the plant, etc., of the Globe Record Company, and claimed by defendant to have been a going concern.

The transaction was as follows: Shortly prior to January, 1902, Johnson owned and controlled the Globe Record Company, a small concern located in New York City and engaged in the manufacture of disc sound records designated as "Climax Records," and on or about February 15, 1902, by a written instrument said Johnson delivered the said Globe Record Company to the defendant here, the American Graphophone Company. As we have seen, Johnson owned and controlled a majority of the capital stock of the Victor Talking

Machine Company, complainant here. This transfer of the Globe Record Company was prior to the time Johnson as trustee acquired an interest in the stock of the Universal Talking Machine Manufacturing Company. The written contract of sale, dated February 15, 1902, is between the American Graphophone Company, party of the first part, and Eldridge R. Johnson, as party of the second part, and expressly provides as follows:

"(1) The party of the second part shall deliver unto the party of the first part immediately upon the execution of this agreement the capital stock and all matrices for stamping records and all property and equipment for record making which the party of the second part personally and individually recently acquired of the Globe Record Company, a corporation of the state of New York, having its principal office and place of business in the city of New York, in the same condition in which the same, the said property of the Globe Record Company was received by the party of the second part, wear and tear excepted, the same to be transferred to the party of the first part under the same freedom from liability, but subject to the same liabilities, whatsoever they may be, as when received from the said Globe Record Company, and free from all incumbrances which may have arisen since that time. The party of the second part shall also convey unto the party of the first part information relative to the operation of the said plant of the Globe Record Company such as he may have received from the parties who transferred and assigned the said Globe Record Company property to him. It is expressly understood and agreed that the bank account of the Globe Record Company, whatever it may be, is not hereby transferred, or intended so to be, unto the party of the first part, but shall belong to the party of the second part.

"(2) It is understood and agreed that the suit of the American Graphophone Company against the Globe Record Company and Eldridge R. Johnson now pending in the United States Circuit Court for the Southern District of New York shall be dismissed without costs to either party.

"(3) It is understood by the parties hereto that the Victor Talking Machine Company, of which the said Johnson is President, is not and has not been associated with said Johnson in the ownership or transfer of the said property of the Globe Record Company, which is the individual act of said Eldridge R. Johnson, and that this transfer of the assets and properties of the Globe Record Company carries with it no license or implied license under any patents of the said Victor Talking Machine Company or said Johnson, and the rights of the Victor Company are the same against the said property as they were before the transfer of the property to Johnson."

The defendant here contends that the plant and apparatus so transferred and delivered by Johnson were constructed for the express purpose of making cut zigzag records and were neither adapted nor available for any other purpose, and could be used only for carrying out the process described in the Johnson patent in suit and producing the sound records described in the Johnson patent in suit, and had been used for that purpose, and that Johnson sent a man to instruct defendant company how to efficiently use such apparatus, and that thereafter defendant company proceeded to make sound records and commercial sound records according to that process and with such apparatus. At that time, February 15, 1902, Johnson had not filed his divisional application for the patent in suit and which patent was not granted until 1908, as we have seen. He had described the invention in his parent application. He had commenced making

and putting out such records as early as 1900. If now Johnson owned a plant including machinery for making sound records such as described in his specifications and in his patent, granted later, both the original records and the copies or commercial records according to the process described in his patent, granted later, and it was in use, a going concern, and he sold it to the defendant company in 1902, as such, and instructed the defendant how to use such plant and the process in making such records and it did use it, and there was no limitation or restriction on the defendant, it would seem unjust and inequitable to restrain or enjoin the defendant company under the Johnson patent granted some six years later. When the Globe concern was transferred by Johnson to this defendant company, he was president of the plaintiff company. The divisional application for the patent in suit was filed November 12, 1904, serial No. 232,389. November 28, 1904, Johnson duly assigned all his interest in the invention, application for a patent therefor, and in any letters patent that might issue thereon to the said Victor Talking Machine Company. Knowledge in Johnson of his invention and original application of which that for the patent in suit was a division, although no divisions had been made in 1902, when the transfer or sale of the Globe Record Company was made, may be and may not be considered information to the Victor Talking Company as Johnson was its president. Paragraph 3 of the agreement between the American Graphophone Company and Johnson for such transfer expressly provides that the Victor Company is not and has not been associated in any way with Johnson in the ownership or transfer of the Globe Company concern, or of its property. This, of course, was notice that the Victor Company assumed no responsibility by reason of such transfer and had no knowledge of its business. That paragraph also expressly provides that the transfer of the assets and properties of the Globe Company "carries with it no license or implied license under any patents of the said Victor Talking Machine Company, or said Johnson," and that "the rights of the Victor Company are the same against the said property as they were before the transfer of the property to Johnson." If the words "carries with it no license or implied license under any patents of the said Victor Talking Machine Company, or said Johnson" referred to, or are to be construed to refer and apply to all subsequent patents issued to or acquired by the Victor Company, or said Johnson, including any patent they or either of them might obtain for the very process, or product or both, then being practiced or used and produced by the Globe Record Company, then neither the Victor Company nor Johnson were or are estopped in any sense from asserting their rights under the Johnson patent now in suit. If, on the other hand, it only referred to patents then in existence and in the minds of both the parties to the agreement, those in existence and relating to the process and apparatus used by the Globe Record Company, then clause or paragraph 3 of the contract, so far as it refers to patents, has no special bearing on this question of estoppel.

As stated, the suit of the American Graphophone Company

against the universal Talking Machine Manufacturing Company in which the Victor Company and Johnson were interested in the manner and to the extent stated was commenced in January, 1902, while the sale of the Globe Record Company to the American Graphophone Company took place about a month later. The validity of the Jones patent was then a matter which the Victor Company, Johnson, and the American Graphophone Company must have been considering more or less. If Johnson at the time said agreement was executed had in mind and expected by a division of his then pending application and in which he described the process, &c., then in use by the Globe Company to assert and prosecute a claim to a patent therefor, he made no reference to such a situation in the agreement or to such a claim on his part. The Victor Company at that time had no interest in the Johnson invention here in question. It took its assignment about two years later. However, the Graphophone Company was necessarily interested in the question. Johnson by mere silence that he was going to claim a patent for the process &c., used by the Globe Company, and saying that his transfer to the Graphophone Company gave no implied license "under any patents of the said Victor Talking Machine Company, or said Johnson," would hardly do his full duty to the American Graphophone Company. The claim is that by such silence he misled the Graphophone Company to its prejudice, and by allowing it to go on, which he knew it probably would do, impliedly licensed it to do all that it has done, or is now doing, which infringes in any way the patent in suit granted some six years later.

E. D. Easton, a witness for defendant here, says that the Globe Record Company was purchased by defendant about February 12, 1902, or a few day later, and reads from his diary as follows:

"Cromellu reported by telephone that Johnson would give us the Globe Record Company and all its assets and also show us all about English's system if we would discontinue our litigation; that he would give us a decree if we did not enforce the patents against him."

He then says they went to Philadelphia and made the settlement of the litigation in which settlement Johnson gave them the Globe Record Company. He also says that February 15th, they went to the laboratory in Philadelphia and saw the matrices packed and got the records; that the matrices were returned to the Burt Company, Milburn, N. J., from whence they had come, and that the records were turned over to Victor H. Emerson; that the Burt Company pressed records from the matrices and these were sent to the Columbia Phonograph Company and sold to the public.

It appears from the evidence of one Palmer that he was manager of the Burt Company in 1901 and 1902, which company received matrices for sound records from the Globe Record Company, and pressed records and sent them back to the Globe Company, and that subsequently the matrices passed to the control of the American Graphophone Company. I do not find substantial evidence that Johnson did instruct or cause to be instructed this defendant in his new process now covered by the patent in suit. If some of the matrices

were of that character and they passed to the defendant undoubtedly, it could use them until worn out, but that fact alone would not carry title to the process or method of producing or the right to make new ones or practice the method, etc., after the issue of a patent. Again, I do not think the evidence shows the Globe Record Company was a going concern when the transfer was made. It is stipulated in the record that in the month of July, 1901, the Globe Record Company made and sold "zigzag disc sound records in commercial quantities and issued a catalog"; that in September, 1901, an oral agreement was made between the Globe Record Company and the defendant or its subsidiary company, the Columbia Phonograph Company General, whereby the Globe Company was to make and sell and the other party to purchase commercial sound records. This, of course, did not transfer the process or method of producing or license the making and selling according to Johnson's method.

In *Leggett v. Standard Oil Company*, 149 U. S. 287, 293, 294, 13 Sup. Ct. 902, 37 L. Ed. 737, the plaintiff had discovered a process which he thought patentable, but he disclosed same to the defendant who promised not to use it, but did. The plaintiff thereupon obtained a patent and sued the defendant for infringement and defendant set up the invalidity of the patent. The plaintiff claimed the defendant, because of his promise and use, was estopped to deny the validity of his patent. Held untenable. In the absence of expressly proved fraud, there can be no estoppel based on the acts and conduct of the party sought to be estopped where such acts and conduct are as consistent with honest purpose and absence of negligence as with their opposites, and the facts constituting the estoppel must be clearly and distinctly and satisfactorily proved. *Arrott v. Standard S. Mfg. Co. (C. C.)* 131 Fed. 457, affirmed 135 Fed. 750, 68 C. C. A. 388. The complainant here starts with the presumption of the validity of its patent in suit. If the complainant's patent is valid, the defendant infringes.

November 19, 1897, about two years after Jones filed his application for his patent, he attempted to amend by inserting the following claims:

"(1) The herein-described method of producing original sound records, which consists of cutting or engraving upon a tablet of suitable material, by means of the lateral vibrations of a suitable stylus, a record groove of appreciable and practically uniform depth, the same having lateral undulations corresponding to the sound waves, substantially as described.

"(2) An original sound record formed of a wax-like material and having engraved upon its surface a spiral groove containing lateral undulations of uniform depth, the depth being slight but appreciable, and the undulations corresponding to sound waves, substantially as described."

These claims were rejected on the prior art and Jones acquiesced. Defendant cannot be heard now to say these rejected claims formed any part of the Jones invention. As I look at it, Johnson claimed and was granted a patent for what in substance was denied to Jones.

Jones claimed but was denied a patent for (1) the method of producing an original sound record which consisted in (a) cutting or engraving upon a tablet of suitable material, (b) by means of

the lateral vibrations of a suitable stylus, (c) a record groove of appreciable and practically uniform depth, and (d) the latter having lateral undulations corresponding to the sound waves. And, again, the product, viz., (1) an original sound record, (2) formed of a wax like material, and (3) having engraved upon its surface a spiral groove, (4) containing lateral undulations of uniform depth, the depth being slight but appreciable, and (5) the undulations (lateral) corresponding to sound waves.

The patent granted Jones is for a method for producing commercial sound records which consists in, (a) cutting or engraving upon a tablet of suitable material, (b) by means of the lateral vibrations of a suitable stylus, (c) a record groove of appreciable and practically uniform depth, and (d) having lateral undulations corresponding to the sound waves, as step 1 and then coating the same, etc. In short, it stands out perfectly plain that the first step of the Jones method or process which consists in making the original record was claimed by Jones as his invention and rejected on the prior art. It was subsequently patented to Johnson as the inventor thereof. I can draw no distinction between what Jones claimed and had rejected and claim 3 of the Johnson patent in suit. Johnson (a) cuts on a tablet of suitable material (b), by means of the lateral vibrations of a suitable stylus, (c) a record groove of appreciable and substantially uniform depth, (d) having lateral undulations corresponding to the sound waves. Wherein does this differ from the rejected Jones claim and step 1 of the Jones process or method? And why is it not patentable? It is the making of the original record which may be used to reproduce sound. However, it would not be a commercial success as a sound record for reproducing sounds because not durable. But the commercial records could not be produced without it. Add the other steps of the Jones method or process, and we have the successful commercial records of Jones. But in practicing the Jones process the defendant infringes the Johnson patent. Clearly defendant infringes claim 3 of the patent in suit. And as clearly to my mind the defendant infringes all the claims of the patent in suit in issue here unless it be claims 14 and 23 which add in broad terms the production of duplicates or commercial records from the original by any process, or any means which will accomplish the end. The defendant insists there is only one known process of producing duplicates from the original, and that the one described in the Jones patent and there claimed.

All Johnson says in the patent in suit as to reproducing sound records from the original is:

"It is understood that in reproducing the record thus formed may be used for reproducing purposes directly, or a more durable and indestructible record may be reproduced by various processes from the original record."

He does not point out or describe or claim either one of the "various processes" referred to. Jones did and does and was granted a patent for that particular or specific process of reproducing a more durable and indestructible record; that is, the commercial sound records for use in reproducing the recorded sounds, music, or speech. I cannot find that Johnson anticipated or was prior to Jones in his

method or process described in his patent, No. 688,739 dated December 10, 1901, for reproducing sound records from the original record made according to the Johnson invention—that is, by coating such original with a conducting material—then forming a matrix thereon by electrolysis, and finally separating this matrix and pressing the same into a tablet of suitable material in the way described, or, in the language of claim 2, by next rendering the surface thereof (of the original record) electrically conductive, then forming a matrix thereon by electrolysis, next separating the matrix from the original record disk without the use of heat, and finally impressing said matrix into a disk of suitable material to form the 'ultimate record. Whether or not this part of the Jones patented process was old in the art does not concern this litigation. The defendant infringes the Johnson patent now owned by complainant, by using his method or process of producing the original record and his patented original record from which the duplicates are subsequently made. If there are methods of reproducing records from the original record other than that described and claimed by Jones, clearly the complainant may use it without fear of the Jones patent.

There will be a decree accordingly, with costs, and for an accounting.

In view of all the prior litigation and all the facts, I may as well say here that, if the defendant desires to appeal and takes its appeal within thirty days from the entry of the decree hereon, the issue of an injunction will be suspended pending such appeal and until the determination thereof, provided it gives a bond in the sum of \$10,000, conditioned to pay all costs, damages, and profits awarded against it herein, and provided it moves such appeal to a hearing promptly by asking that same be advanced.

UNITED STATES LIGHT & HEATING CO. v. J. B. M. ELECTRIC CO. et al.

(Circuit Court, W. D. New York. March 25, 1911.)

No. 408.

1. PATENTS (§ 198*)—APPLICATION—ASSIGNMENT—SEAL.

Where assignments of applications for patents were in writing and recited a valuable consideration, it was not material that they were not under seal.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 277; Dec. Dig. § 198.*]

2. CORPORATIONS (§ 426*)—ASSIGNMENTS—ACT OF PRESIDENT—RATIFICATION BY DIRECTORS.

Where assignments of applications for patents by a corporation, were made by its president and witnessed by a director, who, with the president, formed a majority of the board, and such majority had actual knowledge of the assignments, and the manner of their execution, and the other director was soon after apprised of the assignments, the assignee having acted in good faith thereon and believed that the president had power to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

execute the instruments, the board could not, by subsequently refusing to ratify the assignment, affect their validity.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 426.*]

In Equity. Suit by the United States Light & Heating Company against the J. B. M. Electric Company and others. Decree for complainant.

Jones, Addington, Ames & Seibold (Keene H. Addington and George G. Davidson, Jr., of counsel), for complainant.

Kenyon & Kenyon and Alan D. Kenyon, for defendants.

HAZEL, District Judge. The complainant brings this bill to reform the signature to an assignment of application for patent No. 404,271, and remove the cloud of certain conflicting assignments made by the J. B. M. Electric Company to Charles A. Gould, assignor of the Gould Coupler Company, which has charge of the defense herein. By cross-bill application for patent No. 404,272 was brought into the case, and the defendant Gould Coupler Company prays judgment for the removal of a cloud from its title from the same company. Both the complainant and defendant, Gould Coupler Company, claim title to the inventions of J. W. Jepson, which were assigned by him to the J. B. M. Electric Company and which are the subject of this controversy. No question is raised as to the omission of the word "electric" from the corporate name of the J. B. M. Electric Company in the assignments to the complainant's predecessor, and it is admitted by the defendants that such omission was inadvertent, and that the assignments, if valid, may be reformed by the addition of the word "electric" in the name of the assignor. The entire controversy, therefore, relates to the legal and equitable ownership of both applications for patents, which in the one application is for an automatic regulator in a car-lighting system, and in the other for a specific combination of a generator, regulator, and lamp regulator.

The oral evidence is conflicting, but with the assistance of the exhibit letters and documents it is believed that the true relations of the parties have been ascertained. The material facts are substantially as follows: On January 8, 1907, the complainant's predecessor entered into a written contract with Jepson, Berger, and McGary, individuals, who, however, subsequently organized the corporation, the J. B. M. Electric Company, to which company the agreement was transferred, and in which it was set out that Jepson and McGary had invented various systems of electrical distribution; that they transferred such inventions to the Bliss Car Lighting Company, hereinafter called the Bliss Company, which on its part agreed to manufacture and exploit them and pay royalties therefor. Under paragraph 10 the Bliss Company had the right to manufacture and sell all the improvements applicable to the system and included within the scope of the invention while Jepson, Berger, and McGary reserved to themselves the right to grant other rights and licenses not included in the patents issued on said application. Provision was made for paying the assignors for the time consumed in developing the inven-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tions, for the reassignment of patents on termination of the agreement, etc. Subsequently the lighting apparatus was set up and exhibited at a convention of railroad car builders, but it failed to operate successfully, and the complainant claims that as a result of such failure an additional arrangement was entered into, namely, that a certain Bliss-Reed lamp regulator owned by the Bliss Company should be developed along different lines than the booster system of Jepson which had been tried in connection with said lighting system without success. The witness Urban testified that the development of the so-called Bliss regulator was to be under an employment separate and distinct from the said contract and that any improvements made would belong to the Bliss Company. This version is supported by the witness Bliss, but is contradicted by the testimony of Jepson, Berger and McGary. Several conversations held between the parties are contained in the record which tend to show an understanding that any improvements in the lamp regulator would inure to the Bliss Company, and furthermore that the inventions would, therefore, be assigned to it. It is shown that letters subsequently passed between the parties referring to "the new regulator" and in a letter written on June 22, 1907, by the witness Urban, who was general manager of the Bliss Company, allusion was made to "our Bliss-Reed lamp regulator," and he says:

"We also again beg to caution you to keep this matter quiet as much as possible, as you are the only ones outside of our technical force here and our patent department who know anything about this invention of Mr. Bliss."

Under date of July 9, 1907, McGary, writing for the J. B. M. Electric Company, acknowledged receiving materials for the new regulator, and he reports as to the progress made in the work of its development.

In August and September, 1907, Jepson and Berger were requested to make assignments of application for patents to the Bliss Company to which they replied in substance that they would do so at the earliest opportunity. It is shown that Jepson was to receive ten dollars and Berger six dollars per day, including expenses, for actual time spent and work performed for the Bliss Company. After some discussion on September 30, 1907, between Jepson and Berger and complainant's witness Tower, the J. B. M. Electric Company by Mr. Jepson, its president, executed an assignment of the applications for patents in controversy and contemporaneously an agreement to assign improvements, patents and inventions. There was some disputation at this time as to the execution of the agreement and the assignments and as to whether the Bliss Company were entitled thereto, which, however, finally resulted in their execution and delivery. The agreement in terms was independent of the contract of January 8, 1907, and it is claimed by complainant that by the words "inventions and patents" the parties understood future discoveries in connection with the Bliss regulator. The defendants, however, claim that by the use of such terms was implied future work of a different character which Bliss Company had in charge for the Cutler-Hammer Manufacturing Company. But I am persuaded by the evidence that the said agreement related to inventions and discoveries pertaining to the Bliss-Reed regulator system

and the assignments of the applications for patents and the prior correspondence strongly supports this view, especially if we give weight to the testimony of the witness Urban.

On January 16, 1908, the assignments to the Bliss Company were repudiated by the J. B. M. Electric Company on the sole ground that its president Jepson was unauthorized by the board of directors to execute and deliver the same and the draft of assignments to correct the error in the name of the J. B. M. Electric Company in the original assignment was not executed. There was delay in communicating the action of the board of directors, consisting solely of Jepson, Berger, and McGary to the complainant's predecessor, but ultimately the J. B. M. Electric Company expressly declined to be bound by said assignments. Subsequently, on March 28, 1908, the parties entered into another contract terminating their relations, and the contract of January 8, 1907, was thereby canceled. No reference is contained in such later contract regarding the applications for patents in controversy, nor was anything said in reference thereto. The defendants, however, contend that if the assignments to complainant's predecessor were valid the title to applications for patents Nos. 404,271, and 404,272, which were the subject of the assignment, in accordance with the intentment of the later agreement equitably reverted to the defendant Gould Coupler Company, which on July 28, 1908, became the owner by a second assignment of all the inventions and patents owned by the J. B. M. Electric Company for car lighting and to the applications for the patents in controversy. The evidence shows that the applications Nos. 404,271 and 404,272, were not specifically mentioned in said assignments to Charles A. Gould, but nevertheless they are claimed by the assignee to be included therein, and it appears that afterwards the confirmatory assignment without further consideration was made to the Gould Coupler Company by the J. B. M. Electric Company.

[1] 1. It makes no difference in view of the facts that the assignments to the Bliss Company which were in writing were not under seal (*Gottfried v. Miller*, 104 U. S. 521, 26 L. Ed. 851; *Eureka Co. v. Bailey Co.*, 78 U. S. 488, 20 L. Ed. 209; section 4898, U. S. R. S.¹) and as they recited a good and valuable consideration the defendant, the Gould Coupler Company, which stands in the place of J. B. M. Electric Company, is concluded at this time to challenge by parol evidence the validity of the assignment to the Bliss Company. *Hebbard v. Haughian*, 70 N. Y. 54; 6 Amer. & Eng. Enc. of Law (2d Ed.) 778; 16 Cyc. 721. Moreover, the evidence introduced by complainant establishes that the assignments and transfer of the applications in suit were executed for good and valuable consideration duly paid to the J. B. M. Electric Company.

[2] 2. That the board of directors subsequent to the execution and delivery of the said assignment and transfer refused to expressly ratify the action of its president, in view of the delay which followed such assignment and transfer, is not now of material importance. The evidence shows that a majority of the directors of the J. B. M. Electric Company—i. e., Jepson and Berger—had actual knowledge of the assignments and the manner of their execution while McGary was

¹ U. S. Comp. St. 1901, p. 3337.

soon afterwards apprised of the action of the majority of directors. The corporation did not seasonably repudiate or disapprove the action of the president. Indeed it is proved that Berger witnessed the instrument and under such circumstances the corporation cannot equitably avail itself of the defense that the president was without power to make the transfer. It must be deemed to have acquiesced in the acts of its president, especially as the proof shows that the Bliss Company acted in good faith and believed that the president had power to execute the instrument and to manage the affairs arising out of such inventions or improvements. Authorities abound upholding this view.

3. The contract of January 8, 1907, in my judgment did not include the two applications in controversy, but related to different inventions, and hence the claim of the defendants that the Bliss Company was merely entitled to a license is not sustained. Its title to the inventions and application for patents did not pass to it under the original contract, and therefore the agreement of March 28, 1908, canceling the same did not operate to revert such applications and inventions to the J. B. M. Electric Company.

4. The defendant had constructive notice of complainant's prior recorded assignments and moreover its predecessor Charles A. Gould was apprised of the existence of a certain prior assignment of patents relating to a lamp regulator invented by Jepson and the Bliss Company.

Considering the record in its entirety I am of the opinion that the assignments and transfers of September 30, 1907, to the Bliss Company conveyed the title to the inventions and applications for patents in controversy and that the Gould Coupler Company by its later assignment has neither legal nor equitable title thereto.

A decree in accordance with the prayer of the bill may therefore be entered, with costs.

LYON METALLIC MFG. CO. v. COLUMBIA MACH. WORKS et al.

(Circuit Court, E. D. New York. March 1, 1911.)

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—GEAR CASE.

The Waters patent, No. 789,306, for a gear case, adapted to cover the reduction gear of electric motors of trolley cars, was not anticipated, and discloses invention; also *held* infringed by certain styles of gear cases which were made by defendant when the suit was commenced, but not by the style afterward adopted, and which was the only one made at the time of trial.

In Equity. Suit by the Lyon Metallic Manufacturing Company against the Columbia Machine Works and the Malleable Iron Company. Decree for complainant.

Cheever & Cox, for complainant.

Martin S. Lynch, for defendants.

CHATFIELD, District Judge. One Waters obtained upon the 9th day of May, 1905, upon an application filed December 30, 1904,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

patent No. 789,306, covering an invention relating to gear cases, especially those adapted to cover the reduction gears of electric motors for street railway cars. In general, it is sufficient to note that the motor of a trolley car is in ordinary use located near the front axle. This axle, receiving all the jars and shocks from the wheels, and turning upon bearings, is fitted with a toothed gear, engaging with a pinion gear placed upon the extreme end of the motor shaft, which, in practice, revolves at a speed some four times as great as the axle of the car, in inverse proportion to the relative size of the gear wheels in question. The position of these gears making them liable to impact of mud, stones, and other obstructions, as well as the jar and shock of the movements of the car wheels themselves, renders it difficult to protect the teeth of the gear. Hence, to preserve necessary lubrication while excluding dirt and protecting the teeth, a cover or case is usually supplied. The common form of gear case or protection for these gears has been a pear-shaped box, of sufficient depth to include the gear wheels themselves, and with an opening at approximately the center of the box for the axle carrying the large gear to pass completely through. At the small end of this pear-shaped box, and upon the face of the box toward the center of the car, is also an opening for the shaft of the motor, while the opposite or outside of the gear case comes in close proximity to the wheel upon that side of the car. Saving of weight, with sufficient strength and rigidity to perform durable service, are necessary elements in the gear case. Nearness to the street surface, together with the impossibility of furnishing support from the car or truck above the springs, give but little opportunity for varying the methods of holding such gear case in place.

According to the testimony in this action, cast or malleable iron, and wood with metal bindings were first used in making these cases upon trolley cars, as the use of such cars developed in this country. All support by attaching the case to the frame had to be upon the inner side; that is, toward the center of the car. It was ordinarily furnished by one main support, with some aid in locating and maintaining a steady position of the gear case, furnished by bolts near one or both ends of the case. On cars such as sweepers, and upon some of the older forms of trolleys, a platform under the gear case itself made it unnecessary to use the side support. The desirability of being able to take the gear case off, if the body of the car were removed, or if the gears had to be reached from the under side, compelled a division through the middle of the gear case, in the plane of the two axes. It naturally followed in practice that the two portions of the gear case were bolted together at each end, and the inner surface of the upper half, on each side, was so constructed as to cause the flow of oil, which might be spattered against the inside of the case, to run inside rather than outside the lower half. In some of the sheet or malleable iron cases, cast-iron flanges were fitted around the edges of the upper and lower halves, and in the wooden cases a tongue and groove matching was used, so as to obtain a close contact and an easily adjusted joint, between the two portions.

Mr. Waters, who has assigned his patent duly to the complainant, recognized the great saving in weight in a sheet metal case, and also the added rigidity and strength of construction which could be obtained by making the edges and joints of such a sheet metal case constitute a frame by methods of riveting and bracing. He desired to preserve the durability and rigidity of such a case, even when subjected to the lateral or bulging strain of support from one point, upon but one side of the case, and realized, also, that, if this point of support were in the lower half of the case, the bulging strain would be manifested mainly at the joint; that is, at the upper edges of the lower half upon each side. He therefore described a gear case in his patent of sheet metal (in practice it is now shown that sheet steel is generally used), and, to meet the precise point of invention which has been referred to, he inserted the following, which is the only claim of the patent involved in the present suit:

"2. A gear case formed in two halves and having parallel sheet-metal sides; in combination with a single supporting-bracket rigidly attached to one side of the lower half of said case, whereby the weight of the case tends to cause the bulging of the supported side, the upper half of the case having a flange adapted to engage the outsides of the upper edges of the lower half to thereby prevent the bulging of the sides of said lower half."

In this claim the flange upon the upper half, to engage the edges of the lower half, was, as described, a continuous strip of metal, similar to the casting upon the old cases, which had followed the form of the tongue and groove matching of the wooden case above referred to. But Mr. Waters, realizing that such a flange need not be formed out of the metal piece making the side itself, and that it might be advantageous to fasten a separate over-lapping strip upon the lower edge of the upper half, provided for this alternative construction in his patent.

The defendant has been manufacturing gear cases for a considerable period of time, and has introduced an exhibit, called "Defendant's Exhibit B," of the form of gear case which has been sold by the defendant since its attention was called to the Waters patent. This is the only type of gear case manufactured and supplied by the defendant at the present time. In this gear case the support is afforded by two brackets instead of one, attached to the upper half of the case, on the side toward the center of the car. The general details of construction and methods of securing rigidity, by riveted joints and plates, are similar to all of the other cases shown. The case is made of sheet steel, and differs only from the type of case manufactured by the defendant, as to which infringement was claimed at the time this action was started, in that the supports have been changed from the lower to the upper half, and that these supports or brackets rest and are bolted down upon the bearing surface, instead of being bolted up thereto from the under side.

The gear case (Exhibit B) and also those complained of as shown in the "Complainant's Exhibits 1 and 2," do not have a continuous flange or strip overlapping the entire upper edge of the lower half,

but do have on each side two narrow straps or plates riveted to each face of the upper half, upon the outside, and extending about an inch below the joint, in such position that the lower half of the case will pass inside them when the halves are bolted together.

These straps or plates serve the purpose of guides in fastening the case together, and act in the same way as the flanges or strips described in the Waters patent, when subjected to any strain tending to cause the lower half of the case to bulge. In that sense they comply with the requirements which Mr. Waters was seeking to meet in his patent. But an inherent difference between the present type of gear case made by the defendant and the Waters patent lies in the change of the point of support. The weight of the gear case alone, if supported from the side of the lower half, toward the center of the car, would cause a bulging strain upon both sides of that lower half, which would be rendered greater by any additional strains from the movements of the car. If the point of support be changed to the upper half, the strain caused by the weight of the case and by the movements of the car would have a tendency to press the upper half in, both on the side where the support was attached and the opposite side. That is, the strain would be a collapsing rather than a bulging strain, and the lower half (being supported by the fastenings at each end, and being subjected only to the downward pull caused by the weight of the lower half itself, or to chance blows from obstacles thrown against the case) would need no protection against either the tendency to bulge, or the tendency to collapse, further than such as would be obtained by sufficient rigidity to preserve the general form and shape of the case.

Hence, the defendant at the present time, so far as the record shows, is not infringing the patent, and a gear case of the type represented by Exhibit B, as was admitted at the trial, is of a form which the defendant has a perfect right to place upon the market, so far as the Waters patent is concerned.

The only questions therefore which are important in the case are the general questions of the validity of the patent, and whether or not the type of gear case manufactured and on the market at about the time the suit was commenced, and typified by Complainant's Exhibits 1 and 2 are infringements such that an injunction should issue against the defendant's possible repetition of that infringement.

As to the validity of the patent but little need be said. The idea of supporting the case in the manner indicated, and of obtaining a rigid joint which would exclude dirt, protect the gear, and allow the catching and saving of waste oil, without using an unduly heavy case, was satisfactorily and easily accomplished by the idea of the Waters patent. Its commercial success is shown by the testimony, and, if the construction of the street car truck makes it more convenient to use a support attached to the lower half of the gear case, the Waters patent undoubtedly covers an idea which was worthy of being called invention. No record of any earlier patents has been introduced, and there is nothing to question the validity of the Waters patent (conceding that it contains meritorious invention, as has been

suggested) except the testimony of two or three witnesses as to the use of cases shown by Exhibits C, E, and F.

Some objection was made by the complainant as to the use of these exhibits, inasmuch as they were not formally marked in evidence, but the record shows that they were physically present and used by the witnesses in making their depositions, and they certainly constitute physical exhibits in the record, even though not marked by any officer of the court, having been produced and identified by the descriptions of the record. These cases show a flange or tongue and groove matching, which would have some tendency to resist a bulging or lateral strain. They show an attempt in these earlier cases to secure an exact fitting between the top and the lower halves and a tight joint for obvious reasons. The fact that these cases were supported upon tables or platforms, and that the lateral strain to be considered was only that of their own ability to stand upon a horizontal surface without collapsing, does not show any knowledge on the part of those using these cases (nor would it teach a mechanic or the public) that a case could be successfully used with nothing but the side support. The application of the flanged joint was the point of Waters' invention, and although a somewhat similar joint had been previously used in these cases, under a different method of support, nevertheless Waters' appreciation of the possibility of making a double use of that joint, and the advantage thereby presented if the gear case was supported from the side would seem to have been original with him, and not to have been appreciated or understood until his patent was issued. The testimony of one witness, Remelius, and the production of a blue print, showing that at some time around the date of the application by Waters side brackets were used in supporting the wooden cases, and that since that time these wooden cases, in so far as they have been used, have been supported in that fashion, is not sufficient to invalidate the Waters patent, especially as the evidence of the date at which this use was begun is not definite, and does not clearly antedate the time of Waters' application.

We have left, therefore, only the question of infringement as presented by the type of case shown in Exhibits 1 and 2, and this question of infringement comes down to one proposition, namely, whether the straps or narrow plates, used on these exhibits, are but another form, that is, an equivalent for the flanges or strips of the Waters patent, and whether, if thereby the Waters patent was infringed, an injunction should issue. As has been said, the purpose of these straps or vertical strips is said by the defendant to be to merely act as guides in clamping the cases together, and incidentally to prevent a sudden bulging of the lower half. But it is apparent to any one, whether he be workman or layman, that a lateral strain upon the gear case, supported at the side of the lower half, would be arrested and the sides held in alignment by these vertical strips. Waters expressly reserved in his patent the right to substitute strips, which he implied he would run horizontally along the edge of the joint, but the mere saving of weight and the change in position, without altering the function of the plates of metal, even

assuming that the results be not as satisfactory, would not seem to get the form of construction away from the idea expressed and shown in the Waters patent in the claim in question. It would seem therefore, that a construction like Exhibits 1 and 2 could be enjoined as an infringement of the Waters patent, and this action, having been started for the purpose of preventing what was then an apparent infringing use, was properly brought for an injunction with the incidents thereto.

The type of gear case manufactured by the defendant and the record in the case show that the necessity for injunction is no longer present, and the rights of the complainant will be entirely protected if it be given an accounting for any damage which resulted from the manufacture and sale of gear cases like Exhibits 1 and 2, with a determination that claim 2 of the patent is valid, and that it is entitled to an injunction preventing any further use of the type of gear case infringing the patent.

The necessity for such an injunction having been removed by the admitted action of the defendant in apparent good faith, an actual issuance of the injunction will be temporarily stayed, so long as during the life of the patent the defendant continues to act with strict observance of all appearances, but may be applied for at any time, if deemed necessary, at the foot of this decree.

AMERICAN PATENT DIAMOND DOP CO. v. WOOD et al.

(Circuit Court, E. D. New York. July 20, 1911.)

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—"DOP."

The Loesser & Loesser patent, No. 573,672, for a "dop," to hold a diamond in position for polishing, *held* not anticipated, valid, and infringed.

2. PATENTS (§ 92*)—PERSONS ENTITLED—JOINT INVENTORS.

That one of two joint patentees alone invented certain of the elements of the patented combination does not invalidate the patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 124; Dec. Dig. § 92.*]

3. WORDS AND PHRASES—"DOP."

A "dop" is an implement for holding a diamond in position to polish the facets, the table, and the culet, in distinction from the harder or more violent processes of cutting the diamond.

In Equity. Suit by the American Patent Diamond Dop Company against Rawson L. Wood, St. John Wood, and Harry S. Wood. On final hearing. Decree for complainant.

Johnson & Galston (Clarence G. Galston, of counsel), for complainant.

Prindle & Wright (Edwin J. Prindle, of counsel), for defendants.

CHATFIELD, District Judge. [3] The complainant holds by assignment letters patent issued to Edward and Ernest Loesser upon the 22d day of December, 1896, No. 573,672, for a dop; that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

is, an implement to hold a diamond in position for polishing the facets, the table, and the culet, in distinction from the harder or more violent processes of cutting the diamond.

The claims of the patent with which we have to do are as follows:

"2. A diamond-polishing dop, comprising a head provided with an inclined seat and having means for applying it to a diamond-polishing tool, a bifurcated holding-finger adapted, in connection with said seat, to establish three points of contact with the diamond, and means for securing and adjusting the holding-finger, substantially as set forth.

"3. A diamond-polishing dop, comprising a head having a recess and provided with means for application to a diamond-polishing tool, a removable shoe having a flange fitting said recess and provided with a cavity, and means for engaging the diamond and holding the same in the cavity of said shoe,"

—and in general describe a dop consisting of a metal head or bulb with a shank or shaft which by insertion in the polishing tool holds the dop in position. The recess in the head or bulb of the dop receives the lug or flange of a removable shoe, in which is a cavity for the actual placing of the diamond, while a bifurcated finger (capable of being raised or lowered by means of a set screw through the head or bulb of the dop, engaging with the shank of the finger) bears on the diamond in such a way as to secure a three-point contact between the two extremities of the finger and the recess in the shoe upon which the diamond is placed. The loosening of the set screw allows the turning of the diamond, and the bifurcation allows such contact with the skive as to polish either the facets, table, or culet of the diamond, as the case may be.

Claim 3 is more general than claim 2, and does not provide for the bifurcated finger, nor does it specify an inclined seat, but does provide for a recess with a removable shoe to fit the recess, with a cavity to hold the diamond, and means to hold the diamond in this cavity. This third claim will have to be borne specially in mind when we come to a consideration of the prior art, as its general language describes ideas substantially shown in Fig. 6 of the Hessels patent (*infra*), and this claim would therefore seem invalid for anticipation, unless the combination of parts in one device shows the elements of a basic patent. The defendants' device uses a bulb or head, with a stem or means for applying the head to the diamond-polishing tool, and a shoe with a cavity for receiving the diamond, the shoe fitting into a seat capable of being inclined to the line of support of the dop. Two converging arms or jaws are operated by a set screw through the head of the dop, and are thus capable of being brought into contact with the diamond over the cavity in the seat, thus making three points of contact as in the Loesser patent. The shoe is also capable of adjustment by a screw thread by means of which the shoe is raised or lowered to the required height under the converging claws or arms, while in the Loesser patent the shoe remains at uniform height, but the bifurcated finger or means of engaging the diamond is raised or lowered, and the diamond can be turned so as to polish the different facets or parts of the diamond, one after the other, by the simple operation of raising the finger upon relieving the pres-

sure of the set screw. It will thus be seen that if the idea of the Loesser patent is basic, and covers generally a combination of the bulb or head, the three-point contact capable of being raised or lowered, and (in claim 2) means of inclining the head or bulb to the axis of the support, then the defendants' structure would seem to infringe the complainant's patent. The defendants therefore have attacked the complainant's patent by denying invention, citing several patents of the prior art, which can be taken up at this time.

[1] The Imray patent, December 22, 1882, No. 6,117, of Great Britain, provides for holding a pearl against the edge of a disk by means of a double hook-shaped lever of which the hooks are caused to engage with the pearl and press it against the edge of the disk by means of a cam. The turning of the disk then allows a thin cutter to pass between the two hooks, and thus to cut the pearl in two. This patent shows the idea of holding an object in such a way that a cutting edge or saw may pass between two separate parts of the holder, as in the ordinary buzz-saw, but has very little connection with the idea of polishing a diamond. In fact, the similarity of a bifurcated finger to the double hook is all that would be taught by the Imray patent.

The patent of Fifield & Brainerd, March 3, 1874, No. 148,113, is an American patent for a chuck upon which to engrave metalware, such as spoons or rings. The article to be engraved is held by two jaw-heads, operated by means of a rod forcing them to approach or recede by means of the operation of a thread on the rod, thus securing contact between the two jaws and a rest, or the three points of contact exactly as shown in the defendants' structure. In fact, the defendants' dop would seem to indicate that the idea of the Fifield & Brainerd patent had been applied to the complainant's structure in exchange for the means shown by the complainant's patent. This patent will be considered again later.

The Guild patent, February 3, 1880, No. 224,086, shows a machine for the polishing of jewelry or buttons in which the article to be polished is held between jaws, preferably three in number, which clamp around the article so as to hold it while being polished. This patent uses the jaws in question exactly as a person would take an apple in the fingers, and such use of the jaws is only in combination with other devices, so that nothing is taught thereby.

The Platt patent, June 21, 1881, No. 243,303, the Koehler & Vogel patent, January 22, 1884, No. 292,437, the Souders patent, October 4, 1887, No. 371,105, and the Perry & Cornish patent, May 21, 1867, No. 64,904, are for tools embodying the ordinary proposition of applying pressure at the third point of contact from the well-known principle of a lever, and teach nothing with relation to the construction of a dop beyond the fact that stability can be acquired by three points of contact, which is hardly a patentable idea.

The Loesser patent, April 21, 1896, No. 558,734, did not much precede the patent in question, and one of the patentees seems to have been one of the patentees in the patent under discussion. That Loesser patent was for a diamond-polishing tool, and was said to

have been an improvement upon the patent of Leon Dreyfus, No. 534,821, dated February 26, 1895, which had to do with so constructing a dop as to arrange it easily and quickly at the angle at which the facets or surfaces of the diamond were to be polished. In this the diamond had to be fixed in a deep recess by some adhesive, or imbedded in soft metal, and it is only like the patent in suit in that the head holding the diamond for polishing is called a dop.

The Pimlott patent, December 4, 1866, No. 60,238, covers an improvement in a dog for lathes, by which two adjustable jaws hold the bolt or article to be worked and apply their pressure at any desired distance from the face-plate and give more or less freedom in equalizing the pressure of the jaws to suit any irregularity in the shape of the bolt or object to be turned. But this does not suggest the idea of the complainant's dop, and we come down to two patents, Hessels, November 15, 1881, No. 249,523, and Strasburger, October 13, 1896, No. 569,252, which were both for use in connection with diamonds, but of which Hessels' was for cutting and Strasburger's was for polishing. Taking Strasburger first, it would seem that he has the exact idea shown in the older Loesser patent, namely, a dop or spindle-head in which the stone is fixed with gum, but, instead of rotating the arm or spindle by means of a plate, he has an adjustable universal joint, and he adds an adjustable finger to stiffen or make more secure the stone when fastened in position. This patent certainly does not show the idea of the complainant's dop, although it was for use in polishing diamonds at an angle, and although it suggests the idea of holding the diamond immovably in the position in which it is to be polished, by means of an external finger. But the complainant's idea is radically different, in that the entire head or dop is fixed at the desired angle, and the diamond is then adjusted and mechanically held in a position to present the face which is to be polished at the required angle, instead of adhesively fastening the diamond upon the end of the spindle, and then bringing the spindle into the position required. The Hessels patent has to do with the cutting of diamonds rather than the polishing of diamonds; but, inasmuch as the operation is in connection with one of the steps in the process of preparing diamonds for the market, and as every idea of Hessels' patent would be available to a person considering how to construct a machine for polishing diamonds, but would not be patentable unless it were an invention over the Hessels' method, we must consider this patent more in detail, and it would seem that the Hessels patent is the closest of those cited in the prior art in this case. Hessels fastened the diamond to a frame or sliding-block by two converging jaws, and in one form (shown by a drawing) a retaining tongue which pressed the diamond into a recess. He desires to do away with the cementing of the diamonds to the dop, and he applies either the movable jaws or the retaining tongue to the upper portions of the diamond, thus pressing them into a recess which corresponds to the size of the diamond. He uses adjustable recesses, of various sizes, according to the need, and seems to have supplied, by his device, a mechanical method of holding the diamond rather than

the adhesive or cement method previously known. But he does not suggest, nor does the Hessels' patent teach, the simple structure of the dop patented by the complainant for polishing, and not for cutting. Hessels' much more substantial structure, with its adjustable parts, is available for cutting which requires the application of some force and a heavy machine generally while the complainant's device was an ingenious application, in one device, of somewhat similar ideas to attain similar ends with relation to polishing. The Hessels patent, therefore, would not seem to anticipate the Loesser patent in suit so as to render the Loesser patent invalid, and we therefore come back to the Fifield & Brainerd patent, in which the ordinary idea of a chuck was applied so nearly in the form in which the defendants make their device, and from which, as has been said, they seem to borrow the idea for application to the Loesser dop of the adjustable jaws and the rest for the object to be held in.

It would seem to naturally follow that, if the defendants had attempted to patent their holding device as a basic patent, it would have been anticipated by the Fifield & Brainerd patent, and would have been valid only in so far as it made use of an adjustable seat or recess in connection with the converging jaws for the holding of a diamond in a head or dop. To that extent it seems that it would have been valid, except as anticipated by the patent in suit, and we have therefore the use of this device by the defendants, in a form which they might have patented themselves, if it had not been first used and patented by the Loessers. The methods of use and of adjustment differ so between the dop for diamond polishing and the Fifield & Brainerd chuck that that chuck cannot be said to anticipate such an invention as that of the Loessers in the diamond-polishing business; and, while the use of this device is extremely narrow, nevertheless the Loesser patent would seem to be basic within that field, and they would seem to have secured the right to control the use of a single structure embodying the means for adjusting the angle at which the diamond is to be polished, the recess or adjustable cavity to hold the diamond in that position, and the bifurcated finger or three-point contact method of steadying and securing the diamond in the position in which it is placed upon the recess by an adjustable mechanical contact secured through a threaded screw in the dop itself.

Viewed from this light, the application of the Fifield & Brainerd jaws or the substitution of converging jaws would be either merely an equivalent for the bifurcated finger of the Loesser patent or at most an improvement upon that bifurcated finger, inasmuch as it allows an immediate adjustment without the double process of loosening the set screw and then raising the finger, and it must be held, therefore, that, while the defendants' device might be patented as an improvement for recognized use in connection with the invention of the Loesser patent, yet the defendants' device does infringe the ideas which are reserved to the Loessers in their patent, and that their patent is valid with respect thereto.

[2] The defendants have suggested one other defense, namely, that

some of the testimony shows that one of the Loessers said that the bifurcated finger was his father's idea. This testimony (while it may show that greater credit belonged to the father as to certain parts of the structure, or that the father might have worked out the bifurcated finger himself) does not go so far as to indicate that the patent should be held invalid because one feature of it, even though it be an important feature, was thought of by one of the two who worked out the entire invention, for otherwise it would be impossible to hold that two individuals could jointly participate in inventing a structure, as it must necessarily happen that some of the concepts representing various steps in the invention should occur to first one and then the other, and yet the invention, as a whole, be the joint product of the two.

The complainant may have a decree.

NEWHALL v. J. JACOB SHANNON & CO.

(Circuit Court, E. D. Pennsylvania. July 22, 1911.)

No. 463.

PATENTS (§ 328*)—PRIOR USE—HANGER FOR SUSPENDING TELEPHONE CABLES.

The Cameron patent, No. 595,693, for improvements in suspension of aerial cables, claims 5, 6, 7, 8, and 9, which relate to the hanger by which a telephone cable is suspended from a messenger, are void for prior public use of the device in numerous instances.

In Equity. Suit by Henry B. Newhall against J. Jacob Shannon & Co. On final hearing. Decree for defendant.

Alan M. Johnson, for complainant.

J. B. Fay, for defendant.

WITMER, District Judge. This is a bill in equity for an injunction and account based upon the alleged infringement by the defendant of letters patent No. 595,693, dated December 21, 1897, for certain useful improvement in suspension of aerial cables issued to George Cameron and assigned to the complainant; one of the defenses relied upon being that the alleged improvement or device patented was in public use for more than two years prior to the application for the patent, July 24, 1897. With the increasing popularity of the telephone and a large number of telephone lines or wires which it accordingly became necessary to employ in telephone systems, the advantage of collecting such lines or wires into the form of so called "cables" was early realized. The approved construction of such cables and one that has been in use for many years involves the encasing of a number of insulated pairs of wires within a leaden tube, the latter being then suspended from poles, buildings, or like supports, just as the single wires had previously been, or else run through underground conduits. In suspending such cables some difficulty was encountered by reason of the soft and yielding character of the encasing material which

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

rendered it impossible to subject the same to any great tension, such as would be necessary if the cables were suspended only at infrequent intervals. A strong steel wire or cable called a "messenger" is accordingly utilized to support the telephone cable proper, said messenger being attached to the poles or buildings, and the cable being suspended therefrom at frequent intervals by means of suitable "hangers."

The Cameron patent in suit, as stated by the patentee (page 1 of his specifications, lines 8 et seq.), "relates to aerial cables, and, first, to the method and means employed in stringing or putting them into position, and, second, to the hanger used in suspending the cable from its supporting wire." No attention need be given to the former, except so far as it may concern the consideration of the latter, inasmuch as it is understood that only claims 5, 6, 7, 8, and 9 of the specifications of said patent are declared on, that it is the hanger used in suspending the cable from the messenger which the defendant herein is alleged to have infringed. This hanger, as represented in the several figures of the patent drawing, and particularly of figures 7 and 8, is described as being "composed first of a hook having a large upper eye, and a lower eye, and, second, a flexible insulating chord or band, which may be made of fibrous material, as hemp or flax, saturated with a preservative material, as tar, preferably, a single piece made into loops and its ends secured, or it may be cut as an endless loop from any suitable insulating material, as rawhide, etc., and folded into small loops." The hook referred to being in the form of the letter "S" is further described as being made of wire and bent so that the lower part of the upper eye will have an open space smaller than the diameter of the messenger over which it is intended to pass, and the lower eye practically closed through which it is contemplated that the double flexible chord should be placed and the end thereof passed between the strands of the first end, and then in the same manner looped around the cable to be supported. The structure of the cable hanger proper as described in the different claims, so far as patentable merit is concerned, is substantially identical in scope, the minor differences set up in certain of the subelements being inconsequential and without patentable significance sufficient to distinguish one from the other.

Was the use and sale by the defendant, which is not disputed, without license from the complainant, of this hook and flexible chord assembled as described, and known in trade as the marline cable hanger, an infringement of the complainant's Cameron patent? The defendant contends that the patent is invalid, because (a) of prior use; (b) the patentee is not the inventor; (c) of prior patents; (d) the patent is void on its face.

The evidence presented convinces beyond a reasonable doubt that numerous persons used a cable hanger embodying the alleged invention a considerable period of time over two years antedating the alleged patent of July 24, 1897. This conclusion is inevitable without even taking into account the testimony of the so-called patentees, Cameron and McCoy. The testimony of Frederick J. Crockett, Hugh

A. McCoy, Michael Eagan, Thomas P. Bannon, Elijah Hebb, Daniel McDonald, and Leod McLeod does not fail to make an impression of truthfulness and accuracy notwithstanding the insinuations and aspersions of counsel for the complainant which was indeed a full test of each and all of their patience.

Mr. Crockett testified that he was employed by the New England Telephone & Telegraph Company as inspector and chief inspector from 1886 to 1889; as special inspector in 1890; in charge of inside installation from 1891 to 1893; and as foreman or general foreman in the construction department from 1893 to 1903; that between 1891 and the year of the Cameron patent practically all cables placed by his company were hung and supported from a week to six months by hangers like the Cameron patent. He fixes the year 1891 positively, since he went to the World's Fair in 1890, after he had served two years as foreman. The witness furthermore says that it is his impression that such hangers were in common use in 1888 and 1889 while he was serving as inspector. Mr. McCoy, division superintendent of the New England Telephone & Telegraph Company, states that marline hangers, like the Cameron patent, were used prior to 1892 and possibly in 1890; that in 1893 similar hangers supported a cable in Winchester, Mass., more than a year.

Mr. Eagan states that he was a lineman for the Western Union Telegraph Company from 1887 to 1892 or 1893; that while in this position he, with others, began using hook and marline cable hangers in 1888. He made such as they used, which was offered in evidence, resembling in every particular the one patented. The witness further stated that he helped to erect certain cables, supported by such hangers, which were run in Boston in order to carry the wires removed from certain buildings which were replaced by the Fiske Building, and to carry the wires removed from the old post office replaced by the Exchange Building. These hangers were used as permanent supports of the cable. From examination of the city records it appears that the Fiske Building was completed in December, 1889, and the Exchange Building in October, 1891.

Mr. Bannon testified that as foreman of construction for the New England Telephone & Telegraph Company from 1882 to 1890 he used marline cable hangers to support cables from messenger wires from 1887 on; that from 1890 to 1894, while working for the Boston fire department, he on three different occasions used the same hangers to support aerial cables. The witness made such a one as were used resembling the patent.

Mr. Hebb states that while in the employ of the Western Union Telegraph Company from 1882 to 1888 he helped to use marline hangers of the Cameron patent type in replacing wires about the construction of the Fiske Building and the Exchange Building. He further says that in 1891, while working for the Postal Company, the same were used for similar purposes.

Mr. McDonald testified that while in the employ of the New England Telephone & Telegraph Company in 1891 he helped to erect a cable on School street, Somerville, Mass., which was supported from messen-

ger wire by marline hangers like the patent; that from 1891 to 1896 it was the common practice of his company to attach such cables to messenger wires by such hangers.

Mr. McLeod testified that he assisted in making the change of wires about the Fiske and Exchange buildings, and that cables were attached to the messenger wires by marline hangers of the type patented; that during his employ from 1887 to 1894 by the Western Union Telegraph Company it was their custom to support cables in like manner.

The testimony of these witnesses fixing the time and place when and where these marline hangers were used, and that they were used for the practical purpose of suspending aerial cables from messenger wires and accurately describing the same, is uncontradicted. Notwithstanding the frailties of the human mind and the lapse of time, it clearly outweighs the presumption in favor of the validity of the patent. The use as shown having been a public use, and not for the purpose of experiment or to perfect and complete the successful operation of the alleged invention, it follows that this patent, No. 595,693, to the extent of the claims involved in this suit, is held void by reason of the prior use of the alleged invention for more than two years before the date of the application.

There are other reasons why the patent cannot be sustained, which I will not discuss. Suffice to say that the patentee is not the inventor. Use of an old device for a new and analogous purpose is not invention. *Pennsylvania Railroad Co. v. Locomotive Truck Co.*, 110 U. S. 490, 4 Sup. Ct. 220, 28 L. Ed. 222. The combination of hook and chord in its form as used is surely not of late origin. Attached to a single chord the hook has been in unlimited use, with a loop chord it has also long been in use for suspending weights of various forms and kind. These and other reasons might be assigned for refusal to sustain the patent, but the former, that of prior use, is deemed sufficient to warrant the action of the court.

The bill is therefore dismissed, at the cost of the complainant.

WOOD v. KAHN et al.

(Circuit Court, S. D. New York. July 3, 1911.)

PATENTS (§ 328*)—INVENTION—PROCESS OF DIVIDING DIAMONDS.

The Wood patent, No. 839,356, for a process of dividing diamonds, consisting of dividing a larger diamond to form a plurality of smaller diamonds, by sawing into the larger diamond from opposite sides, the saw cuts meeting at an angle to form blocks from which smaller diamonds can be formed, the purpose being to save waste involved in the splitting method, does not disclose the invention or discovery of an art, and is void for lack of patentable invention.

In Equity. Suit by St. John Wood against Louis Kahn and others for infringement of the Wood patent, No. 839,356, for a process for dividing diamonds. On final hearing. Decree for defendants.

Mr. Prindle, for complainant.

Mr. Galston, for defendants.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

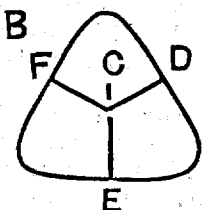
HOUGH, District Judge. The patent in suit is described as "a process for dividing diamonds." The patentee says in his specification:

"I have discovered that I can saw from different sides of a rough diamond and can make the saw cuts meet at any desired angle, and that by disposing the saw cuts according to certain methods which I have invented, which this discovery makes possible, I can divide the diamond to such advantage that there results a most important increase in the weight of the finished diamonds from a given rough crystal."

The methods which he declares he has invented are fairly summed up in the first claim, viz.:

"The process of dividing a larger diamond to form a plurality of smaller diamonds, which process consists in sawing partially into the body of such larger diamond from opposite sides, said saw cuts meeting at an angle to form blocks from which smaller diamonds can be formed."

The application of the process is shown by the subjoined figure:



It is therefore observable that this patent is not for any diamond, or shape of diamond, nor is it for any machine, nor even for the result of any mechanical operation, in the sense that such result is peculiar to a given apparatus.

What is sawed is the ordinary diamond as mined, what is produced is the ordinary diamond of commerce, and the means by which the first is transformed into the second (so far as this patent is concerned) is a diamond saw, which is admittedly old. It is therefore necessary to consider the evidence to ascertain the exact nature of the alleged invention. From the depositions it appears that great difficulties attend the sawing of diamonds, arising from the hardness of the material, the existence of flaws or "knots" in diamonds, and the fact that every diamond contains four "grains," which run parallel to the faces of the theoretically perfect natural diamond, which is an octohedron. It has therefore long been the practice to form the diamond of commerce by splitting as much as possible, instead of by sawing. This splitting process, owing to the peculiar nature and numerous grains of a diamond, involves waste.

There is a thought (and it seems to me a meritorious one) involved in this patent. That thought is a certain boldness of conception and a willingness to risk present loss in order to gain knowledge useful in the future. It had long been known that a diamond could be sawed in every direction indicated by Wood; but whether it could be so sawed or treated without losses more than counterbalancing possible gain was, in the opinion of the few persons who had considered it, uncertain. Wood ventured, and has demonstrated that without undue loss his saw cuts can be made to meet at a common point. Yet this result is obtained from diamonds of the familiar kind, by machinery which is confessedly old, operated in the same manner as formerly and by the same men, except that Mr. Wood has told the workmen how to direct their saws, and in so doing originally took the risk of ruining certain diamonds of his own upon which he experimented.

This is the view of the patent most favorable to complainant. The patentable category into which all processes must fall is that of art; for, as has been frequently pointed out, a process *eo nomine* has never been mentioned in any of the patent acts, and the very fact that the patent is for a process negatives the idea that it is either a machine, manufacture, or composition of matter. Therefore it must be an art.

Whether a bold thought, put into practice in disregard of possible present loss of most expensive material, can ever constitute a patentable art, is a subject worthy of discussion. An exact, though homely, analogy to what Mr. Wood has done may be found in the proverbial advice to "grasp a nettle firmly." Nettles were old, and the habit of handling them gingerly was doubtless likewise old, and the first man who risked present pain and possible injury, and grasped it firmly and boldly, made a discovery, and doubtless embodied his discovery in a proverb. But it is doubted whether the process, however excellent, is patentable. It is not, however, necessary to go back to first principles in this matter; for it is admitted, and is indeed insisted upon as the great merit of this patent, that what results from it is economy of material alone. The invention consists in economically separating the diamond, and results solely from the manner in which the lines of separation or sawing are arranged with reference to the material to be separated or sawed.

No legal or patentable difference is perceived between the art of sawing diamonds and the art of sawing wood, and in *Brown v. District of Columbia*, 130 U. S. 87, 9 Sup. Ct. 437, 32 L. Ed. 863, this matter was considered. The patent there before the court (94,063) was for "an improved mode of cutting blocks for street pavements," and the invention consisted "in a novel method of cutting and splitting blocks for wood pavement in such a manner that * * * two finished blocks [were produced] without more waste of timber than that occasioned by the saws" (130 U. S. 91, 92, 9 Sup. Ct. 438, 32 L. Ed. 863); and the conclusion of the court upon this patent is as follows:

"To cut the block so as to get the grain in a particular way, and so as to avoid waste, requires some mechanical skill, without involving an invention." 130 U. S. 103, 9 Sup. Ct. 442 (32 L. Ed. 863).

It follows that the bill must be dismissed, not for lack of ingenuity or commendable boldness, but for the lack of that quite different thing, "patentable invention."

NOTE.—Decision in this case has been grounded on the point thought fairest for all concerned, because it is radical. So far as the evidence herein is concerned, however, it should be stated that I am wholly unable to find that any case for infringement has been made out against L. and M. Kahn.

METALLIC RUBBER TIRE CO. v. HARTFORD RUBBER WORKS CO.

(Circuit Court, D. Connecticut. July 27, 1911.)

No. 1,261.

PATENTS (§ 328*)—INFRINGEMENT—VEHICLE TIRE.

The Adams patent, No. 609,320, for a vehicle tire, construed and held not infringed.

In Equity. Suit by the Metallic Rubber Tire Company against the Hartford Rubber Works Company. On final hearing. Decree for defendant.

Alfred Wilkinson and John H. Roney, for complainant.
Ernest Hopkinson and Edward W. Vaill, for defendant.

PLATT, District Judge. This is the usual bill in equity, asking for injunction and accounting, based upon letters patent to Calvin T. Adams, No. 609,320, issued August 16, 1898, for a vehicle tire.

The defenses are invalidity, irregularity of issue, noninfringement, and lack of equity.

The first thing to settle is what the inventive concept of Adams was, and what he claimed under it. In discussing that we must not forget that the Adams' concept was formed in 1895 when the bicycle was in vogue and the heavy motor car of to-day was a vague uncertainty. His mind was concerned with bicycles alone, and nothing else, except possibly tires of a similar character. We must go to the file wrapper to learn what he did. He wanted to show how the tires of bicycles and "other wheeled vehicles" (in which latter phrase he undoubtedly had in mind carriage wheels) could be so treated as to retain their resiliency, and at the same time be prevented from slipping on smooth and wet roadways. The yielding tires of bicycles had up to that time, he says, been provided with spikes extending well beyond the head, so as to penetrate and give a locking hold upon ice, but these could not be used on roadways without destroying the tire or making it hard work to propel the machine. Such tires had also been provided with external metallic fittings to bear on the ground when the tire is compressed, but such fittings were too heavy, expensive, and complicated. His idea was to provide a tread for the yielding tire which would not add much to the weight or expense of the tire, could be easily applied, would last, would not slip on smooth or wet roadways, and would not "materially increase the labor of propulsion." His way of doing it was to weave into the yielding material of the tread wire which should appear every now and then flush with the surface, and at other points be embedded within the material of the tread, or to embed within the material of the treads studs of metal or other hard substance which should come up flush with the surface. In this way he expected that the metal would get a grip on the roadway and prevent slipping, but at the same time the tread and metal would readily yield with the tire and permit the flexible material of the tread to act as a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cushion. He then proceeded to tell people how to carry his idea into practice. He made pictures of pneumatic bicycle tires embodying his invention, both on the surface and in cross-sections.

His cross-section (Fig. 2) shows the hard bearings *C C C* made by weaving or stitching metallic wire through the tread in lines running lengthwise of the tread (as shown in Fig. 1), so that the wire is alternately flush with the surface and embedded within the material of the tread. He then explains that the wire being interwoven with the material of the tread will remain securely therein after the exposed portion has worn off, and that the exposed ends will then act in the same way as the hard bearings. This is the nearest he comes to the idea of "cat's claws." He appears to have thought that some virtue would be left in his hard bearings, even after they were worn apart, but that was an incidental, and not a substantive, thought. In his cross-section (Fig. 3) he shows his hard bearings made by sticking metal studs into the yielding material of the tread, so that their heads would come flush with the roadway and act like the exposed portions of the metal wire in Fig. 2. (That hard bearing would, of course, always be ready for work, no matter how much the material of the tread should wear away, and he would not have to face the possibility of loose ends dangling about, which was very likely a comfort to his mind.)

He then makes three claims based upon what he thought he had invented:

(1) "A yielding tread for a vehicle tire, having a peripheral succession of hard bearings embedded in the material of which the tread is composed and substantially flush with its surface."

(2) "A vehicle tire treated in the same way, without a tread." (Both of these claims count, of course, upon the metal studs, and are put first, although the specifications treat the subject in the reverse order.)

(3) "A yielding tread for a vehicle tire, having metallic wire interwoven with the material of which the tread is composed so as to lie in part substantially flush with its surface."

There is nothing in the claim, it will be observed, covering the function of that portion of the wire lying flush with the surface after it has been worn away so as to leave exposed ends held in place by that portion of the woven wire which remains countersunk in the material of the tread. These claims were rejected by the examiner on a number of citations, and in December, 1895, Mr. Adams absolutely cut out any claim to his invention as respects the wire interwoven with the tread, and proceeded with his metal stud idea, in one way and another. By various citations the examiner brought Mr. Adams to such a frame of mind that on January 5, 1897, he abandoned his metal stud idea and any broad claim covering the "interwoven wire form of bearings," and limited his application "to the combination with the cushioned tire of the interwoven wire bearing tread."

It is argued by defendant that Adams presented this idea to the public when he cut it out of his claims, and devoted himself to the metal stud proposition. This is more or less persuasive, dependent upon the angle from which one views it, but I do not think the rights of the

parties should turn upon that consideration. We are still hunting for the breadth and scope of the mental concept which pervaded Dr. Adams' mind. At this last moment he is still thinking and arguing about his wire as being interwoven with the material of the tread, and in the new claim which he prepares and inserts he does not suggest the functional advantages which will accrue to his idea after the exposed portion of the interwoven wire has been worn through by frictional contact with the roadway. He was thinking about bicycle tires, and, if he had looked into the art at all, he must have found that others before him had conceived the idea of stitching wire into a bicycle tire. Others had done it for other purposes, mainly to stiffen and strengthen their tires. It is not surprising that he should have thought that he could adapt their idea to his own use. (See Phillips' British Patent, 10,145, of 1893, and Barker's British Patent, No. 1952, of 1888.) That he could weave in his wire and make it useful to prevent slipping was the thought which came to him, and he proceeded to develop that thought in conformity with our statutes relating to patent discoveries. Assuming his idea to have been what I am confident it was, he complied with the statutes. Assuming it to have been what the plaintiff insists that it was, he failed completely to comply with them. If one follows his disclosures, he could not get the wire into the tread in any other way than by weaving or stitching. There is not the faintest allusion to such a manner of treatment as the defendant applies to its coiled wire. It is an easy thing to take such a structure as defendant's tire, made under the Midgley idea, and reason backwards to the Adams idea. By the time one reaches the Adams idea it has a very different aspect from the one reached by beginning with the art as it existed when Adams came into view, and working up to Adams through the light thus presented.

This memorandum is the outcome of many hours of careful thought and study of the case from every viewpoint. It would be a pleasant task to jot down my notions as they have come to me during those hours, but time forbids and no useful purpose would be gained thereby. In the light of the facts presented by the use of the heavy tires which must be applied to the ponderous motor car of the present day, a vastly different problem is presented from the one which Adams encountered from 1895 to 1898. It would be absurd, as well as highly inequitable, to so enlarge the scope of the answer which he made to his problem that it would enable him to levy tribute upon those who have faced with courage a problem vastly larger. He certainly failed completely to teach any one how to solve the larger problem, and for that reason alone, no matter what was in his mind, he failed to perform that end of his bargain which he was obliged to perform before he could expect the right of monopoly to which a properly prepared application, disclosure, and claim would have entitled him.

Construing the patent as I feel bound to do, the defendant does not infringe.

Let the bill be dismissed, with costs.

LUTEN v. DOVER CONST. CO.

(Circuit Court, D. New Jersey. May 1, 1911.)

1. PATENTS (§ 310*)—SUIT FOR INFRINGEMENT—EQUITY JURISDICTION—SUFFICIENCY OF BILL.

A bill for infringement of a patent, which alleges a specific instance of infringement by defendant without stating any facts from which it is to be inferred that the infringement is at an end, states a case within the jurisdiction of equity to grant relief by injunction.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 310.*]

2. PATENTS (§ 310*)—SUIT FOR INFRINGEMENT—DEMURRER.

To warrant a court in declaring a patent void on demurrer, its invalidity must be so clear and convincing on its face that no evidence in aid of the presumption arising from the grant could avail to sustain it.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 535-540; Dec. Dig. § 310.*]

3. PATENTS (§ 310*)—SUIT FOR INFRINGEMENT—MULTIFARIOUSNESS OF BILL.

A bill for infringement of a number of patents is not multifarious where it alleges, not only that all the inventions are capable of being employed in a single unitary structure, but that they are so used by defendant.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 518; Dec. Dig. § 310.*]

4. PATENTS (§ 310*)—SUIT FOR INFRINGEMENT—SUFFICIENCY OF BILL.

That a bill for infringement does not allege that the patent was recorded does not raise a presumption that such record was not made as required by statute, and such defense is not available on demurrer.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 310.*]

In Equity. Suit by Daniel B. Luten against the Dover Construction Company. On demurrer to bill. Overruled.

Suit to restrain infringement of five certain patents on reinforced concrete structures, Nos. 818,386, 853,202, 853,203, 923,058, 934,411; the last two are process patents.

F. H. Drury, for complainant.

James A. Carr, for defendant.

RELLSTAB, District Judge. The causes of demurrer relied upon in the argument on brief, are, in substance, first, that the complainant has a complete remedy at law; second, that the two process patents are void on their face; third, that the bill is multifarious; fourth, that there is no averment of the recording of the patent; fifth, that there is no proper averment of the affixing of the patent marks.

These assignments cannot prevail. On demurrer, all well-pleaded facts contained in the bill are taken as true. The bill, after setting out the grants of five several letters patent, the earliest being April 17, 1906, alleges, so far as is necessary to notice on this demurrer, Paragraph 6,

"That all of the inventions described and claimed in all of said patents are capable of being employed and used in a single unitary structure, and that they are so employed and used by the respondent;"

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Paragraph 9, That defendant without license, in infringement of said letters patent (enumerating all) at Dover, Morris county, N. J.—“knowingly and willfully constructed and sold, or caused to be constructed, used and sold, a 45 foot reinforced concrete bridge or arch structure over Rockaway River on Mercer street, in said county, made in accordance with and containing the improvements and inventions claimed and described in said letters patent (enumerating all) and recited in the claims thereof, but to what extent the defendant has made use of said inventions or improvements described and claimed in said letters patent (enumerating all) your orator does not know and prays discovery thereof;”

Paragraph 10, That the defendant—

“has received and enjoyed large gains, profits and advantages from the unlawful use of said inventions and improvements set forth in said letters patent (enumerating all), which might otherwise and would have been obtained by your orator, and to which your orator is entitled, but how much exactly your orator does not know, and therefore prays a full and complete discovery thereof;”

Paragraph 11,

“On information and belief that there has been imprinted upon plans and designs or structures, made in accordance with the improvements and inventions described and claimed in said letters patent (enumerating all), the word ‘Patented,’ together with the date of grant of your orator’s said letters patent, in accordance with the statutes in such case made and provided, thereby identifying said structures as being made under said letters patent, and giving notice thereof to the public.”

The bill concludes with the usual relief prayers in patent suits in equity.

[1] As to the first ground. As seen, the bill specifically alleges that all of the alleged inventions are not only capable of being conjointly used in a single structure, but that they are so used by the defendant. The character of the structure erected by the defendant and the place where erected, embodying such inventions, are specifically set out, and furnish the evidence that it is a continuing infringement. The bill does not present a case where the pleaded circumstances by necessary implication show that the infringement is at an end. The complainant is entitled not only to recover damages for the infringement, but to restrain the further continuance thereof, which latter relief is obtainable only in a court of equity. *Root v. Ry. Co.*, 105 U. S. 189, 26 L. Ed. 975, and the other cases cited on behalf of the demurrer, are not applicable to the present case. The instances at circuit where injunctions issue, though but a single case of infringement is established, are numerous. The owner of the patent is not required to await additional onslaughts upon his statutory privilege ere he may obtain the aid of the injunctive arm of the chancery court. Even though after answer and proofs it be established that defendant abandoned the use of the only infringing device charged, injunction may issue. *Morton Trust Co. v. Standard Steel Car Co.*, 177 Fed. (3d Cir.) 931, 101 C. C. A. 211. A fortiori, on demurrer, the bill must be sustained.

[2] As to the second ground. This, as noted, is interposed only to the two process patents. Assuming that an attack upon the validity

of only two of five patents averred to be capable of conjoint use by the defendant can be made under a general demurrer, such infirmity on the face of the patents must be so clear and convincing that no evidence could avail in supporting and maintaining the presumption of validity that goes with the grant. *Dick v. Oil Wells Supply Co.* (C. C.) 25 Fed. 105; *American Fibre-Chamois Co. v. Buckskin Fibre Co.*, 72 Fed. 508, 18 C. C. A. 622.

Such conclusion is not warranted in this case.

[3] As to the third ground—multifariousness. This depends upon such patents being distinct and unrelated. The bill, as already stated, alleges the contrary. *Union Switch & Signal Co. v. P. & R. R. Co.* (C. C.) 68 Fed. 914; *Huntington Dry Pulv. Co. v. Virginia-Carolina Chemical Co.* (C. C.) 130 Fed 558.

[4] As to the fourth ground. Section 4883 of the Revised Statutes (U. S. Comp. St. 1901, p. 3381) requires that all patents, together with their specifications, shall be recorded. The bill alleges the due issue of such letters patent, and sets out the usual patent office copies of their respective specifications and drawings. The letters patent are presumptive evidence that all statutory requirements prerequisite to the grant have been complied with. *Gear v. Grosvenor*, 10 Fed. Cas. 130, No. 5,291. The absence in the bill of an averment of the recording of such letters does not raise a presumption that such record was not made; hence such defense is not available on demurrer.

As to the fifth ground. Defendant concedes that, if a proper case for injunction is made out by the bill, this ground is unavailable on demurrer, and would go only to the matter of damages. As this equity has been found in favor of complainant, no further consideration of this assignment is necessary.

The demurrer is overruled.

FOSTER HOSE SUPPORTER CO. V. THOMAS P. TAYLOR CO.

(Circuit Court, D. Connecticut. July 26, 1911.)

No. 1,261.

PATENTS (§§ 214, 226*)—INFRINGEMENT—EFFECT OF LICENSE.

Where a licensee under a patent, with the knowledge of the licensor, carried on his business and made and sold the patented article through a partnership using his own name, the changing of the partnership into a corporation having the same name, the business, plant, and workmen being the same, and under the direction of the licensee, does not afford ground for the forfeiture of the license, nor render the corporation liable in equity as an infringer of the patent.

[Ed. Note.—For other cases, see Patents, Dec. Dig. §§ 214, 226.]

In Equity. Suit by the Foster Hose Supporter Company against the Thomas P. Taylor Company. On final hearing. Decree for defendant.

J. J. Kennedy, for complainant.

Morris W. Seymour and David S. Day, for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

PLATT, District Judge. This so-called bill in equity, alleging infringement of letters patent No. 638,540, is an old friend with a new face. Thomas P. Taylor, the owner of the property at Bridgeport, Conn., in which he had manufactured and sold the abdominal pads covered by said patent, was made defendant in a bill in equity in this court filed May 27, 1907. That bill recited that said Taylor had been licensed under the Young patent, but for failure to pay royalties on time the owner of the patent had canceled the license, and that therefore his manufacture and sale of the pads since the cancellation constituted an infringement of the complainant's rights. The court found that the revocation was, under the facts, inoperative, and that Taylor was therefore protected by the license agreement, and the bill was dismissed, with costs. On appeal, this decree was affirmed, and a writ of certiorari denied by the Supreme Court. Thereafter on March 10, 1911, the decree of the Circuit Court of Appeals was made the decree of this court, and costs of both courts taxed against the complainant.

Soon after the filing of the bill alluded to just above, said Taylor, by articles of incorporation, changed the character of his business from one carried on as a partnership under his own name to a corporation carried on under his own name. The plant was the same; the workmen the same; the business the same. The change was made in a time of business stress, when Mr. Taylor was ill, and was for the single purpose of enlarging his plant, increasing his facilities, and consolidating his indebtedness. It enabled him to do his business more safely, and relieved him of much personal anxiety. He retained his personal license under the Young patent, and continued to render personal accounts for the royalties thereunder.

I am unable to see how this change altered in the least degree the personal relations between the complainant, licensor under the Young patent, and Mr. Taylor, the licensee. Up to the time of the incorporation he was manufacturing and selling the pads through the agency of Thomas P. Taylor, a copartnership. After the incorporation he made and sold them through the agency of the Thomas P. Taylor Corporation. From beginning to end the licensor had the benefit of his personal experience and business acumen. In neither case did Mr. Taylor do the actual manual work, and the licensor did not expect that he would. In both cases the same machines were used; the operators were the same; the location the same; the name, character, experience, and good will the same; the salesmen the same; the bookkeepers the same. The only difference was that Mr. Taylor by his acts had fortified and strengthened his financial position at home and abroad. This evidence of his sagacity explains to a large degree the reason for the personal confidence which the licensor reposed in him, and ought to have brought from complainant congratulation rather than harassment.

The long and short of it is that this is the second attempt of the complainant to avoid a license agreement, which, owing to the changing fortunes of patent litigation respecting the Young patent, has become to the complainant an unwelcome asset. Time forbids an ex-

tended discussion of the interesting points represented in this case. I am inclined to think that the bill is without merit in law. If there is any merit at all on the law side, it is of a doubly-refined and extra-technical character; and when we depart from the legal viewpoint, and examine the equitable considerations, it has never before been my lot to read the proofs offered to sustain a bill in equity which have so completely stripped it of any reasonable foundation.

Let the bill be dismissed, with costs.

KIMBALL v. DETROIT, M. & T. S. L. RY.

(Circuit Court, N. D. Ohio, W. D. November 5, 1910.)

No. 2,225.

1. COURTS (§ 347*)—FEDERAL COURTS—JURISDICTION—PROCEDURE.

Under Conformity Act June 1, 1872, c. 255, § 5, 17 Stat. 197, providing that in actions at law in federal courts the proceedings shall conform to the practice of the state in which the action is brought, to which there is but the one exception that the defense that the court has no jurisdiction of defendant must be set up by special plea in abatement, a plea to the jurisdiction, taking issue with the averment of the petition that plaintiff is a resident of Ohio, where the action is brought, and insisting that he is a resident of Michigan, of which state defendant is also a citizen, is not permissible. Gen. Code Ohio, § 11,309 (Rev. St. § 5061), permits this question, when appearing on the face of the petition, to be raised by demurrer; section 11,311 (section 5063) permits it, when not so appearing, to be raised by answer; and no other method for raising it is known to the practice of that state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. § 347.*]

Conformity of practice in common-law actions to that of state court, see notes to *O'Connell v. Reed*, 5 C. C. A. 594; *Nederland Life Ins. Co. v. Hall*, 27 C. C. A. 392.]

2. JUDGMENT (§ 106*)—DEFAULT—EXTENSION OF TIME.

Though defendant merely interposed a plea to the jurisdiction, which practice is not permissible, yet it being impossible to say that it was filed otherwise than in good faith, motion for default judgment will be disallowed, and he will be allowed time in which to plead.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 106.*]

At Law. Action by Bertha G. Kimball against the Detroit, Monroe & Toledo Short Line Railway. Heard on defendant's motion. Disallowed.

C. A. Thatcher, for plaintiff.

King, Tracy, Chapman & Welles, for defendant.

KILLITS, District Judge. This matter is before the court upon motion of the plaintiff for a default judgment in favor of the plaintiff and to fix a time for the jury to assess the damages which the plaintiff has suffered. This motion is based upon the fact that the defendant, instead of answering within rule, has filed what it calls a plea to the jurisdiction, attempting to take issue with the averment of the petition that the plaintiff is a resident of the state of Ohio, and insisting

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that the plaintiff is in fact a citizen and resident of the state of Michigan, of which state the defendant is also a citizen. No further answer or defense is interposed, and the rule day for answer has expired. The defendant has attempted in this action at law to follow a course proper in actions in equity, and all the authority given for this proceeding is drawn from equity rules and cases. While it is quite apparent to the court that the plea was filed in perfect good faith, it is equally plain that it has no proper function here.

[1] The act of Congress of 1872, c. 255, § 5, 17 Stat. 197, commonly called the "Conformity Act," provides that in all actions at law the proceedings shall conform to the practice of the state in which the action is brought, and to the operation of this act of conformity there is but one exception, and that is, where the defense is that the court has no jurisdiction of the defendant, that defense must be set up by a special plea in abatement. This proposition is very plain on consideration of Bates on Federal Procedure at Law, §§ 977, 1033, and 1034. There seems to be a call for the innovation on the practice which the defendant has attempted, and considerable argument in its favor as a saver of time and expense, but this court has a little delicacy in attempting to legislate in this behalf.

The act of conformity unmistakably requires us to follow the practice in the state courts. By section 11,309, General Code of Ohio (Rev. St. § 5061), it is permitted to the defendant to demur to the petition when there appears on the face of the petition any one of 10 defects, and this classification is comprehensive enough to include the defect complained of by the defendant in this so-called plea to the jurisdiction. Section 11,311, General Code (Rev. St. § 5063), provides that, when on the face of the petition no ground of demurrer appears, the objection may be taken by answer. The only method known to the Ohio practice to raise the question attempted to be raised by the defendant is that provided by one of these two statutes.

[2] The plea to the jurisdiction must, therefore, be disregarded, but as the court is not able to say that it was filed otherwise than in perfect good faith, the motion for a default judgment must also be disallowed, and defendant is allowed until the 19th of November, 1910, within which to further plead.

In re BASSETT.

(District Court, E. D. Washington, S. D. May 4, 1911.)

No. 622.

1. BANKRUPTCY (§ 396*)—EXEMPTIONS—RESIDENCE.

The bankrupt's right to exemptions is fixed by the state or local laws where he had his domicile.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 396.*]

2. BANKRUPTCY (§ 396*)—EXEMPTIONS—RESIDENCE—EVIDENCE.

Evidence held to show that the bankrupt had his residence in the state of Washington, entitling him to exemptions under the laws of that state.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 396.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. DOMICILE (§ 8*)—RESIDENCE—BURDEN OF PROOF.

The burden of proving change of residence is upon those asserting it.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. §§ 36, 37; Dec. Dig. § 8.*]

In the matter of James W. Bassett, bankrupt. On question certified to the court by the referee as to exemptions. Exemptions allowed.

Frank B. Sharpstein, for bankrupt.

J. C. Hurspool, for excepting creditor.

RUDKIN, District Judge. The following question has been certified to the court by the referee in bankruptcy at the instance of one of the bankrupt's creditors:

"Whether the said bankrupt, James W. Bassett, is entitled to any of the property set off in the trustee's report for the reason that said bankrupt is not a resident of the state of Washington and not entitled to any exemption?"

Section 6 of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3424), provides that:

"This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months, or the greater portion thereof immediately preceding the filing of the petition."

[1] The bankrupt had his domicile in this state during the prescribed period, and his right to exemptions is fixed by the state or local laws. The exemptions in question are claimed under title 4, c. 3, § 563, Rem. & Bal. Code Wash. Section 571 of the same chapter contains the following proviso:

"And provided also, that nothing in this chapter shall be construed to exempt from attachment or execution property, real or personal, of non-residents, or any person who has left or is about to leave the state with the intent to defraud his creditors."

The petition in bankruptcy was filed and the exemptions claimed on the 22d day of December, 1910, and the answer to the question certified depends upon the residence of the bankrupt on that date. In re O'Hara (D. C.) 162 Fed. 325; In re Donahey (D. C.) 176 Fed. 458.

[2, 3] The testimony on the question of residence is extremely meager and unsatisfactory. Both parties seem to have studiously avoided that issue. All that appears in the record is this: The bankrupt and his family came to this state from Oregon in the spring of 1908 and settled in Walla Walla county. On the 2d day of May, 1910, he filed on a homestead in the state of Montana and thereafter returned to this state where he pursued his farming operations. How long he was absent from the state on that occasion does not appear. On the 19th day of October, 1910, he sent his wife to Montana to establish a residence on the homestead, furnishing her money for that purpose. The wife caused the erection of a small house on the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

homestead at a cost of \$117 and remained there for some time, returning to this state on the 7th day of December, 1910. Since her return, so far as the record discloses, she and her husband have remained in this state, and there is no evidence as to their intentions for the future. Under this testimony I am of opinion that the referee properly found that the bankrupt was a resident of this state. He was unquestionably a resident of the state for a considerable period of time preceding the filing of the petition in bankruptcy, and the burden of proving a change of residence is upon those asserting the change. In re Grimes (D. C.) 94 Fed. 800.

A party cannot be a resident of the state of Montana within the meaning of the federal homestead law, and a resident of the state of Washington within the meaning of the exemption laws, at one and the same time, but this court is only concerned with the question of his residence in this state. His actual residence has at all times been here, and whether his constructive residence will hold down his homestead claim in Montana does not concern us. It may well be that the present adjudication as to his place of residence, made at his instance, will jeopardize or defeat his homestead claim in Montana, but that question affects him alone. I am satisfied that the testimony fails to show that he was a nonresident of the state on the 22d day of December, 1910, when his right to exemptions became fixed, and the finding of the referee is therefore approved. Let an order be entered accordingly.

CHAN TSE CHEUNG v. UNITED STATES.

(District Court, W. D. Texas, El Paso Division. July 18, 1911.)

No. 307.

ALIENS (§ 32*)—CHINESE PERSON—DEPORTATION—IDENTITY—EVIDENCE.

Evidence held insufficient to identify appellant against whom a deportation order had been rendered as the same person who had been granted a certificate to enter the United States by the Superintendent of Imperial Chinese Customs at Canton, viséd by the American Consul General, as a fruit merchant.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 93-95; Dec. Dig. § 32.*]

What Chinese persons are excluded from the United States, see note to Wong You v. United States, 104 C. C. A. 538.]

Deportation proceedings by the United States against Chan Tse Cheung. From an order of deportation issued by the United States commissioner, the alien appeals. Affirmed.

This is an appeal from an order issued by the United States Commissioner at El Paso deporting the appellant to China. It appears that on April 6, 1909, the Superintendent of Imperial Chinese Customs, at Canton, China, issued to one Chan Tse Cheung a certificate, in accordance with section 6, Act July 5, 1884, c. 220, 23 Stat. 116, 117 (U. S. Comp. St. 1901, pp. 1307, 1308), as evidence of the right of Chan Tse Cheung to enter the United States. This certificate was duly viséd by the American Consul General at Canton, and has the photograph of Chan Tse Cheung attached. Among

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

other things, the certificate shows that the applicant therefor was a fruit merchant, born in 1886, and had an interest in the firm of Hang Fat at Canton. The amount in gold invested in the business was \$12,000, and Chan Tse Cheung's share \$4,000. No physical peculiarities of the applicant are noted in the certificate. Subsequently Chan Tse Cheung landed in San Francisco, Cal., where the immigration officials, presumably in conformity with departmental regulations, took up the Canton certificate, and delivered August 23, 1909, to Chan Tse Cheung a paper entitled "certificate of identity." Chan Tse Cheung gave the officials in exchange for this certificate of identity a receipt, bearing the same date as the certificate last mentioned. Both the identity certificate and receipt executed by Chan Tse Cheung had photographs attached. The former noted the following physical marks and peculiarities of the immigrant: "Large scar on left temple; large scar on forehead; small mole under left ear." The receipt described the physical marks as follows: "Long scar over left temple; large scar on forehead above the center of eye brows; small mole under left ear; small scar under left nostril." At the time of the appellant's arrest for being unlawfully in the country he had in his possession the certificate of identity above referred to. A photograph of the appellant was taken by the officials at El Paso and at a hearing before the commissioner the appellant offered this photograph in evidence as his likeness. The testimony of the Chinese interpreter clearly shows that in his opinion the photograph, attached to the Canton certificate, was not the picture of the appellant. The hearing resulted in an order of deportation and an appeal to this court.

George Estes, for appellant.
S. Engelking, Asst. U. S. Atty.

MAXEY, District Judge (after stating the facts as above). After a careful examination of the record, the court is of the opinion that the order of deportation passed by the commissioner should, for the following reasons, be affirmed:

(1) The photograph of the appellant taken by the immigration authorities at El Paso and admitted by the appellant to be a likeness of himself bears but slight, if any, resemblance to the one attached to the original certificate, issued by the Superintendent of Imperial Customs at Canton, China, to Chan Tse Cheung on April 6, 1909. Nor is there any apparent resemblance between the El Paso photograph and the pictures attached at San Francisco to the certificate of identity and to the receipt executed by Chan Tse Cheung.

(2) The certificate of identity issued to Chan Tse Cheung August 23, 1909, by the immigration officials at San Francisco, upon which the appellant relies for identification, and the receipt therefor signed by Chan Tse Cheung, describe certain physical marks and peculiarities, such as scars, &c., which were not found upon the face of the appellant when he was examined at the hearing before the commissioner at El Paso.

(3) The certificate issued by the Superintendent of Imperial Chinese Customs states that the amount in gold invested by the firm of Hang Fat (of which Chan Tse Cheung was a member) in the fruit business was \$12,000, and that Chan Tse Cheung's share therein was \$4,000, whereas the appellant testified before Commissioner Oliver that his share in the business was \$1,500 Chinese money.

In view of the foregoing, the court has reached the conclusion that

the appellant has failed to establish that the original certificate issued at Canton and viséd by the American consul was issued to or intended for him. In other words, and to be more exact, the proof fairly discloses that the appellant is not the person to whom such original certificate was issued.

Failing to connect himself with the original certificate, which by statute is made in such cases the sole evidence of his right of entry into the United States (*Mar Bing Guey v. United States* [D. C.] 97 Fed. 579), the appellant has failed to establish that he is lawfully in the country. An order will therefore be entered affirming the order of deportation.

EMMONS v. UNITED STATES.

(Circuit Court, D. Oregon. July 24, 1911.)

No. 1,655.

UNITED STATES (§ 111*)—CLAIMS—RIGHTS OF ASSIGNEE.

Under Rev. St. § 3477 (U. S. Comp. St. 1901, p. 2320), prohibiting the transfer of claims against the United States, and declaring that such transfers shall be void unless executed in a particular manner and containing certain recitations of fact, an assignment of a claim against the United States for money paid to the Land Office by plaintiff's assignors as the purchase price and fees, pursuant to a timber land entry which was erroneously rejected, was invalid and insufficient to sustain an action against the government by the assignee in a federal court.

[Ed. Note.—For other cases, see *United States*, Cent. Dig. §§ 94-98; Dec. Dig. § 111.*]

Assignment of claims and government contracts, see note to *Greenville Sav. Bank v. Lawrence*, 22 C. C. A. 650.]

Action by Arthur C. Emmons against the United States. Judgment for defendant.

See, also, 175 Fed. 514.

Snow & McCamant, for plaintiff.

Walter H. Evans, Asst. U. S. Atty.

BEAN, District Judge. This action was commenced in 1889 to recover money paid to the United States Land Office at Oregon City by plaintiff's assignors as the purchase price and fees in entries of timber land under the act of June 3, 1878, c. 151, 20 Stat. 89 (U. S. Comp. St. 1901, p. 1545). A demurrer to the complaint was sustained by Judge Hanford in 1890 upon the ground, among others, that while the United States would be liable in an action by an entryman, an assignee could not maintain the same. *Emmons v. U. S.* (C. C.) 42 Fed. 26. An amended complaint was subsequently filed and a demurrer thereto was heard by Judge Deady, whose impression was that under the Act of 1887 (Act March 3, 1887, c. 359, 24 Stat. 505 [U. S. Comp. St. 1901, p. 752]) enlarging the jurisdiction of the Court of Claims and giving the Circuit and District Courts concurrent jurisdiction therewith, within certain amounts, an assignee might maintain

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

an action and as the question had not been passed upon by the Supreme Court since the passage of the act referred to, he overruled the demurrer. *Emmons v. U. S.* (C. C.) 48 Fed. 43. The issues were subsequently made up and the case came on for final hearing on the first of the present month on the pleadings and a stipulation of facts signed by counsel.

From the agreed facts it appears that the money in controversy was paid to defendant by plaintiff's assignors in good faith as the purchase price of certain lands, for which they had made application in proper form, and which should have been sold to them if the law had been properly administered. Their applications were, however, rejected for the reason that the land was not open to purchase under the timber and stone act because, although heavily covered with timber, it might be made fit for cultivation by removing the timber and clearing the land; clearly an erroneous ruling, and one which the department revoked shortly thereafter. *U. S. v. Budd*, 144 U. S. 154, 12 Sup. Ct. 575, 36 L. Ed. 384. When application was subsequently made for return of the money, the department held that it only had authority under the law to return purchase money when an application had been erroneously allowed and not when it had been erroneously rejected, and that the plaintiff's assignors belonged to the latter class. The applications to purchase were therefore admittedly wrongfully rejected and the purchase money retained because of such wrongful act. If the plaintiff had a right to maintain this action, under the circumstances I should not hesitate to render a judgment in his favor. But the insurmountable difficulty is that by section 3477, Rev. St. (U. S. Comp. St. 1901, p. 2320) it is declared "that all transfers and assignments made of any claim upon the United States, or any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders or other authorities for receiving payment of any such claim or of any part or share thereof, shall be absolutely null and void unless they are freely made and executed in the presence of at least two attesting witnesses after the allowance of such a claim, the ascertainment of the amount due and the issuing of a warrant for the payment thereof. Such transfers, assignments and powers of attorney must recite the warrant for payment and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same." The Supreme Court has frequently had occasion to consider this section, and the holding is that the intent of Congress as expressed therein was that a voluntary assignment of naked claims against the government for the purpose of suit or in view of litigation or otherwise, should not be countenanced, and that the statute embraces every claim or right to demand money from the United States, however arising, of whatsoever nature, and whenever and wherever prosecuted. *U. S. v. Gillis*, 95 U. S. 407, 24 L. Ed. 503; *Spofford v.*

Kirk, 97 U. S. 484, 24 L. Ed. 1032. The question was recently considered at great length by the Court of Appeals of this court and by the Supreme Court in *National Bank of Commerce v. Downie*, 161 Fed. 839, 88 C. C. A. 657; *Id.*, 218 U. S. 345, 31 Sup. Ct. 89, 54 L. Ed. 1065, and the doctrine reaffirmed without qualification, the court holding that the statute made "absolutely null and void" all voluntary assignments, of whatsoever kind or nature, of unallowed claims against the government. This is the latest expression on the subject, and under the rule as there announced there seems no escape from the conclusion that the plaintiff cannot maintain the action, and I am therefore reluctantly constrained to find in favor of the defendant.

THE RELIANCE.

(District Court, D. Rhode Island. March 13, 1911.)

ADMIRALTY (§ 121*)—STIPULATION FOR DISCONTINUANCE—PAYMENT OF COSTS.

A stipulation between parties in admiralty that the action shall be discontinued, and that libelant shall pay costs as taxed by the court, limits the power of the court to a taxation of costs, which do not include damages for the fraud of libelant in filing the libel, nor for surveyor's fees and expenses not taken under order of court, nor for detention of the vessel, nor for premiums paid for bond for value; but claimant, if aggrieved, must be left to his remedy at law or otherwise.

[Ed. Note.—For other cases, see Admiralty, Dec. Dig. § 121.*]

In Admiralty. Suit by the Morris & Cummings Dredging Company against the steam tug Reliance. On exceptions to clerk's taxation of costs on the appeal of libelant and claimant. Claimant's exceptions overruled, and libelant's exceptions sustained.

Livingston Ham, for libelant.

Frank Healy, for claimant.

BROWN, District Judge. By stipulation between the parties it was agreed "that said action be discontinued, the libelant to pay costs to date as taxed by the court." Subsequently the claimant filed its bill of costs, which was taxed by the clerk, and both parties now appeal from the taxation.

The libelant objects to the item allowed by the clerk:

"Detention of tug October 22d to November 10th at \$40; demurrage, \$760."

It is conceded upon the claimant's brief that no charge can be made for the legitimate detention of the attached vessel where the libel is brought in good faith. This allowance is claimed on the ground of bad faith and fraud in the filing of the libel.

Conceding, for the purposes of this hearing, the power of an admiralty court, after a decision on the merits in law or fact, to award to a claimant damages on the ground of mala fides in bringing a libel and in procuring a seizure thereon, it is yet apparent that in the present case there is no basis for the charge of mala fides in any decision of fact or law made by the court before the entry of the stipulation

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for discontinuance. No case has been cited by the claimant in which, after such a stipulation, the court has gone outside of the record and determined upon affidavits a controversy as to the merits, for the purpose of awarding damages. The fact that the libelant moved for a discontinuance is not a conclusive showing of lack of merit in its case.

I am of the opinion that under the stipulation the power of the court is limited to a taxation of costs.

The claimant urges, however, that the word "costs" should be taken in a sense broad enough to include disbursements and damages. While it may be possible to extend the term "costs" to include certain disbursements made under an order of court, no case has been called to my attention which goes to the length of holding that damages awarded to a claimant by reason of the improvidence or bad faith of the libelant in bringing the suit are in the nature of taxable costs. The award of damages for an unfounded suit involves a question of substantial rights of a different nature from that involved in the allowance of statutory costs and of disbursements made under the order of court. Where a libelant discontinues and abandons his attempt to establish the merits of his case, it is just that he should pay costs, and also expenses which were cast upon his adversary by order of court. If a claimant desires, however, to assert a further right to full damage for malicious abuse of process, the right thereto must be distinctly asserted, tried, and established before a discontinuance, and cannot be determined by the court upon an appeal from the clerk's taxation, or under a stipulation for the taxation of costs by the court.

Without determining whether the admiralty court has power to try a counterclaim for damages for malicious abuse of process, it seems clear that, if such power exists, it should not be exercised after the entry of this stipulation, which leaves open only the question of costs, but that the claimant, if aggrieved, should be left to whatever remedy he may have at law or otherwise.

The claimant also claims surveyor's fees and expenses for raising the scow and preparing her for the survey. None of these proceedings was taken under order of court, and therefore they amount merely to claims for damages; and what we have said concerning the item for detention of the tug is also applicable to these items.

The clerk's taxation of costs is affirmed as to claimant's items 1, 3, 7, 8, 9, 10, and 11, and is overruled as to item 2 and as to item 6, "premiums paid for bond for value, \$210." This item is disallowed, upon the authority of *Smith v. Davis*, 187 Fed. 40, decided by the Circuit Court of Appeals for this circuit December 28, 1910. I am of the opinion that the present case cannot be so distinguished as to prevent the authority of *Smith v. Davis* from controlling.

The claimant's exceptions are overruled, and his claims for damages disallowed, without prejudice. The libelant's exceptions are sustained.

The clerk will tax the costs accordingly.

REMSEN v. C. F. BLANKE-TEA & COFFEE CO.

(Circuit Court, N. D. Georgia. June 7, 1911.)

No. 1,329.

REMOVAL OF CAUSES (§ 102*)—MOTION TO REMAND—GROUNDS.

Where an action has been removed to the federal court for diversity of citizenship, the fact that plaintiff filed a bill of exceptions and appealed to the state Supreme Court from the order of removal was not ground for remand.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 102.*]

In Equity. Petition by Nathan C. Remsen against the C. F. Blanke Tea & Coffee Company. On motion to remand. Denied.

Edgar Latham, for petitioner.

King, Spalding & Underwood and O. E. Thornton, for defendant.

NEWMAN, District Judge. This is a motion to remand. The only ground of the written motion is that, since the order of removal in the state court, the plaintiff has filed a bill of exceptions in the case and carried it to the Supreme Court of Georgia, alleging error in the order of removal.

While it was not made a part of the motion, it was contended in the argument at the bar that the record shows that only \$1,500 is involved in this case, and that consequently there is no jurisdiction here. Plaintiff's suit was an equitable petition against the defendant to rescind a contract, and he prays for the rescission of the contract and judgment for \$3,500, stating that he is willing to return certain stock, the subject-matter of the suit, upon receipt of the \$3,500.

It is claimed by the plaintiff, also, that it is only a proceeding in rem, and the \$1,550 is the total amount realized from certain property seized. The trouble about this is that there was an application for service on the defendant company by publication, under the Georgia statute. The state court appears to have recognized this as a proper case for such service, and directed the same. There is in the record a report of the clerk of the court showing that he had mailed a copy of the paper containing the notice to perfect service to the defendant company, and then an order by the court that, service having been perfected as required by law, it be declared perfected, and that the case proceed. So it would seem that this suit was changed, or certainly endeavored to be changed, from an action in rem, if it was that originally, to one in personam, and it looks, from an examination of the record, as if it was a suit in personam for \$3,500.

But it is unnecessary for me to determine this question, because the only ground of the motion to remand, as stated, is the fact that the case has gone to the Supreme Court of the state. No question is made that the plaintiff is a citizen and resident of this district, and that the defendant company is a corporation of another state and doing business and residing therein.

The motion to remand must be denied.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

THE MAME.

(District Court, D. Connecticut. April 13, 1911.)

No. 1,628.

TOWAGE (§ 9*)—COMPENSATION—ACTIONS—PLEADING.

A libel for towage services to a vessel in her home port where the bargain was made with the owner, which states that the services were performed at the special instance and request of the owner, and which does not set forth that they were done on the credit of the vessel, and which does not show that a state statute created a lien, does not set forth facts to support an action in rem.

[Ed. Note.—For other cases, see Towage, Dec. Dig. § 9.*]

In Admiralty. Libel by the New Haven Towing Company against the scow Mame, her tackle, etc. Exceptions sustained, and libel dismissed.

Robert C. Stoddard, for libelant.

James D. Dewell, Jr., for claimant.

PLATT, District Judge. This matter was heard on exceptions. The pith of the criticism is that the action is in rem, but that the libel does not set forth facts sufficient to support such an action.

To particularize, it states that the towage services were performed at the special instance and request of the owner, and does not set forth that they were done on the credit of the vessel. The scow was in the home port. The bargain was made with her owner, and there is no state statute creating a lien which this court might be asked to enforce, if such a statute were in existence. The proctor for the libelant admits that he used an ancient form of libel which was framed to fit actions in personam, but he wishes the court to treat it as if he had used one suited to actions in rem, which was at his hand in Benedict within a page or two of the one selected.

Without doubt the court has jurisdiction of the cause, but manifestly the libelant mistook his remedy.

Exceptions sustained and libel dismissed, with costs to claimant.

LEARY v. MAYOR AND ALDERMEN OF JERSEY CITY et al.

(Circuit Court, D. New Jersey. May 3, 1911.)

No. 1.

1. TAXATION (§ 179*)—NAVIGABLE WATERS—GRANTS OF LAND UNDER WATER.

An instrument executed by the riparian commission of New Jersey pursuant to 3 Gen. St. N. J. 1895, p. 2787 et seq., empowering the commission to execute a lease in perpetuity for an annual rental, which bargains, sells, leases, and conveys to the grantee, a corporation, and its successors and assigns forever, a tract for which conveyance has been sought by the grantee, with the right and franchise to exclude the tide water from so much of the tract described as lies under tide water, and which declares that the grantee shall take, hold and enjoy the premises subject to the payment of an annual rent, and which contains a covenant

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by the grantee on behalf of itself and its successors and assigns for the payment of the rent, and which authorizes the state on nonpayment of any installment of rent to re-enter, is a grant in fee with a condition subsequent that, if the annual payments are not made when due, the estate may be defeated, so that the land described is taxable in the hands of the grantee or one claiming under him.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 302; Dec. Dig. § 179.*]

2. NAVIGABLE WATERS (§ 37*)—GRANT TO MUNICIPALITY—"HARBOR"—"SHORE."

A statute incorporating a township and fixing its boundaries as "on the southeast by New York Harbor," etc., fixes the boundaries of the township so as to include lands under the water of the harbor to the boundary line of the state, since a harbor is a recess in the coast line of a body of water in which ships can be sheltered, and it may extend to a line inside of which vessels may find protection, and the word has a more extended meaning than "shore," which when applied to a tide water bay usually means the part between ordinary high and low water marks.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 201-227, 285; Dec. Dig. § 37.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3213-3215; vol. 7, pp. 6495-6497.]

3. NAVIGABLE WATERS (§ 37*)—GRANT TO MUNICIPALITY—BOUNDARIES—LEGISLATIVE INTENT.

The legislative intent in the use of words of a statute creating a municipal corporation and defining a water boundary will govern rather than the literal meaning of the words used, and the words are not subject to the strict rule of construction applied when the state grants title to some of its territory to a private grantee, but the legislative purpose sought by the territorial subdivision must be kept in view.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 201-227, 285; Dec. Dig. § 37.*]

4. BOUNDARIES (§ 14*)—GRANTS—NONTIDAL STREAMS—"TO"—"ON"—"BY"—"AT"—"ALONG."

In a conveyance the words "to," "on," "by," "at," "along," a nontidal stream presumptively carry title as far into the stream as the grantor possesses.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 102-107; Dec. Dig. § 14.*]

For other definitions, see Words and Phrases, vol. 1, pp. 351-356, 593-599, 929-932; vol. 8, p. 7585; vol. 6, pp. 4960-4966, 7737; vol. 8, pp. 6984-6986, 7816-7817.]

5. NAVIGABLE WATERS (§ 37*)—TIDAL WATERS—BOUNDARIES.

Any boundary at tide water established in a grant of land includes the land below the high-water mark, as far as the grantor owns.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 201-227, 285; Dec. Dig. § 37.*]

6. NAVIGABLE WATERS (§ 37*)—GRANTS—CONSTRUCTION.

The presumption that a grant of land bounded on or along streams above tide water carries the exclusive title to the grantee to the center of the stream, unless the grant clearly denote a contrary intention, does not exist where the grantor is the state, unless the intention to so convey is clear.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 201-227, 285; Dec. Dig. § 37.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

7. TAXATION (§ 176*)—PROPERTY SUBJECT TO—STATUTES.

Lands under water of a harbor which is fixed as the boundary of an incorporated township incorporated by statute defining its boundaries as "on the southeast by * * * harbor" are within the limits of the municipality, and taxable as such.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 305; Dec. Dig. § 176.*]

8. TAXATION (§ 529*)—PAYMENT—PRESUMPTIONS.

The presumption created by lapse of time that taxes have been paid so that a lien for the taxes has expired is one of fact, and is rebuttable.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 982-984; Dec. Dig. § 529.*]

9. TAXATION (§ 529*)—PAYMENT—EVIDENCE—PRESUMPTION FROM LAPSE OF TIME—FINDINGS OF COMMISSIONERS—CONCLUSIVENESS.

A finding of the commissioners of adjustment under the New Jersey tax adjustment act of March 30, 1886 (P. L. p. 149), that taxes are due and unpaid, cannot be overcome in a suit to restrain the sale of land for the unpaid taxes by a presumption of payment created by lapse of time.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 982-984; Dec. Dig. § 529.*]

10. MUNICIPAL CORPORATIONS (§ 979*) — TAXATION — COLLECTION — INTERFERENCE BY INJUNCTION.

Interference by injunction with collection of taxes legally imposed by a municipal corporation on the ground of laches will be accorded only where complainant's right is clear, the injury imminent, and the remedy at law inadequate for his protection.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2120-2123; Dec. Dig. § 979.*]

In Equity. Suit by Daniel J. Leary against the Mayor and Aldermen of Jersey City and others to restrain the sale of lands for unpaid taxes. Heard on bill, supplemental bill, answers, stipulations, and proof. Bill dismissed.

Ziegner & Lane, for complainant.

Warren Dixon, for defendants.

RELLSTAB, District Judge. The complainant is the assignee of a certain written instrument made by the state of New Jersey on April 30, 1881, to the Morris & Cummings Dredging Company. This instrument conveyed an interest in certain lands under the waters of the bay of New York in Jersey City. The assignment is dated February 24, 1904. Taxes have been assessed against these lands for the years 1883 to 1905, inclusive, aggregating the sum of \$163,392.24; which taxes have not been paid. On April 19, 1906, the city collector of Jersey City gave notice that pursuant to a resolution of the board of finance of Jersey City, passed March 23, 1906, and section 13 of the act entitled "An act concerning the settlement and collection of arrearages of unpaid taxes, assessments and water rates or water rents in cities of this state and imposing and levying a tax, assessment and lien in lieu and instead of such arrearages and to enforce the payment thereof, and to provide for the sale of lands subjected to future taxation and assessment," approved March 30, 1886, known as the "Martin Act" (Act March 30, 1886 [P. L. p. 149]), he would

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

on May 29, 1906, sell such lands for the payment of the taxes assessed for 1883 to 1902, inclusive. No sale was had on this date, but on July 3, 1906, the city collector advertised in a public newspaper that such sale would take place on July 24, 1906. Thereupon, on July 9, 1906, the original bill was filed to restrain such sale, etc. Some time after the filing of such bill (the precise time does not appear) the board of aldermen of Jersey City, with the concurrence of the board of finance, caused a commission to be appointed under the said Martin act. This commission made an adjustment of such taxes, which action, however, was not confirmed by the judge of the circuit court of Hudson County, to whom it was reported, the report being referred back to said commission for further consideration. Subsequently the commission made another report concerning *inter alia* the lands in question, which was confirmed by the circuit judge. Thereupon the supplemental bill in this cause was filed; such further adjustment and the confirmation being made the basis of the said bill.

The complainant contends that the taxes are illegal because, first, the lands belong to the state of New Jersey, and are not taxable; second, the lands are without the jurisdiction of the state of New Jersey; third, the lands are not within the taxing district of Jersey City; and, fourth, the assessment was made upon real estate, and not upon the interest of the complainant therein. He also contends that the lien of the taxes has expired.

[1] First, as to the ownership of the land taxed: This involves the legal effect of the conveyance made by the state to the complainant's assignor. The legislation relating to the state land under tide waters, as well as its conveyance, must be considered. The pertinent parts of such legislation are as follows: Section 4 of the supplement to the act entitled "An act to ascertain the rights of the state and of the riparian owners in the lands lying under the waters of the bay of New York and elsewhere in the state," approved April 11, 1864, which supplement was approved March 31, 1869 (3 Gen. St. N. J. 1895, p. 2787):

"That in case any person or corporation who by any legislative act, is a grantee or licensee, or has such power or authority, or any of his, her or their representatives or assigns shall desire a paper capable of being acknowledged and recorded, made by and in the name of the state of New Jersey, conveying the land in the proviso to the third section mentioned whether under water now or not, and the benefit of an express covenant, that the state will not make or give any grant or license power, or authority affecting lands under water in front of said lands, then and in either of such cases, such person or corporation, grantee or licensee, having such grant and license, power or authority, his, her or their representatives or assigns, on producing a duly-certified copy of such legislative act to said commissioners, and in case of a representative or assignee also satisfactory evidence of his, her or their being such representative or assignee, and requesting such grant and benefits as in this section mentioned, shall be entitled to said paper so capable of being acknowledged and recorded, and granting the title and benefits aforesaid, on payment of the consideration hereinafter mentioned; and the said commissioners or any two of them, with the Governor and Attorney General for the time being, to be shown by the Governor signing the grant, and the Attorney General attesting it, shall and may execute and deliver and acknowledge in the name and on behalf of the state, a lease in perpetuity to

such grantee or licensee or corporation having such grant, license, power or authority, and to the heirs and assigns of such grantee or licensee, or to the successors and assigns of such corporation, upon his, her or their securing to be paid to the state an annual rental of three dollars for each and every lineal foot measuring on the bulkhead line, or a conveyance to such grantee or licensee or corporation having such grant, license, power or authority, and to the heirs and assigns of such grantee or licensee, or to the successors and assigns of such corporation in fee, upon his, her or their paying to the state fifty dollars for each and every lineal foot, measuring on the bulkhead line, in front of the land included in said conveyance; provided that no corporation to whom any such grant, license, power or authority was given by legislative act as aforesaid, in which provision was made for the payment of money to the Treasurer of the state for each and every foot of the shore embraced and contained in the act, nor the assigns of such corporation shall be entitled to the benefits of this section; and provided further, that the said commissioners shall in no case grant lands under water beyond the exterior lines hereby established, or that may be hereafter established, but the said conveyance shall be construed to extend to any bulkhead or pier line further out on said river and bay that may hereafter be established by legislative authority; in case any person or corporation taking a lease under this section, shall desire afterwards a conveyance of all or any part of the land so leased, the same shall be made upon the payment of the said sum of fifty dollars for every such lineal foot, as aforesaid, of the land so desired to be conveyed, the conveyance or lease of the commissioners under this or any other section of this act, shall not merely pass the title to the land therein described, but the right of the grantee or licensee, individual or corporation, his, her or their heirs and assigns, to exclude to the exterior bulkhead line, the tide water by filling in or otherwise improving the same, and to appropriate the land to exclusive private uses, and so far as the upland from time to time made shall adjoin the navigable water, the said conveyance or lease shall vest in the grantee or licensee, individual or corporation, and their heirs and assigns, the rights to the perquisites of wharfage, and other like profits, tolls and charges."

And section 8 of the same supplement (Id. p. 2788):

"That if any person or persons, corporation or corporations, or associations, shall desire to obtain a grant for lands under water which have not been improved, and are not authorized to be improved, under any grant or license protected by the provisions of this act, it shall be lawful for any two of the said commissioners concurring, together with the Governor and Attorney General of the state, upon application to them, to designate what lands under water for which a grant is desired lie within the exterior lines, and to fix such price, reasonable compensation, or annual rentals for so much of said lands as lie below high-water mark, as are to be included in the grant or lease for which such application shall be made, and to certify the boundaries and the price, compensation or annual rentals to be paid for the same, under their hands, which shall be filed in the office of the Secretary of State; and upon the payment of such price or compensation or annual rentals, or securing the same to be paid to the Treasurer of this state, by such applicant, it shall be lawful for such applicant to apply to the commissioners for a conveyance, assuring to the grantee, his or her heirs and assigns, if to an individual, or to its successors and assigns, if to a corporation, the land under water so described in said certificate; and the said commissioners shall, in the name of the state, and under the great seal of the state, grant the said lands in manner last aforesaid, and said conveyance shall be subscribed by the Governor, and attested by the Attorney General and Secretary of State, and shall be prepared under the direction of the Attorney General, to whom the grantee shall pay the expense of such preparation, and upon the delivery of such conveyance, the grantee may reclaim, improve and appropriate to his or their own use, the lands contained and described in the said certificate; subject, however, to the regulations and provisions of the first and second sections of this act, and such lands shall thereupon vest in said

applicant; provided, that no grant or license shall be granted to any other than a riparian proprietor, until six calendar months after the riparian proprietors shall have been personally notified in writing by the applicant for such grant or license, and shall have neglected to apply for the grant or license, and neglected to pay, or secure to be paid, the price that said commission shall have fixed; the notice in the case of a minor shall be given to the guardian, and in case of a corporation to any officer doing the duties incumbent upon president, secretary, treasurer or director, and in case of a non-resident, the notice may be by publication for four weeks successively in a daily newspaper published in Hudson county, and in a daily newspaper published in New York City."

Section 1 of another supplement, approved March 27, 1874 (Id. p. 2791):

"That from and after the passage of this act it shall be lawful, for the riparian commissioners, or any three of them therein concurring, together with the Governor of this state, to fix and determine, within the limits prescribed by law, the price or purchase money, or annual rental to be paid by any applicant for so much of lands below high-water mark, or lands formerly under tide water belonging to this state as may be described in any application therefor duly made according to law; and the said commissioners, or any three of them therein acting and concurring, with the approval of the Governor, shall in the name and under the great seal of the state, grant or lease said lands to such applicant accordingly; and all such conveyances or leases shall be prepared by the said commissioners or their agents at the cost and expense of the grantee or lessee therein, and shall be subscribed by the Governor, and at least three of said commissioners, and attested by the Secretary of State."

Section 1 of the "Joint resolution relative to the riparian commission," approved March 17, 1870 (Id. p. 2796):

"That the riparian commissioners may and shall, in all leases, as well those authorized by the eighth section as those authorized by the fourth section of the act of last year, relating to the subject of lands under water, covenant on behalf of the state that the state will at any time accept the capital sum of which the annual payment is the interest, at the rate of seven per centum per annum, in lieu of all further annual payments, and make conveyance of the fee simple and may convey or lease to any exterior line hereafter to be fixed; and such lease or conveyance under said eighth section and this resolution shall, in all respects, be as effectual to pass all the perquisites of wharfage and other like profits, tolls and charges, as conveyances and leases under the fourth section would be."

Section 1 of the act entitled "An act relative to the riparian commission," approved April 6, 1871 (Id. p. 2796):

"Whereas, applications are frequently made to said commission for grants and leases of lands which were heretofore, but are not now, under tide-water, and it is desirable to quiet the possession of those who so apply, but doubts have arisen whether such cases are now provided for by law; and it has been found by experience that grants and leases containing the grants and covenants authorized by the fourth section of the act approved March thirty-first, one thousand eight hundred and sixty-nine, entitled 'Supplement to an act entitled "An act to ascertain the rights of the state, and of riparian owners, in the lands lying under waters of the bay of New York, and elsewhere in the state,"' approved April eleventh, one thousand eight hundred and sixty-four, and the joint resolution of one thousand eight hundred and seventy, are more readily accepted, and are more satisfactory, than those which do not contain the same.

"Section 1. That the said commissioners with the concurrence of the Governor and Attorney General, in all cases of application for grants or leases

of land now, or at the time of the application, or at the time of the lease or grant, under tide water; and in all cases of application for grants or leases of lands which are not now, or shall not at the time of the application, or at the time of the lease or grant be under tide water, and in all cases of applications for leases or grants for all or any of such lands may, notwithstanding the first proviso of the fourth section of said supplement, or any other clause or matter in said supplement contained, grant or lease, or lease first with a covenant to grant, and grant afterwards, for such principal sum that the interest thereof at seven per centum will produce the rental, such lands, or any part thereof lying between what was, at any time heretofore, the original high-water line and the exterior lines established or to be established, and grant or lease in all cases in which, in their discretion, they shall think such grant or lease should be made, such rights, privileges and franchises as they are authorized to grant in cases coming directly within the said fourth section, and enter into the same covenants in the name of the state, in all cases of grants or leases where they deem such covenants proper, as are authorized in grants or leases under said fourth section, and insert such other covenants, clauses and conditions in said grants or leases as they shall think proper to require from the grantee or lessee, or ought to be made by the state; provided, that nothing herein contained shall authorize grants or leases in front of a riparian owner to any other than such riparian owner, except upon the proceedings and conditions in said supplement provided; and provided also, that the applications for grants or leases, and the certificates of said commissioners, Governor and Attorney General, may in the cases hereby provided for, vary from the provisions of the said supplement in such manner as to conform to this act, and any party who has already asked for or accepted a lease or conveyance may apply for and have the benefits of this act, notwithstanding such former application or former acceptance of a lease or conveyance."

The instrument of April 30, 1881, recites that the Morris & Cummings Dredging Company, pursuant to the act of March 31, 1869, and other statutes and joint resolutions of New Jersey, being the owner of lands fronting on New York Bay, and "desirous of obtaining a lease for the lands under water hereinafter leased which lie in front of said lands," had applied to the commissioners appointed under the act of March 31, 1869, and the Governor, "for a lease of the lands hereinafter leased"; that it has applied to them "to fix the price and reasonable compensation and the annual rental for the lease of so much of said lands under water as lie below high-water mark, and may properly be included in the lease, and the boundaries and the price, reasonable compensation and the annual rental to be paid for the same"; that, in compliance with the application, the commissioners had "agreed to lease the lands hereinafter mentioned, and determined that the sum of \$4,233.60 as the annual rental to be paid for said lands under water so designated, and did fix the sum of \$60,480 as the price or reasonable compensation on payment of which a conveyance of all or any part of the said lands free from rent would under said act be made"; that the applicant had secured to be paid to the Treasurer of the state the above-mentioned annual rental; and that it had "applied to the said commissioners for a conveyance assuring to it, its successors and assigns, the land under water hereinafter described." After this recital, the instrument proceeds to declare that: "The said state of New Jersey, by the said commissioners, the Governor concurring, in consideration of the premises and of the rent, covenants and conditions hereinafter contained, doth hereby bargain, sell, lease, and convey unto the said the Morris & Cummings Dredging Company,

and to its successors and assigns forever," the tract of land for which "a conveyance" had been sought, which is described by metes and bounds, "and also the right, liberty, privilege and franchise to exclude the tide-water from so much of the lands above described as lie under tide-water by filling in or otherwise improving the same, and to appropriate the land above described to their exclusive private use." The instrument then declares that the grantee is "to take, to have and to hold, use, exercise and enjoy the said lands and premises, and all the rights, liberties, privileges, franchises and perquisites aforesaid, exercisable within and over, or with reference to the same, to and for the said several uses, intents and purposes, and in the manner and form that they are above granted unto the said the Morris & Cummings Dredging Company, and to its successors and assigns, forever, subject to the regulations now imposed by law on the exercise of the said rights of property hereby granted, and to such as shall hereafter lawfully be made, yielding and paying therefor unto the said state of New Jersey the annual rent of \$4,233.60, to be paid to the state of New Jersey by the said the Morris & Cummings Dredging Company, its successors and assigns, in two equal half-yearly payments, one half thereof on April 30th, and the other on October 30th in each and every year forever, the first payment to be made on October 30, 1881." Then follows a covenant by the grantee on behalf of itself and its successors and assigns for the payment of the rent, a provision authorizing the state, in case any installment of rent shall not be paid when due, "into the said tract of lands hereby leased to re-enter and the same and every part thereof, and all improvements, and all the rights, liberties, privileges and franchises aforesaid, to have, possess and enjoy." Lastly follow covenants by the state that "a conveyance will be made to the Morris & Cummings Dredging Company, its successors and assigns, of the said lands, rights, privileges and franchises, or any part thereof it or they may desire, free and discharged from the whole or of an equitable portion of the said rent, on paying to the said state the sum of \$60,480.00, or an equitable portion thereof, and upon application duly made therefor," and that the state "will not make or give any grant, license, power or authority to any other person or corporation affecting lands under water in front of said lands hereby leased."

This instrument must be construed in the light of the legislation by which it was authorized. That legislation, as we have seen, declared by section 4 of the act of March 31, 1869, that the commissioners are authorized to execute "a lease in perpetuity" to the grantee, his heirs and assigns, if an individual, or, if a corporation, to its successors and assigns, upon an annual rental being secured to the state, and that such lease should not merely pass the title to the lands therein described, but the right to exclude the tide water by filling in or otherwise improving the same, and to appropriate the land to exclusive private uses, and to the right to the perquisites of wharfage and other like profits, tolls, and charges. By section 8 of the same act the commissioners are authorized to "fix such price, reasonable compensation or annual rentals for so much of said lands as lie below high-water mark as are to be included in the grant or lease," and to execute "a

conveyance assuring to the grantee, his or her heirs and assigns" if an individual, or to its successors and assigns if to a corporation, the lands described in the conveyance, and declares that "such grantee may reclaim, improve and appropriate to his and their own use such lands," and that "such lands shall thereupon vest in said applicant." These provisions clearly authorize the conveyance, even though it be by what the statute calls a lease, of an inheritable estate; that is, of an estate in fee. There is nothing in the joint resolution of March 17, 1870, the act of April 6, 1871, or the act of March 27, 1874, that repeals such authority. What the state did in the present case was to convey to the Morris & Cummings Dredging Company an estate in fee simple, with reservation of an annual rent. The instrument itself shows an intent to convey such an estate. Instead of conveying the lands therein described by the technical words of a lease "demise, grant and to farm let," they are conveyed by the words "bargain, sell, lease and convey." Instead of conveying the lands to the grantee, its successors and assigns, for a term of years, they are conveyed to the grantee, its successors and assigns, forever. The habendum and tenendum clause runs to the grantee, its successors and assigns, forever.

By this instrument the state parted with the whole estate as effectually as if the consideration had been paid in one sum. The instrument contemplated two methods of paying the consideration, an annual sum equal to 7 per cent. of the entire consideration, as directed by the joint resolution of March 17, 1870, and a lump sum, at any time at the option of the purchaser, whereupon another conveyance was to be executed and the annual payments cease. The right, title, and interest of the purchaser were the same whichever method of payment was adopted. So long as the purchaser made the annual payments, the estate vested in it was as absolute as if the entire capital sum had been paid in the first instance. The use of the words "lease" and "rent" does not change the quality of the estate where the whole interest is conveyed. Substance, not form, controls. A lease never conveys all that the owner has. That at some time and by the very terms of the instrument itself the estate shall revert to the lessor, his heirs or assigns, is of the essence of a lease. In the present case a default in the annual payments causes a forfeiture; but this is not the necessary result of the terms of the conveyance. It provides for such a contingency, but does not require it. The conveyance transferred the whole estate to the purchaser. Only his disregard of the terms can end it and cause a reversion. *Cook v. Mayor and Counsel and City of Bayonne et al.*, 77 Atl. 1048, decided by the New Jersey Supreme Court since the argument in the present case, is directly in point. It was there said:

"An instrument calling itself a 'lease' made by the riparian commission of this state for lands under water, pursuant to the statutes of 1869 and 1871 (3 Gen. St. 1895, pp. 2786, 2796), which 'bargains, sells, leases and conveys' to the grantee 'her heirs and assigns forever' with habendum in fee and reservation of annual rental with right of re-entry and of distress in case of non-payment expressly reserved, and covenanting for a further conveyance free and discharged of the rent on payment of a stipulated gross sum, is a grant in fee subject to a rent charge, and the land therein described is taxable in the hands of the grantee."

I concur in the defendants' contention that the estate conveyed is an estate in fee simple, with a condition subsequent, the condition being that, if the annual payments are not made when due, the estate may be defeated, and that the land described in the instrument made by the state of New Jersey to the complainant's grantor is taxable in his hands.

The second contention, viz., that the lands are without the jurisdiction of the state, has been decided adversely to the complainant by the United States Supreme Court in *Cent. R. R. of N. J. v. Jersey City*, 209 U. S. 473, 28 Sup. Ct. 592, 52 L. Ed. 896.

[2] Third. Is the land within the taxing district of Jersey City? By the tenth stipulation it is agreed that, if the lands in question became a part of Jersey City, they became so under the provisions of section 1 of the act to reorganize the local government of Jersey City, approved March 31, 1871 (P. L. [N. J.] p. 1094), sections 1 and 4 of the act of February 4, 1873 (P. L. [N. J.] p. 203), consolidating Jersey City and Greenville, and section 1 of the act of March 18, 1863 (P. L. [N. J.] p. 306), incorporating the township of Greenville. An examination of these provisions alone makes it impossible to determine the exact New York Bay front boundary of Jersey City at the time of the filing of this bill, so far as it relates to the locus in quo.

None of these gives the boundaries of the township of Greenville. Section 2 of the latter act read in connection with section 1 thereof does give such boundaries, which are as follows:

"On the southeast by New York Harbor, on the west by the Morris Canal, and lands of James Currie, Esquire; on the northwest by Newark Bay and the Hackensack River; on the northeast by a road or lane known as Myrtle Avenue, with a continued line running southeasterly from said Avenue to New York Harbor, and northwesterly from said avenue to the Hackensack River (this last boundary being the unadjusted dividing line between the 'town of Bergen' and the township hereinafter incorporated)."

As the locus in quo is admittedly in New York Harbor and contiguous to the upland formerly a part of Greenville, the question whether it is a part of the taxing district of Jersey City depends upon whether it was a part of Greenville before its consolidation with Jersey City. "On the southeast by New York Harbor" is the pertinent course. "Harbor" has a more extended meaning than "shore." By the shore of a tide-water bay is usually meant the part between ordinary high and low water marks, alternately covered and left dry by the ordinary flux and reflux of the tides. Tyler, *Law of Boundaries*, p. 33. A harbor is a port or haven for ships, a sheltered recess in the coast line of a sea, gulf, bay, or lake, most frequently at the mouth of a river (*Cent. Dict. and Cyclo.*), in which ships can moor and be sheltered from the fury of the winds and heavy seas. A finding that a harbor extends to a line inside of which large numbers of vessels may find protection from storms is correct. *Rowe v. Smith*, 51 Conn. 266-271, 50 Am. Rep. 16.

[3-6] The legislative intent in the use of the words employed in running a water boundary governs, rather than the literal meaning of the words. The words "to," "on," "by," "at," "along" a nontide water stream presumptively carry title as far into the stream as the grantor

possesses. "Any boundary at tide water, by whatever name—whether sea, harbor, or bay—includes the land below the high water mark, as far as the grantor owns." *City of Boston v. Richardson*, 13 Allen (Mass.) 146, 155. In *Atty. Gen. v. Del. & Bound Brook R. R. Co.*, 27 N. J. Eq. 631, 639, the Court of Errors and Appeals held that no rule is more firmly settled than "that grants of land bounded upon or along rivers above tide water carry the exclusive right and title of the grantee to the center of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river." This presumption, however, does not exist where the grantor is the state, unless the intention to so convey is clear. But it must not be overlooked that on this question of legislative intent we are not considering a grant of a title to the soil under the tide water, but the ascertaining of the extent of the territorial jurisdiction of one of the municipalities created by the state, to which the state has delegated some of its sovereign powers, and upon which it has imposed the burden of exercising some of its sovereign prerogatives. The terms used by a sovereign in such grants are not to be subjected to the strict rule of construction as when it grants title to some of its territory to a private grantee. The legislative purpose sought by such territorial subdivision is to be kept in mind.

In *McCannon v. Sinclair*, 2 El. & El. Q. B. 53, held that where a parish comes down as far as the bank of a river, a navigable stream, there is a *prima facie* presumption that it extends as far as the middle of the river, and that a pier extending beyond low-water mark was subject to the poor rates. In *Rex v. Landulph*, 1 Moody & R. N. P. Rep. 393, held that where two parishes are separated by a river, and there is no positive evidence of the boundary line between them, it is presumed that the boundaries coincide with the middle line of the channel. *Luke v. Brooklyn*, 43 Barb. (N. Y.) 54, affirmed 1 Abb. Dec. (N. Y.) 24, held:

"For the purpose of ascertaining whether particular property is situated within the city of Brooklyn, the line of low water, as the water flows in the East River, after the land is reclaimed from the river, or by the erection of wharves and piers, and the filling in from the shore for the purpose, is to be deemed the dividing line between the cities of New York and Brooklyn. The jurisdiction of the city of Brooklyn must from necessity follow the shore as it advances into the river or bay, whether the accretion proceeds from alluvion or artificial deposits and erections."

Admittedly the county of Hudson, of which Jersey City is a territorial subdivision, extends to the line between New Jersey and New York, embracing the locus in quo. The language of Judge Pratt in *Tebo v. Brooklyn*, 10 N. Y. Supp. 749,¹ is so apt to this situation as to justify its insertion here:

"The respondent concedes that the lands under water in Gowanus Bay form a part of the county of Kings, but claim that those lands fall within no town. To quote from respondent's printed argument: 'The county of Kings includes such land under water, the line running from Red Hook Point to the

¹ Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 57 Hun, 591.

west, along the southern boundary of New York County to the centre of the main channel to the ocean, but the lands under water fall within no town.' The idea that land may be within a county and yet fall within no town is so peculiar that clear evidence would be required to satisfy us that such has been the legislative intent. We do not find such evidence. On the contrary, section 1 of the charter of 1854 [Laws N. Y. 1854, c. 384] seems to assume that the city of Brooklyn is bounded by the bay of New York, clearly implying that Gowanus Bay is included within the limits of Brooklyn."

The territory of the state extends to the middle of New York Bay or Harbor. The question of boundaries here is not between municipalities of the same sovereignty. There is nothing in the acts creating the township of Greenville out of the town of Bergen, or of the town of Bergen out of the township of Bergen or of the township of Bergen out of the county of Bergen, or of the county of Bergen, that suggest a legislative intent to exclude from such boundaries a portion of the state's territory lying between the upland and its exterior boundary lines in New York Bay. In such case the presumption is, first, that in the dividing of the state's territory into counties, all of it, for government purposes, was intended to be included; and, second, that in the subdividing of the county of Bergen the same legislative intent was carried out.

[7] The legislation of the state founded upon the constitutional mandate enacted before the state granted the lands in question, and during the years that the taxes challenged were imposed, requires that all property not expressly exempted be taxed, and that lands be assessed to the owner thereof. Act March 17, 1854; Act March 19, 1891 (3 Gen. Stat. N. J. 1895, pp. 3345, 3350). The same requirement still obtains. Act April 8, 1903 (P. L. p. 397) §§ 5, 6. To admit the contention of complainant under this head, a class of property than which none is more valuable would escape taxation; not by express legislative exemption—the only way indicated in the cited enactments—but by a narrow construction of the word "on" in running the Harbor boundary. Such a rule of construction is not permissible in view of the state's policy, clearly indicated by legislation granting title to lands under tide water, requiring the taxation of all property within the state, and subdividing the entire territory of the state into taxing districts, to impose and collect such taxes.

The fourth ground, "that assessment was made upon real estate and not upon the interest of the complainant therein," is disposed of by the conclusion reached on the first ground.

The remaining contention is that the lien of the taxes has expired. This ground is applicable only on a finding that the lands were taxable by Jersey City. As such taxability has been found, it follows that, if any of the taxes are enforceable by sale of the land assessed, such sale cannot be restrained on this ground. The bill does not allege, and no claim is made, that complainant paid or offered to pay any of such taxes, and the answer specifically asserts that they were not paid, and the proofs do not show their payment. Section 151 of the act to reorganize the local government of Jersey City, approved March 31, 1871, declares:

"That all taxes and assessments which shall hereafter be assessed or made upon any lands, tenements or real estate situate in said city, shall be and remain a lien thereon from the time of the confirmation thereof until paid."

Counsel for complainant contends that this provision was repealed by the act of March 17, 1882 (P. L. N. J. p. 130). This act is amendatory of and supplementary to the general tax act of 1846. Query, whether this act limited in its operation to the act of 1846 which did not apply to special charter provisions (Sheridan v. Stevenson, 44 N. J. Law, 371) will impliedly repeal such special legislation of 1871 applicable to Jersey City alone, and which was not repealed by the amendments to the New Jersey Constitution inhibiting special legislation adopted in 1875. A determination whether the charter provision is repealed by this later enactment is not necessary, however, in this case. Under the tax adjustment act of March 30, 1886, known, and herein referred to, as the Martin act, and which the record shows has been invoked by the defendants to adjust unpaid taxes, some, if not all, of the taxes challenged in these proceedings, may be made the basis of a new lien. *Jersey City v. Speer*, 78 N. J. Law, 34, 72 Atl. 448, affirmed 76 Atl. 1037. Nor is it necessary to consider the further contention that "the lien of all of the taxes prior to 1888 has expired because of the presumption that they are paid."

[8] This presumption is not one of law, but one of fact, and therefore rebuttable. In *re Martin Act Commissioners of Plainfield*, 21 N. J. Law J. 334.

[9] The commissioners of adjustment to whom these alleged arrearages of taxes were submitted for adjustment had complete jurisdiction over that subject. They found such taxes were due and unpaid. Such findings in a collateral proceeding cannot be overcome by the alleged presumption of fact. *Stanley v. Supervisors of Albany*, 121 U. S. 535, 7 Sup. Ct. 1234, 30 L. Ed. 1000.

In these proceedings the commission will be presumed to have proceeded according to law. If in the readjustment of the taxes the commission has included in its findings, taxes for years to which such presumption could be enforced, or for years the lien for which was lost at the time the premises passed into the ownership of the complainant, and could not thereafter be legally established against his ownership in such lands, an adequate remedy at law, by appropriate proceedings in the state courts, was at his command.

[10] Municipal operations are dependent, directly or indirectly, upon moneys derived from taxes, and interference by injunction with the collection of such taxes legally imposed, upon the ground of laches, will be accorded only where the complainant's right is clear, the injury imminent, and the remedy at law inadequate for his protection.

The present case presents no sufficient ground for the injunctive or other relief prayed, and the bill is dismissed.

In re A. O. BROWN & CO.

(District Court, S. D. New York. February 15, 1911.)

1. TRUSTS (§ 352*)—MINGLING OF TRUST FUNDS—REMEDIES OF BENEFICIARY.

Where a trustee deposits trust funds with his own in a bank, there is no presumption as in case of payments by a debtor that the first money drawn out was the first deposited, but when the rights of the beneficiary require it he may assert a lien upon the entire deposit or any part of it.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 520-525; Dec. Dig. § 352.*]

2. BANKRUPTCY (§ 140*)—CONVERSION OF PROPERTY BY BANKRUPT—REMEDIES OF OWNER.

Bankrupts, who were brokers, converted certain stocks owned by claimants, and sold the same, and also other stocks, to a third party, receiving payment by checks given at different times after both sales. They deposited the checks in bank and the proceeds of one was applied to the payment of a note to the bank releasing certain collateral which came into the hands of their trustee. *Held* that, in the absence of evidence showing that the proceeds of claimants' stocks were included in a particular check, there was no presumption that the first check covered the stock first bought, but that the claimants were entitled to a lien on the entire deposit to the extent that their funds contributed to such deposit and to be subrogated to the rights of the bank in the collateral released.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.*]

3. BANKRUPTCY (§ 140*)—BROKERS—RECLAMATION OF STOCK DELIVERED FOR SALE.

Claimant directed bankrupts, who were brokers, through a branch office, to sell certain stock, and being advised that it had been sold she delivered the stock to the manager of the branch office and received a check in payment. Before the check was presented insolvency had intervened, and it was not paid. In fact before claimant delivered the stock bankrupts had sold it, delivering stock of their own, and had received payment therefor. *Held* that, in the absence of fraud, or proof that the check was not good when given, claimant could not rescind and reclaim the stock, which on delivery became the property of bankrupts in any event, even though they converted the proceeds before insolvency.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.*]

4. APPEAL AND ERROR (§ 204*)—RECEPTION OF EVIDENCE—EFFECT OF FAILURE TO OBJECT.

A litigant cannot permit incompetent evidence to be received without objection and then insist on a reversal because of its admission.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1258-1280; Dec. Dig. § 204.*]

5. BANKRUPTCY (§ 214*)—CONVERSION OF PROPERTY—FOLLOWING TRUST FUNDS.

Claimant had a lien on a bank deposit of bankrupts for the proceeds of stock converted by bankrupts which went into such deposit. During two days bankrupts made further large deposits, and also drew out the entire fund. With a part of it they paid a note to the bank which was secured by collateral, and with another part they purchased stocks which they deposited as collateral for other loans. *Held* that, to entitle the claimants to follow the fund on which they had a lien into the collateral released by payment of the note or the stocks purchased from the bank deposits, it was incumbent on them to show that up to the time of the payment of the note, or for the stocks, the deposit had remained continuously equal to the amount of their claims so that such payment and purchases were made from the mixed fund, there being no presumption

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that if such fund had been drawn out prior to such payment or purchases the subsequent deposits were intended to replace it.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 214.*]

6. BANKRUPTCY (§ 140*)—BROKERS—RIGHT OF CUSTOMER TO RECLAIM STOCKS.

To entitle claimants, who had delivered stock to bankrupts as brokers, to reclaim similar stocks from the trustee, they must show that after such delivery the bankrupts continuously had on hand a sufficient amount of the same stocks to cover their claims.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.*]

7. BANKRUPTCY (§ 140*)—STOCKBROKERS—CONVERSION OF CUSTOMERS' STOCK—EVIDENCE.

That bankrupts as brokers sold the particular certificates of stock purchased for a customer does not establish a conversion and entitle the customer to follow the proceeds of such certificates, since all that was required of the bankrupts was that they keep in hand a sufficient amount of the same kind of stock for delivery to the customer.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.*]

In the matter of A. O. Brown & Co., bankrupts. On report of referee with respect to claims upon the fund on deposit with the Hanover National Bank. Report confirmed.

See, also, 185 Fed. 972; 189 Fed. 442.

W. B. Crisp, for petitioners.

Ralph Wolf, for trustee.

W. W. Black, for Lannon.

Heyn & Covington, for Jackson.

K. K. Mackenzie, for Smart.

HAND, District Judge. The distribution of this fund involves a great many different controversies which must be considered separately. I will take them up in the same order as the master.

Ex parte Schuyler, Chadwick, and Burnham.

The facts are stated in the referee's report very fully. I concur with him in finding that the stocks were procured by fraud, and that therefore the claimants had the right to rescind their contract and follow the stock or its proceeds. I do not concur with the master in finding that the proceeds of the stock were contained in the check for \$23,000, if by that he means that there is any evidence that Miller & Co. supposed they were paying for that stock with that check. I think there is no evidence from which it can be determined what was the intent of Miller & Co. in that respect. There is no evidence that the check for \$266,600 was paid to the bankrupts before the Interborough stock was delivered. That stock at the latest was delivered at 2 o'clock, and there is no means of placing the time of delivery of the first check before 3 p. m. If the first check was delivered before the stock, the master says that the final \$600 may be accounted for by the fact that the price of the Interborough stock was already known, but it is not the custom to pay for any part of stock which has not been delivered. There is no evidence of the time at which the 1,000 shares of Great Northern, or the 1,000 shares of Northern Pacific, stock were delivered. If it be assumed that they and the first check

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

were delivered before the Interborough stock, it would have been an extraordinary thing that the payments made on account of those 2,000 shares of stock should have been in the sum of \$600 when the purchase price of neither answered that figure. Any conclusion seems to me necessarily too speculative to be the basis of a decision involving property rights, though if I were forced to such a speculation I should conclude from the amount of the check that all stock deliveries had been made before any check was issued. However, I do not think it necessary to decide that question, because there being no evidence which favors the claimants' construction, it must be taken against him, he having the burden to establish it. I shall therefore assume that all three deliveries of stock preceded that of the first check. The obligation of Miller & Co. to pay for all this stock was similar to the obligation of a banker to pay deposits which have been made with him and the case is analogous to those cases in which a trustee mingles in a bank account funds of his own and funds of his beneficiary. The rules affecting withdrawals from such an account I have tried to state in an opinion recently handed down on January 23, 1911, in the suit in the Circuit Court of Primeau v. Granfield, 184 Fed. 480, to which I refer for my reasons, and which I shall here only shortly recapitulate.

[1] In such cases the rule does not obtain which commonly obtains between debtor and creditor; that is, that the earliest payments are to be attributed to the earliest debits. *U. S. v. Kirkpatrick*, 9 Wheat. 720, 6 L. Ed. 199. On the contrary in cases where the rights of the beneficiary demand it, that rule is abandoned. The case is regarded in this way: All the deposits taken together constitute an obligation of the banker's, a single chose in action, amounting in total to the sum of the deposits. Upon that chose in action the beneficiary has a lien, if he wishes to assert it, equal to the sum of money which his property has contributed to it. So in this case the claimants may elect to retain a lien upon the total deposit after the first withdrawal. This is the effect of the case of *Knatchbull v. Hallett*, L. R. 13 Ch. Div. 696, a case which has been very frequently cited and the decision of which has been followed many times. This is sometimes stated as a presumption of the trustee's intent, but that is a fiction.

[2] The result of this is that, had the failure occurred before Miller & Co. had paid the second check, the claimant would have been allowed by a court of equity to assert his lien against the sum of \$23,000. However, that sum of \$23,000 instead of being represented by a chose in action in which the bankrupts were obligees and Miller & Co. were obligors, was represented by a check for \$23,000 which had been paid in discharge of that chose in action and which was in every sense the proceeds of it. The claimants therefore had, at their election, a lien upon that check precisely similar to the lien which they had upon the chose in action, and that lien remained after the bankrupts had deposited it with the Hanover National Bank. The trustee concedes that if once the claimants establish a lien upon that deposit they are entitled to be subrogated to the note held by the bank, which was paid with the deposit, and which was itself secured by certain collateral, which or whose proceeds afterwards came to the hands of the trustee. Therefore, although I do not agree with the

facts upon which the result was reached, I do think that the result was correct.

There remains to be considered whether the intent of Miller & Co. and the bankrupts was so clear to pay for the Interborough stock by the first check that the proceeds of the stock could only have been in the first check. That is not clear. As I have already said, the Interborough stock was probably delivered before the first check was issued, but it does not follow from that that the first check was intended particularly to include that stock. The assistant cashier of Miller & Co. either would not, or could not, state what was the reason for making payment by two checks, and the more natural reason is that there was something in the accounts of the parties which justified the inference that there might be a set-off which required that much at the outside. The retention of that sum of money, for whatever reason it may have been done, would not normally, however, be attributed to any particular one of the three items together creating the obligation. They would probably be regarded as together making one obligation, like deposits in a bank, as I have suggested. Here again the inquiry is necessarily speculative, but in this case the trustee must establish that the first check was intended to include the whole of the stock, and he cannot do it. Instead of that, if there be any conclusion, it must be that Miller & Co. had no specific intention at all, but paid the check generally on their obligation. If their intention was undifferentiated, then there is ground to apply the rule which I have already indicated. The report as to Schuyler, Chadwick and Burnham is therefore confirmed.

Ex parte Bessie H. Parker, No. 1.

[3] Here, also, the referee has fully stated the facts, and the only question is of their legal result. It is urged that the claimant was not bound by the customs of the New York Stock Exchange, and therefore may not be charged with knowledge that the order to sell her stock would be at once executed by the broker, and the contract of sale filled from their own stock or from other stock which they borrowed for that purpose. I do not think it necessary to determine that question. She certainly knew from the fact that she was dealing with brokers that the transaction was not one of sale between them and her. Moreover, she positively knew when she delivered her stock in Buffalo on the 24th, that it had been sold, because she had received their sale slips. She could hardly suppose that the buyer had advanced the money before getting the stock. The only other possible hypothesis to the facts is that the brokers were advancing her the money. It is of no consequence which she understood for the result is the same upon either hypothesis. I shall first assume that she understood the true facts, which were these: The brokers had received the proceeds from the sale of the stock, which proceeds belonged in equity to the claimant. They had the right to hold those proceeds until they were themselves supplied with stock equal in kind and amount to that which they had sold upon her behalf. In short, the brokers were agents having in their possession property of their

principal upon which they had a lien estimated in shares of stock. There is no proof that the funds which had been received by the brokers from the buyer of the stock did not remain in specie, and were not traceable and accessible to the claimant. She has not, therefore, shown that the bankrupts converted her money. All she was entitled to was that money which was held in trust for her by the brokers. If the check had been paid, it would simply have been one mode of settling with her for the property held in trust. However, there is no presumption that they converted the proceeds, and the claimant would in strictness be obliged to show that they were not in the possession of the receiver before she could rescind. This would be enough to dispose of the present hypothesis. Lest, however, this might result only in an application for a new hearing to supply those facts, I may assume that they did convert the proceeds. In that case the claimant may not rescind under *Re Brown*, *Ex parte First National Bank*, 175 Fed. 769, 99 C. C. A. 345. That case is the converse of this, for there the suggestion was that the purchase money could be followed when the stock had been converted, while here it is the proceeds that have been converted, and the stock is to be followed. The cases are to that extent alike.

There is, however, this difference, that here the delivery was made in exchange for a check. The delivery was actually intended to be final. There was no condition annexed to it, though of course the claimant would not have made the delivery had she known that the check would be dishonored. If the delivery had been procured by fraud, then the claimant might rescind, but there was no fraud. So far as appears there were always funds in bank to meet the check. The trouble was that the assignment came in, and sequestrated the funds so that the check could not be paid. There is no case holding that such an event justifies rescission. Undoubtedly, to procure a delivery on a worthless check is a fraud (*Keable v. Payne*, 8 A. & E. 555; *Johnson Co. v. Central Bank*, 116 Mo. 558, 22 S. W. 813, 38 Am. St. Rep. 615; *Nat. Bank of Commerce v. Chicago, Burlington, & Northern R. R. Co.*, 44 Minn. 224, 46 N. W. 342, 560, 9 L. R. A. 263, 20 Am. St. Rep. 566; *Hodgson v. Barrett*, 33 Ohio St. 63, 31 Am. Rep. 527; *Matthews v. Cowan*, 59 Ill. 341); but those cases are quite different from the case of a good check not presented till after insolvency. In such a case everyone understands that he has no assignment of the fund, unless he gets a certified check, and he assumes the solvency of the maker until he cashes it. While it is a representation that one has funds in bank and will not overdraw one's account, to utter one's check, there is certainly no ground for saying that there is involved any representation of general solvency.

Upon the other hypothesis—that is, that the claimant supposed no sale had yet been made, and no purchase money collected—no different result ensues. The brokers had the right to deliver the stock and get the proceeds. One share of stock is like another, and no one would question that they need not deliver the exact shares which she gave them. If they delivered other shares, after getting hers, they could have appropriated hers. As a fact they had already delivered such

shares in advance and had got the purchase price, which was what she was entitled to. They had already got her the money at their own expense, and they were entitled to recoup themselves. So her shares became absolutely theirs as soon as delivered, whether she knew of the prior sale or not. They had anticipated her orders, and her right was in the purchase price, which is what she meant to get. In short, it makes no difference that the brokers had been more expeditious in executing the order than she supposed. Of course the question remains in this event, as in case she actually knew the facts, whether the delivery was procured by fraud so that she might rescind, but that question I have already considered.

[4] Finally, objection is made to the testimony given from the books. It is enough to say that no such objection was urged at the time when it was offered, and that, had it been taken then, the defects might have been remedied. Nothing can more greatly serve that absurd artificiality of procedure with which so much litigation is burdened, than to allow a litigant to lie by while incompetent, though logically probative, evidence, goes in, and then insist upon a reversal because it was not regular. The rules of evidence are not sacred tables, in the punctilious observance of which courts have an interest independent of the consent of the parties. The time to object is when the proof is offered or not at all. The report is confirmed.

Ex parte First National Bank of Princeton, Ill.

Ex parte William H. Simpson.

Ex parte Frederick J. Bullen.

Ex parte Edgar Perkins.

Ex parte Samuel C. Scotten.

Ex parte Scotten and Snyder.

Ex parte Martha Leland.

Ex parte Ernest T. Fellows.

Ex parte Henrietta C. Schroeder-Burley.

Ex parte Bessie H. Parker, No. 2.

Ex parte Thomas E. Conklin.

[5] These cases may all be treated as one, because the claimants all seek to make their claims good through the Hanover Bank account into which all their proceeds had gone before August 24th with one exception. On the morning of August 24th that account contained over \$130,000, and they had a lien on it for what money of theirs had gone into it, under *Knatchbull v. Hallett*, supra. On the morning of the 25th the account contained about \$6,200, which was at once entirely withdrawn and the account reduced to nothing. The subsequent deposit of \$23,000 did not come from the funds of any of the claimants, and there is no presumption that it was intended to be in restoration of the claimants' funds. The claims here must therefore depend upon the transactions of the 24th. On that day over \$3,700,000 was deposited in the account, and over \$3,800,000 was withdrawn. The sums withdrawn were used for the most part in the purchase of stocks, the kind and amount of which are known, but the actual destination of which has not been, and cannot apparently be, shown. On

the 24th, the bankrupts paid one loan of \$200,000 from this bank account and obtained four loans each secured by specific collateral: one for \$80,000, one for \$50,000, one for \$250,000, one for \$8,000. The theory in regard to the payment of the note for \$200,000 is this: the agreement between the bankrupts and the bank gave the latter a general lien for all advances upon any collateral in its hands; therefore, the payment of the note by the mingled funds released the collateral pro tanto and the claimants may be subrogated to the surplus. The theory as to the collateral securing the four loans is this: That collateral was bought on the 24th by mingled funds. If the specific collateral was not bought, at least similar stocks were bought. Apparently the reasoning is, that the claimants may elect to regard all their money as going into any investment they choose and then if the stocks bought be mingled with other similar stock, they may elect again to regard the shares pledged as their shares.

There is, however, no theory which does not involve the hypothesis that up to the time of the supposed investment in the stocks in question the fund had remained continuously equal to the amount of the claims. For example although the claimants were all entitled to a lien to the amount of their claims upon the account at the opening of business on the 24th, yet if that account had been at any time that day reduced below that amount, subsequent deposits would not restore to the claimants their rights. There is no presumption of an intent to restore, and in the case at bar it would be an obvious fiction. Now on the 24th the transactions were enormous. Only a part of the stock purchased was of the kind pledged upon these four loans. Indeed there were drawn over \$400,000 of checks for other purposes before any check was drawn to pay for any stocks of the kind placed with the loans. It is true that the order of drawing the checks is in no sense the same as the order of presenting them, but the fact mentioned at least shows the possibility. The claimants therefore failed to prove that at the time of the alleged investments any of their money remained in the account, and that is a necessary step in tracing their money into any particular part of the estate. Moreover, even if they could follow any part of their funds into the stocks purchased that day, there is no way of telling whether the collateral pledged was delivered before the supposed purchases or after. If the collateral was pledged before, it would not do to call all the stock, that pledged as well as that free, a single fund upon which the claimants might have a lien. The mingling, which justifies such a rule, must be an actual and indistinguishable mixing into one fund.

Nor is there any presumption in the case that the fund always remained large enough to answer the trust moneys. The very first check drawn was greater than the opening balance and it is the merest speculation to assume what were the deposits or what the amount in the bank's account all day long. While equity will follow funds as long as they can be traced, it always requires affirmative proof by the beneficiary that his money went into some specific thing. Here, that proof would require the claimants at least to show that at the time of each investment which they claim their money was in the bank—I

mean at least that much money. The same reasoning applies as to the payment of the \$200,000 note.

I need not therefore consider whether, for the purposes of establishing a lien, the beneficiary may select any earlier withdrawal which went into an investment and which has been preserved. If the general mixed fund has been wholly dissipated, it has been held that he may do so (*Re Oatway*, 1903, 2 Ch. Div. 356), and that *Knatchbull v. Hallett*, *supra*, does not limit him to a lien only where the result will be to prevent his following his money. That presupposes what has not been shown in this case; that is, that the supposed investment was in fact made from a mixed fund. The claimants have throughout assumed that throughout the 24th the fund remained large enough to cover their claims, and it is upon that rock that, in my judgment, their theory is wrecked. The report is confirmed.

Ex parte Scotten.

Ex parte Scotten and Snydacker.

Claims to Stock in Specie.

[6] These claimants likewise claim some of their stock in specie upon the theory that it must be presumed to be included in some of the collateral found with the bank, 1,000 shares of United States Steel, 3,000 shares of Copper. It is enough that they do not make proof that there was continuously on hand from the time of the receipt of their stocks by the brokers, an amount of stock large enough to cover their claims. It has been decided twice by the Circuit Court of Appeals, *Re McIntyre*, Ex parte Talbot, 181 Fed. 960, 104 C. C. A. 424, *Re Brown*, Ex parte Gorman, 184 Fed. 454, that there is no presumption of restoration arising from the presence of similar stock at insolvency. Therefore, it is necessary to show a continuous fund of stock equal to the claimant's.

[7] It is true that there seems to be a general supposition, and indeed this case has proceeded upon that basis, that the sale of the particular certificate purchased for a customer is a conversion and justifies him in following the proceeds. That is not the law. *Re McIntyre*, Ex parte Nevin, 174 Fed. 627, 98 C. C. A. 381. All a broker need do is to keep on hand enough stock, free or hypothecated for no more than his own lien upon it, to meet his obligations. Strictly speaking, no one of the customer claimants in this case has shown that their stock was converted, for the proof does not formally show that there was not on hand enough stock to meet all orders. This may be assumed, however, for the result is the same in any case.

Ex parte Perkins.

In so far as the master gave this claimant any securities, no objection is made by the trustee and his report is confirmed.

Finally, therefore, the report is confirmed throughout. A docket fee and disbursements are allowed to Schuyler, Chadwick, and Burnham.

Let an order pass as contained above.

In re A. O. BROWN & CO.

Ex parte SMART.

(District Court, S. D. New York. May 16, 1911.)

1. BROKERS (§ 23*)—CUSTODY OF PRINCIPAL'S FUNDS—EFFECT OF PURCHASE WITHOUT DELIVERY.

When a customer gives money to a broker to invest, the broker holds it in trust until he has received the securities in which he is to invest it. No mere contract of purchase satisfies the condition on which he may be permitted to appropriate it, but only an actual delivery to him of the securities or an appropriation on the purchase of like securities within his control.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 23.*]

2. BANKRUPTCY (§ 140*)—BROKERS—RIGHT OF CUSTOMER TO RECLAIM MONEY.

Where bankrupts as brokers made a purchase of stock for a customer, but there was no delivery, similar stock subsequently purchased by them will not be presumed to have been bought for such customer, unless there was some express act of the brokers setting it aside for him, and he is entitled to reclaim the money given them with which to make the purchase from their trustee as a trust fund.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.*]

In the matter of A. O. Brown & Co., bankrupts. Ex parte Allen R. Smart. Order in favor of claimant.

See, also, 185 Fed. 972.

Ralph Wolf, for trustee.

Kenneth K. Mackenzie, for petitioner.

B. G. Heyn, for claimant Laura Jackson.

Thorndike Saunders, for claimant Samuel C. Scotten.

HAND, District Judge. [1] This cause now comes back upon a separate report of the master. The claimant's position is this: When a customer gives money to a broker to invest, the broker holds it in trust until he has received the securities in which he is to invest it. No mere contract of purchase satisfies the condition upon which he may be permitted to appropriate it, but only the delivery to the broker of the securities. Admitting under *Re Brown*, Ex parte Herrocks, 185 Fed. 766 (decided November 14, 1910), that the presumption is that a contract of purchase on a stock exchange is represented by some securities in the brokers' hands, even if set off by a contract of sale, yet if the customer affirmatively shows that the purchase was not followed either by a corresponding delivery, or by any other appropriation of securities within the brokers' control, then he has established that the condition has never been fulfilled by which alone the brokers might appropriate the money. While, if such securities ever did come into the brokers' hands, the latter's rights from thence forward are only against the stock (*Re Brown*, Ex parte First National Bank, 175 Fed. 769, 99 C. C. A. 345), he necessarily can have no right to any stock, until some stock has been received for him. Therefore, it is only necessary for the claimant to show that no stock was in fact borrowed or held to answer for Whitney's "short" sale. If so, then that sale

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was no different from a sale made by the brokers themselves without stock and merely for the purpose of "washing" their purchase, as it is called.

To all of this reasoning I agree, nor is it any answer to say that some title passed when the contract of purchase was made. There is indeed no evidence that the other party to that contract had any stock when he made it, and if he did, no title in it would pass until he had set aside the certificates which he appropriated to fill his contract. Therefore the simple question is whether the claimant has affirmatively shown that there never was any stock set aside by the brokers to cover Whitney's "short" sale. The books purport to show all the transactions; they must be supposed to be complete in the absence of evidence to the contrary. They show that from the 24th day of August till the failure the brokers had received and had in possession all told only 380 shares of the stock in question. None of this was borrowed or held to cover Whitney's sale so far as appears on the books. Has the claimant proved the negative of the possibility that some part of it was received upon his purchase? The 30 shares in the hands of Lipper were always on pledge and could not have answered. The 200 shares that came from Boody, McLenman & Co. were never the bankrupts' stock at all. The 100 shares bought for Annis became his on delivery, even though it was converted at once thereafter. There remain the 50 shares received from Ehrich Hochstadter & Co. on the 24th and immediately sold.

[2] It does not appear for whom this was purchased, and the question is whether the customer could have claimed them, had they remained in specie. I think that under *Re McIntyre, Ex parte Talbot*, 181 Fed. 960, 104 C. C. A. 424, he clearly could not. It was there held that new purchases of similar stock will not be presumed to be in substitution for that already converted. The same rule should apply when the only facts are that a purchase of stock for a customer has not been followed by a delivery. There must be some express act of the broker setting aside other stock to the customer, in order to effect a substitution. Presumptions will not answer.

Therefore Smart has affirmatively proved that there never was in the bankrupts' hands any stock which could answer to the purchase, the purchase is no better than if it had never been made, and the bankrupts have never fulfilled the condition entitling them to the money.

Since there is not now enough money to go around among the claimants, by consent they agree to abate ratably. Let a proper order pass.

In re A. O. BROWN & CO.

Ex parte PARKER.

(District Court, S. D. New York. April 4, 1911.)

1. SALES (§ 316*)—RIGHT OF SELLER TO RESCIND—INSOLVENCY OF BUYER—PAYMENT BY CHECK.

Where on a delivery of property a check is given in payment, and the drawer, drawee, and payee all live in the same city, so that it may be presented at once, in the absence of an agreement or understanding to the contrary, the drawer must be held to represent that the drawee is already in funds to meet it, and, if not, the payee may rescind the sale and reclaim the property.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 890-895; Dec. Dig. § 316.*]

2. BANKRUPTCY (§ 140*)—BROKERS—RIGHT OF CUSTOMER TO RECLAIM STOCK.

Claimant directed bankrupts, who were brokers, through a branch office, to sell certain stocks, which the bankrupts did, delivering stock of their own and receiving payment therefor. On being advised of the sale, claimant delivered her stock to the manager of the branch office, and received from him a check in payment therefor. There were no funds in the drawee bank to meet the check at the time it was drawn. The bankrupts' insolvency followed, and it was not paid. *Held*, that claimant had the right to recover the proceeds of her stock from the bankrupts' trustee, if they had not been dissipated, and, if they had been, she had the right to rescind the delivery and reclaim her stock, subject, however, to the right of the trustee to retain it by paying her the amount for which it was sold, and that it was therefore practically immaterial whether or not the bankrupts had converted the proceeds.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.*]

In the matter of A. O. Brown & Co., bankrupts. Ex parte Bessie H. Parker. Order in favor of claimant.

See, also, 189 Fed. 432.

Ralph Wolf, for trustee.

Henry L. Sprague, for claimant.

HAND, District Judge. [1] It now appears that when Becker gave the check to Mrs. Parker, there were no funds in his account. The question is what Becker's representation really was, and what Mrs. Parker had the right to believe was involved in giving her a check at all. If the natural meaning of the transaction was that there was money there at that time subject to withdrawal by the check, then she may rescind, for confessedly that representation was untrue. If, on the other hand, the representation is only a promise that there will at some future time—that is, when she chooses to present the check, be funds to meet it—then there is no misrepresentation of fact unless Becker at the time did not intend to put the drawee in funds, before the check should be presented, of which there is no evidence.

Now a check is undoubtedly a draft, and, in the case of a time draft, I suppose no one would say that there was any representation by the drawer that the drawee was in funds in *præsentia*. Every one knows that business usage does not contemplate that the drawee shall be in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

funds until the draft is due. The trustee makes a plausible argument, through what he says is the common custom among brokers in meeting out of town checks upon their branch offices. He says that it is customary for the branch house to wire the New York house that a check has been delivered, and for the broker to put the drawee bank in funds by wire before the check goes through the clearing house. It is doubtless the custom to deposit checks and so to take 24 hours to cash them, and, if that were a part of the engagement so that the check could not be presented for payment except at the end of 24 hours, then the check would properly be held to be a time draft; and, though the time would be short, it would be also quite proper to hold that to give the check was no more than a representation that at the end of the 24 hours the drawee would be in funds. Were that the fact, it would be impossible to show fraud or a misrepresentation of fact without showing that the drawer did not intend to put the drawee in funds when he uttered the check. However, though it is the usual custom to deposit checks, it is by no means the inevitable custom, nor is there anything implied in the transaction to prevent the payee from going at once to the drawee's paying teller and demanding payment in cash, or requiring a certification. Unless there is some agreement to the contrary, this right of the payee gives him immediate control over the funds in the drawee's hands, and he certainly has the right to assume that the drawee will be in funds when he appears, and that the drawer so means to represent.

In short, the period of the time of presentation of a check is by no means one day, but it is the earliest time within which the check may be presented, and that, of course, varies with the facts. In a case like that at bar, where the drawer, the payee, and the drawee all live in the same city, and where the payee may cash the check in a few minutes, the time is reduced practically to nothing, and it seems to me that the drawer must be held to represent that the drawee is already in funds, unless he indicates in some way that the check is not to be presented at once. It is of no consequence that the payee may wait and so take a chance of the drawer's and the drawee's continued solvency. If the check means that the drawee is in funds now, and if the payee accepts it as cash, he may rescind if he was misled, however innocently.

The authorities are not helpful upon this precise proposition. I have found no case in which the point was taken that there were no funds in the drawee's hands at the time the check was given, except cases in which there was in addition clear proof of fraud, such as *Earl of Bristol v. Wilshire*, 1 B. & C. 514; *Keable v. Paine*, 8 A. & E. 555. In the other cases the rule seems to be confused with the rule which exists in many jurisdictions that delivery by a seller upon a cash sale is not of itself a waiver of the condition of payment. I believe that this rule is quite wrong in principle (*Williston on Sales*, § 346); nor is there any authority binding upon me. At least such a delivery must be held to be presumptive evidence of waiver and this appears to be the rule in New York. *Osborn v. Gantz*, 60 N. Y. 540. That question, however, in the light of the present facts is immaterial.

[2] The last question is as to whether the failure to prove the dissipation of the proceeds changes the claimant's rights. Whether the proceeds are traceable or not, the trustee still has the right to keep this stock, even though acquired by fraud, if he will pay the proceeds, or the amount of the proceeds, for which it was sold. This right he has in spite of the fact that the claimant's assent to a delivery was procured by fraud, because her assent was not necessary to the brokers' right to demand the stock at any time upon tender of the proceeds. He therefore, even after the delivery is rescinded, retains the right which the brokers had to retain the stock upon that condition.

Coming back now to the failure to prove that the proceeds have been dissipated, it is apparent that this makes no difference in the result, because, if they are not dissipated, the claimant is confined to the proceeds, while, if they are, yet the trustee may still retain the stock upon paying to her the equivalent. How, then, can the trustee complain of a failure to prove that he has not got the proceeds? If he has them, he must pay them over but he may keep the stock. If he has not got them, he may pay over their equivalent and keep the stock. The only change in his position is that, if she had proved that he did have the proceeds, he would have had to pay them, whether or not the value of the stock had fallen. That, however, is her right, not his. Her failure to prove that only eliminates her right to insist on the proceeds. If he is given the option to pay either amount of the proceeds or stock, which option he has even if the proceeds themselves be gone, he is in no worse position than if he had the proceeds. Therefore, if an order be entered giving him that option, the issue of whether or not the proceeds are dissipated becomes immaterial.

What I said in the earlier opinion was correct enough, and would result strictly in compelling the claimant to show that she could not get the actual proceeds. Since, however, the amount of the proceeds is the precise equivalent of the actual proceeds, it seems to me of no consequence to require proof of a matter, which, while formally necessary, makes not the slightest substantial difference in result. As it does not concern any one whether the claimant traces and gets the actual proceeds, or gets the equivalent sum of money by way of tender from the trustee, I shall not require any proof upon the subject. I had not carried out the detail of this reasoning before, as it was not necessary, while there was no misrepresentation, and while so far as appeared the claimant upon delivering the stock had accepted the broker's credit.

Let an order pass directing the trustee at his option to turn over either the certificate or the amount of the proceeds at which the stock sold.

MINNEAPOLIS ST. RY. CO. v. CITY OF MINNEAPOLIS et al.

(Circuit Court, D. Minnesota, Fourth Division. April 21, 1911.)

1. STREET RAILROADS (§ 28*)—FRANCHISES—CONSTRUCTION.

The right of a city granting a street railway franchise subject to the right at any time to designate any other line of railway in the city as demanded by the public necessities, and to extend any existing line, and, on the failure of the company to construct and put in operation any line demanded within a reasonable time fixed by the council, to grant to any other company the right to construct and operate a street railway in the streets so designated, can only be exercised by an order which fixes the time within which the company must construct and operate any line ordered, and, before the council may give another company the right to maintain a car line on any street in which a line has been ordered, it must determine the time within which the company must complete the work.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 28.*]

2. STREET RAILROADS (§ 28*)—FRANCHISES—ENFORCEMENT—REMEDY OF MUNICIPALITY.

The sole remedy of a city granting a street railway franchise subject to the right to designate other lines of railway and to extend any existing line, subject to the right to grant to any other company the exclusive right to operate a street railway in the streets so designated on the company failing to comply with the extensions demanded, is on the failure of the company to comply with extension orders, by granting to some other company the right to operate cars on streets on which extensions or new lines have been ordered.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 28.*]

3. CONSTITUTIONAL LAW (§ 241*)—EQUAL PROTECTION OF THE LAW—MUNICIPAL ORDINANCES—VALIDITY.

An ordinance directing a street railway company to construct and equip tracks on designated streets and put the same in operation does not deny the equal protection of the law to the company which accepted a franchise, giving the city the right to designate other lines or the extension of existing lines as demanded by public necessities.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 700, 701; Dec. Dig. § 241.*]

4. INJUNCTION (§ 144*)—RESTRAINING ENFORCEMENT OF MUNICIPAL ORDINANCES—PLEADING.

One suing to restrain the enforcement of a municipal ordinance may allege extraneous facts showing that the ordinance is in fact void, and the allegations of the bill must be taken as true on motion for temporary injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 316, 317, 321; Dec. Dig. § 144.*]

5. CONSTITUTIONAL LAW (§ 133*)—IMPAIRING OBLIGATION OF CONTRACT—FRANCHISES—ORDINANCE.

An ordinance granting a street railway franchise required the company at its own expense to remove its tracks when the city desired to make any improvement on the streets including the laying of sewers, and reserved to the city the power to designate any other line of railway or an extension of any existing line as demanded by the public necessities. A subsequent ordinance, accepted by the company, provided that sewers should be built in streets before new lines should be ordered or existing lines be extended, and later such ordinance was amended so as to omit all reference to sewers. *Held*, that the amended ordinance was binding on the company though not accepted by it, because the amendment was an exercise of the power of the city to regulate the manner of carrying

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

on the business of the road and the use of the streets, and hence an ordinance directing the construction of a line over a street in which there were no sewers was not invalid as impairing the obligation of a contract.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 376; Dec. Dig. § 133.*]

6. CONSTITUTIONAL LAW (§ 297*)—DUE PROCESS OF LAW.

Such ordinance was not invalid as depriving the company of its property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 297.*]

7. STREET RAILROADS (§ 28*)—ORDINANCES—EXTENSIONS—VALIDITY.

Where a street railway franchise reserved to the city the right to direct the construction of new lines and the extensions of existing lines, when demanded by public necessities, an ordinance directing the construction of tracks nine miles in length could not be adjudged invalid as arbitrary and unreasonable, on the ground that the public necessities did not demand the work, the city council having determined that public necessities demanded the work, and the general manager of the company stating that 9½ miles of extensions during the year would not be unreasonable, but within the power of the company to make.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 28.*]

8. CONSTITUTIONAL LAW (§ 133*)—DUE PROCESS OF LAW—IMPAIRING OBLIGATION OF CONTRACT—STREET RAILWAY EXTENSION—MUNICIPAL ORDER.

A street railway company accepting a franchise to operate a street car system in a city, subject to the right of the city at any time to designate other lines of railway as demanded by public necessities, or the extensions of existing lines, with the right of the city to grant to any other company the exclusive right to construct and operate a street railway in streets so designated on the company failing to comply with the orders of the city, may be put to its election on the adoption of an extension ordinance as to whether it will build the line ordered or allow another company to build it, and any future action by the city in exercising its rights under the franchise is within the scope of the franchise, and will not deprive the company of its property without due process of law nor impair the obligation of a contract.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 133.*]

9. CONSTITUTIONAL LAW (§ 115*)—OBLIGATION OF CONTRACTS—LEGISLATURE.

Resolutions or orders of a city directing a street railway company to construct new lines or extend existing lines are legislative acts, within the rule that a legislative act may not impair the obligation of a contract.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 115.*]

10. STREET RAILROADS (§ 65*)—REGULATIONS—MUNICIPAL AUTHORITY.

A city granting a street railway franchise may, within the police power, regulate the service for public convenience, safety, or health.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 65.*]

11. STREET RAILROADS (§ 70*)—REGULATIONS—ORDINANCES—VALIDITY.

An ordinance of a city limiting the number of passengers on each street car to 75, and imposing a penalty for its violation, is a valid exercise of the power of the city to regulate street car service of a company having a franchise to operate a street car system in the city.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 70.*]

12. STREET RAILROADS (§ 70*)—REGULATIONS—ORDINANCES—VALIDITY.

A provision in a city ordinance limiting the number of passengers on street cars that the company shall post in its cars the number of people to be reasonably carried in each car is valid.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 70.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

13. STREET RAILROADS (§ 70*)—REGULATIONS—ORDINANCES—VALIDITY.

An ordinance requiring a street railway company, having a franchise to operate street cars in a city subject to the duty to furnish and run a sufficient number of cars to accommodate the traveling public on all streets which they occupy for railway purposes, to continuously provide and operate on each car line a sufficient number of passenger cars to receive and carry all persons desiring transportation without admitting into the car more passengers than the carrying capacity thereof, does no more than declare obligations imposed on the company by the franchise, and is not invalid as subjecting the company to a forfeiture of its franchise for failure to comply with the ordinance.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 70.*]

14. MUNICIPAL CORPORATIONS (§ 661*)—CONTROL OF STREETS—POLICE POWER.

Where the state commits to a city the care of its streets and the enforcement of all regulations for controlling the operation of street cars thereon, the city has the exclusive right to regulate the streets, not only for the people who live there, but for all who come there.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1432, 1434-1437; Dec. Dig. § 661.*]

15. STREET RAILROADS (§ 70*)—REGULATIONS—ORDINANCES.

An ordinance providing that when any passenger shall be admitted into any street car in excess of the carrying capacity thereof as defined, the company shall forfeit a specified sum for each passenger so admitted, merely provides for a penalty for receiving persons in excess of the specified number, without requiring or authorizing it to receive more than such number, and the ordinance is valid.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 70.*]

16. STREET RAILROADS (§ 70*)—REGULATIONS—ORDINANCES.

A city ordinance which prohibits a street railway company from admitting passengers on any of its cars in excess of the carrying capacity of the car as defined, relates only to the city, and only prohibits the company while in the city from taking on passengers after the prescribed number has been reached, and is not invalid so far as it affects interurban business and the company may bring into the city a car carrying more passengers than the maximum.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 70.*]

17. STREET RAILROADS (§ 70*)—REGULATIONS—ORDINANCES.

A municipal ordinance prohibiting a street railway company from admitting passengers into any of its cars in excess of the carrying capacity thereof as defined is not invalid for failing to provide for extraordinary occasions, and, where an extraordinary occasion arises, it may defend a violation by establishing the facts.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 70.*]

18. STREET RAILROADS (§ 70*)—REGULATIONS—ORDINANCES.

The proviso in an ordinance fixing the maximum number of street car passengers, and imposing a penalty on the street car company for a violation thereof, that company shall not be liable to the penalty in any case wherein another car on the same line proceeding on the same track and in the same direction and containing fewer passengers than the carrying capacity, shall at the time be within 300 feet of the point where the excess passenger is admitted, does not impose any obligation on the company, and does not require it to run its cars 300 feet apart, but merely relieves the company from the obligation imposed on it in another part of the ordinance, and the proviso is not violative of the federal Constitution.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 70.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

19. INJUNCTION (§ 85*)—ORDINANCES.

An ordinance regulating street car service, and fixing the maximum number of passengers permitted on cars, must be obeyed at the expense of the street railway company, and it cannot restrain the enforcement of the ordinance on the ground that obedience to it will necessitate an enormous expense where the claim that such expense will be incurred results from an erroneous construction of the ordinance.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 155, 156; Dec. Dig. § 85.*]

20. INJUNCTION (§ 144*)—PLEADINGS—CONSTRUCTION.

Though a motion for temporary injunction to restrain the enforcement of a municipal ordinance must be determined by the allegations in the bill, yet where the allegations are based on an unwarranted construction of the ordinance, the court must disregard the allegations.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 316, 317, 321; Dec. Dig. § 144.*]

In Equity. Suit by the Minneapolis Street Railway Company against the City of Minneapolis and others. Motion for temporary injunction denied.

N. M. Thygeson and J. C. Michael, for complainant.

D. Fish, for defendants.

WILLARD, District Judge. After hearing the arguments of respective counsel, the court rendered the following decision, orally:

I will follow the order pursued by counsel, and in discussing the two branches of this case, I will take up first the so-called construction and extension ordinances.

[1] Section 3 of the original ordinance of 1875 provides as follows:

"The city council may at any time designate any other line of railway in the said city as a line demanded by the public necessities; and may also designate an extension of any existing line or lines.

"And in case said company, upon being notified of such designation shall not within such reasonable time as shall be fixed by the city council, construct and put in operation such line, then the city council may charter to any other company the exclusive right to construct and operate a street railway in the street or streets so designated."

I eliminate from this discussion all the ordinances passed prior to 1911. I do so, because in all of them, except two, there is no attempt whatever to fix any time within which the street railway company must complete the line. These ordinances on their face, so far as they are an attempted compliance with section 3 of the ordinance of 1875 are completely null and void, impose no obligation or liability upon the company, and furnish no ground for the claim on the part of the company that they impair in any way the obligation of its contract with the city, or deprive it of its property without due process of law.

There is one ordinance which directs the company to commence construction forthwith, but that is not in compliance with the terms of section 3. The ordinance relating to the Franklin Avenue line requires the company to commence construction by April 1st, but nowhere in that ordinance is there any determination of the time within which the line shall be completed; and that is an essential feature of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

section 3. Before the city council can give another company the right to maintain a car line upon any street in the city on which an extension has been ordered, it must determine the time within which the complainant company must complete such extension. That has not been done in any of these ordinances passed prior to 1911. They are all entirely worthless and inoperative, in so far as they attempt to impose any duty upon the railway company. I should require considerably more argument than I have heard now before I should be convinced that the street railway company, under the terms of the various ordinances now existing, could be compelled by the city to make any extensions, or to construct any new lines. My present opinion, which of course may be changed by future argument, is that there is no such power in the city. This point was not overlooked when the original ordinance of 1875 was made. Not only was there a provision with regard to new lines, but there was a provision in section 2 with regard to other lines, and that section expressly required the company to construct lines upon determined streets, required them to be completed within a specified time, and provided if they were not completed within that time that all the rights of the company given by the charter should be lost. But when they came to treat of extensions and new lines, while they provided that they might be ordered, they made no provision that the city council might compel their construction, neither did they make any provision if the new lines were not constructed and such extensions were not made that the company should forfeit all its rights under the charter. The remedy was made specific and was set forth in terms.

[2] The ordinance indicates plainly that the only remedy which the city had then, and has now, was and is the granting to some other company the right to maintain street cars upon these streets as to which extensions or new lines had been ordered. To my mind, that is the only remedy. There is no power in the city council to compel the construction of these new lines. It is said that that remedy is valueless, that it is worthless; that no other company would take a charter to construct these extensions or new lines. Whether this is true or not is of no importance. The parties made the contract as it now is, and they are bound by it. But it may be added that at the time the contract was made it was not an absolutely inadequate remedy. Those were the days of horse cars. They were not the days when street railways were operated from a central plant which required the expenditure of an enormous amount of money for its construction.

There is, moreover, another provision in section 4 of the ordinance which makes the remedy apparently of more value than it appears on its face to be. That section specifically provides that any company to which a charter was granted to construct lines on a street in which the present company refused to make construction should have the right to use the rails and tracks of the old company under such terms as might be determined by the district court of Hennepin county. So I do not think it can be said that when that contract was made it was entirely one-sided. I say this is my present opinion upon that

branch of the case; but it is not necessary to decide the question now, because in my judgment we have not yet reached it.

It is claimed by the complainant that the four or five—four, I think—ordinances passed in 1911 are void because they impair the obligation of the contract between the company and the city, because they deprive the company of its property without due process of law, and because they deny the company the equal protection of the law.

[3] I shall dismiss the last claim without any further consideration, because I think there is absolutely nothing in it. But upon the first two claims it is necessary to consider the precise terms of the ordinances which are thus assailed. I will take as an example Exhibit M. That ordinance was approved on the 17th day of March, 1911, and provides for an extension of the line upon Plymouth avenue, from the terminus of the present car line on said avenue west to Sheridan avenue.

The ordinance commences by declaring:

"That street car service is demanded by the public necessities upon the following named avenue."

—and then says:

"That the Minneapolis Street Railway Company be and it is hereby authorized and directed to lay, construct, and equip a double track electric street railway upon and over said Plymouth avenue," etc., "and to put the same in operation within the period hereinafter prescribed, as a part of its city street car system."

The ordinance further provides (and I call it an ordinance although it is denominated a resolution):

"That the period of five months immediately following the passage of these resolutions be and is hereby declared to be, in the judgment of this council, a reasonable time within which to complete said construction and equipment."

That is all there is of the ordinance. It does not in any way indicate what the city proposes to do if the company does not comply with the ordinance. It does not order or direct any officer of the city to take any action whatever. It simply declares that the public necessities demand this construction, fixes the time within which the construction shall be made, and orders the company to make it.

Now, wherein does that ordinance impair the obligation of the contract between the company and the city, or in what way does it deprive the company of its property without due process of law? It is an ordinance—a resolution—passed in strict conformity with section 3 of the ordinance of 1875. But it is said that it violates the contract in the respects claimed, because upon some of these streets it is made to appear by the bill that sewers have not yet been laid; and it is claimed that by the terms of the contract between the parties no extensions can be ordered until sewers have been laid.

[4] Of course it is entirely proper for the orator to allege extraneous facts which show a resolution passed by the city council to be in fact void. So I must take the allegations of the bill with regard to the nonexistence of sewers upon any of these extensions to be true.

[5, 6] Legislation with regard to sewers appears in the original ordinance. By that ordinance the company was bound at its own expense to remove its tracks whenever the city desired to make any improvements on the streets, including the laying of sewers. But in the ordinance approved December 29, 1892, there is the following:

"Sewers shall be built in all streets before new lines shall be ordered, or existing lines shall be ordered extended thereon, and said company shall only be required to construct the lines so ordered between the 1st of April and the 1st of November."

That ordinance was accepted by the company, and the ordinance itself provided that it should not take effect until so accepted. It related to transfers, and why this matter of sewers was put in does not appear; but it was put in there, and of course it was binding upon the city as long as it stood there. But on July 28, 1893, an ordinance was passed over the mayor's veto, amending section 6, which was the section treated of in the ordinance of 1892, and as so amended the provision in regard to sewers was omitted; so that, as the law now stands, there is no provision requiring the city to lay sewers in the streets before the street car company can be ordered to construct new lines or extensions. It is claimed, however, by complainant that this ordinance of 1893 was never accepted by the company, and consequently, it cannot in any way affect the rights which were granted to it with respect to sewers by the ordinance of 1892. Upon that subject I consider the opinion of the Supreme Court in a case between these same parties, the City of Minneapolis v. Minneapolis Street Railway Company, 215 U. S. 417, 30 Sup. Ct. 118, 54 L. Ed. 259, as conclusive.

Section 8 of the ordinance of 1890 provides as follows:

"In the construction, maintenance and operation of said lines of street railway, said Minneapolis Street Railway Company, its successors and assigns, shall at all times be subject to all the conditions and limitations and other provisions of an ordinance entitled 'An ordinance authorizing and regulating street railways in the city of Minneapolis,' passed July 9, 1875, and approved July 17, 1875, as the same has been amended and is now in force, and all other ordinances of said city now in force or hereafter adopted, so far as applicable."

It was held in the case cited that that ordinance giving the city power to regulate by future ordinances the construction, maintenance, and operation of all lines did not give the city power to regulate fares, so as to infringe the contract, or take away what had been secured in that respect by the ordinance of 1875. Precisely what was meant by the words "construction, maintenance, and operation" was decided in that case, where it was said on page 435 of 215 U. S., page 125 of 30 Sup. Ct. (54 L. Ed. 259):

"The right to future control under section 8 was to include the 'construction, maintenance and operation' of the line of the street railway company. Did this undertaking have the effect to abrogate the contract right already existing, and to subject the company for the future as to the right to charge fares, to the discretion of the city council? Or, do the terms 'construction, maintenance and operation' have reference to the manner of carrying on the business of the road, the laying of its tracks, the use of the streets, the keeping up of the equipment, the safety of the passengers and the public,

and similar matters not involving the right to charge fares? We think these terms refer to the latter class of rights and privileges. Such is the import of the words used, and the subject of rates of fare is not mentioned."

I think that is conclusive upon this question. It is distinctly held there, as I understand it, that the city council has the right by future ordinances to regulate and control the manner of carrying on the business of the road, the laying of the tracks, the use of the streets, and the keeping up of the equipment. When we consider the meaning of the term "use of the streets," we must conclude that it includes the question whether the tracks should be laid before the sewers are put in, or after they are constructed. So I eliminate from the consideration of this matter the question with regard to sewers, because I consider that the ordinance of 1893 was binding upon the company, although not accepted by it.

[7] It is further claimed that the resolution or ordinance Exhibit M is invalid because it is arbitrary and unreasonable, because the public necessities do not demand any such extensions as are ordered. Upon that point it is important to notice that section 3 of the ordinance of 1875 provides that the city council may at any time designate any other line of railway in the said city as a line demanded by the public necessities. It would be going a great way for the court, after the council has determined that the public necessities do demand an extension, to say that they do not demand it. Of course, there may be cases where the action of the city council is so arbitrary and entirely unreasonable as to impose that duty upon the court. If, for instance, the city council should order the construction of a line of railway upon every street in the city, no court would for a moment hesitate to say that such action was arbitrary and unreasonable, and that such a burden could not be imposed upon the company. But that is not this case. Here the ordinances ordered extensions amounting to some nine miles of track, and the city council has declared that the public necessities demand such extensions. We have also evidence that the general manager of the street railway company has stated that 9½ miles of extensions during the present year (I do not remember the exact words), but that the expense of putting in that amount would not be unreasonable, and that it would be entirely within the power of the company to make such extensions. Under these circumstances it is impossible for me, and I think impossible for any court, to say that this ordinance Exhibit M, or the ordinances taken together, are so arbitrary and unreasonable as to deprive the company of its property without due process of law, or are such as would impair the obligation of the contract between the parties.

Reference has been made to the case of the Northwestern Telephone Company against the city of Minneapolis reported in 81 Minn. 140.¹ That was a case in which the city council had ordered that the wires of the Telephone Company be put underground through a large extent of territory in the city. It was alleged in the bill, as I remember (I have not examined the case for some months), that the action of the city council was arbitrary and unreasonable, and that the public necessities did not require any such action. To that bill there was a

¹ 82 N. W. 527, 86 N. W. 69, 53 L. R. A. 175.

demurrer and the court said, that the city, by its demurrer, admitted that the action was arbitrary and unreasonable. My understanding of the final decision in the case is that it was based upon the allegations contained in the bill.

[8] It is further said, admitting that the only remedy which the city has here is the right to grant to another company a franchise to make these extensions, that the city cannot put the company to its election now as to whether it will build, or will allow another company to build, them. But that is the very election which they agreed to make when they accepted the terms of section 3 of the original ordinance. They agreed, then, if the city should order an extension made which the public necessities demanded and it was not constructed within the time fixed, that the city council might grant to another company the right to make that extension.

[9] I assume for the purpose of the argument that these resolutions or ordinances are legislative acts, and I think they are, as a matter of fact. I think they go beyond mere executive or administrative action. They determine something which is within the legislative power. But with that assumption, in what way do they now impair the obligation of the contract, or in what way do they now deprive the company of its property without due process of law, assuming that they are invalid? The time when the city, if they are invalid, will deprive this company of its property will be when the council takes some future action against the company for its failure to comply with these resolutions. If the company does fail to comply with them, and the city council then grants a franchise to another company, the time will have arrived when the company could take some action, and it could then make a valid assertion that its contract rights have been impaired. If the order directing the construction was invalid, then the order granting the franchise would be invalid. Then would be the time for the company to bring such suit as this; but, in my judgment, that time has not yet arrived. The legality of these resolutions must be determined from what they show upon their face. It is only a legislative act that can impair the obligation of a contract. Such an act must be an act of the Legislature, or of some board which has been given by the Legislature legislative power. Ordinance Exhibit M relates simply to the building by the company of a new line. This is the only action which the council has taken. Any future action taken by an officer of the city, relying upon this ordinance, would be entirely without its scope, and would not be an act impairing the obligation of a contract, and would not deprive the company of its property without due process of law, for the ordinance on its face contemplates no future action.

The fourteenth amendment does not declare that no man shall be deprived of his property without due process of law, but that no state shall deprive any person of his property without due process of law. If an officer of the city without any legislative authority from the council or from the state undertake to deprive this company of its property without due process of law, its remedy is in the district courts

of this state, and it can there assert its rights against any one invading them.

There is an allegation in the bill that the city has threatened to forfeit the rights of the company to its franchises on the lines extended. But no such threatened action on the part of any city official would be warranted by this resolution Exhibit M. Upon this branch of the suit *Des Moines v. City Railway Company*, 214 U. S. 179, 29 Sup. Ct. 553, 53 L. Ed. 958, and also the case of the *St. Paul Gas Light Company v. St. Paul*, 181 U. S. 142, 21 Sup. Ct. 575, 45 L. Ed. 788, are in point.

The latest utterance upon the subject is found in the case of the *Atchison, T. & S. F. Ry. Co. v. City of Shawnee*, 183 Fed. 85. That being a determination of the Circuit Court of Appeals of this circuit; the decision is of course binding upon this court, but the resolution in that case goes much farther than the resolution in this case. It was there said:

"It is more than a mere declaration of the attitude of the city and a direction to its law officer to bring suit in court. It not only denies the company has any right or title to the street arising from a lawful vacation, but demands that it shall assume the burden of opening it up and restoring it to public travel. The resolution is militant, not merely declaratory."

In other words, it was a determination by the city of Shawnee that the railway company had no right whatever to a piece of land which it in fact owned. For these reasons I have come to the conclusion that the bill furnishes no authority at all for holding that the ordinances or resolutions to which I have referred, and which are limited as I said before to those passed in 1911, are null and void. They are in my judgment valid, and, being valid, there is no ground upon which a temporary injunction can be issued.

[10] That disposes of the first branch of the case, and I come now to the second branch, which relates to what is called the service ordinance. The law upon this subject is well settled, and I read from an opinion in the case of the *Edison Electric Light & Power Company of St. Paul and St. Paul Gas Light Company v. Blomquist et al.*, 185 Fed. 615, rendered by me on the 20th of March of this year:

"The law governing the rights of city councils to regulate public service corporations is not doubtful. In *Northern Pacific Railway v. Duluth*, 208 U. S. 583 [28 Sup. Ct. 341, 52 L. Ed. 630], it appeared that the railway company after considerable negotiation with the city, in which it denied its obligation to build a viaduct, in 1891, entered into a contract with the city, which contract provided that the city should build the viaduct, and that the railway company should contribute to the expense of its construction \$50,000. The city undertook for a period of 15 years to maintain the bridge over the railway's right of way. In 1903 the viaduct and its approaches having become dangerous to public use, the city adopted a resolution requiring the railway company to repair the bridge, and commenced proceedings by mandamus to compel it to make such repairs. It was held by the Supreme Court that the railway company could be compelled at its own expense to repair the viaduct, notwithstanding the contract previously made."

In *West Chicago Railroad v. Chicago*, 201 U. S. 506, 26 Sup. Ct. 512, 50 L. Ed. 845, it appeared that the railroad company under the

authority of the city council of Chicago had built a tunnel under the Chicago river. After the completion of this tunnel it became necessary to deepen the channel of the river, for the purpose of public navigation, and to lower the tunnel. It was held that the ordinance of the city requiring the railroad company to do this at its own expense was valid. The court said on page 526 of 201 U. S., pages 523, 524 of 26 Sup. Ct. (50 L. Ed. 845):

"What the city asks, and all that it asks, is that the railroad company be required, in the exercise of its rights and in the use of its property, to respect the public needs as declared by competent authority, upon reasonable grounds to exist. This is not an arbitrary or unreasonable demand. It does not, in any legal sense, take or appropriate the company's property for the public benefit, but only insists that the company shall not use its property so as to interrupt navigation."

In *New Orleans Gas Co. v. Drainage Comm.*, 197 U. S. 453, 25 Sup. Ct. 471, 49 L. Ed. 831, it was held that the changing of the location of gas pipes, at the expense of the gas company, under the streets to accommodate a system of drainage, did not amount to a deprivation of property without due process of law.

In *Cincinnati, Indianapolis & Western Railway Company v. City of Connersville* (November 28, 1910) 218 U. S. 336, 31 Sup. Ct. 93, 54 L. Ed. 1060, the court said:

"The question as to the right of the railway company to be reimbursed for any moneys necessarily expended in constructing the bridge in question is, we think, concluded by former decisions of this court. * * * The railway company accepted its franchise from the state, subject, necessarily, to the condition that it would conform at its own expense to any regulations, not arbitrary in their character, as to the opening or use of streets, which had for their object the safety of the public, or the promotion of the public convenience, and which might, from time to time, be established by the municipality, when proceeding under legislative authority, within whose limits the company's business was conducted."

The court further said in that case:

"This court has said that 'the power, whether called police, governmental, or legislative, exists in each state, by appropriate enactments not forbidden by its own Constitution or by the Constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good.'"

[11] Under that statement of what the law is, I come now to consider whether a simple ordinance limiting the number of people that the company can carry in its cars can be valid. Would an ordinance which only said that 75 people and no more should be carried in a car be valid? Upon that point I can entertain no doubt. It seems to me that it is clearly within the power of the city council, in the exercise of those functions which the state has committed to its care, to make such a provision. It is not necessary to discuss from a practical standpoint the evils which come or result from overcrowded street cars. An ordinance of that kind, saying no more than that the company should not receive more than 75 persons in one of its cars would be valid, and an ordinance which imposed a penalty for receiving more than that number would be also valid. I say 75 persons, and I say that

because 75 is about the number which the company can carry under this ordinance. There has been no claim from counsel that if the ordinance is valid the number 75 is an unreasonable number, and I assume that it is not unreasonable. The city council has determined that it is a reasonable number, and there has been no contention to the contrary. Such an ordinance as that being valid, the question is, Is the ordinance here sought to be enforced valid? I will take up the sections as they appear in the ordinance.

[12] No serious complaint is made as to section 1, which simply requires that the company post in its cars the number of people to be reasonably carried in each car. If such an ordinance is valid, I see no objection to that section.

[13] Section 2 provides that from and after April 15, 1911, between certain hours, "said Minneapolis Street Railway Company shall continuously provide and operate upon every part of each car line maintained by it within said city of Minneapolis a sufficient number of passenger cars to receive and carry all persons desiring transportation thereon, without admitting into any such car more passengers than the carrying capacity thereof. Provided, that for all the purposes of this ordinance two children under the age of six years, present in any car, may be counted as one adult."

What does that section contain more than is contained in one of the prior ordinances? When we turn to the original ordinance of 1875 we find that by section 12:

"It shall be the duty of the company to furnish and run a sufficient number of cars to accommodate the traveling public, on all streets which they shall use and occupy for railway purposes."

The city has the right to limit the number of people to be carried in each car; and section 2 of this ordinance does no more than section 12 of the ordinance of 1875, namely, to require the company to furnish cars for people desirous of transportation.

It is to be observed, and it is a very important point, that no penalty whatever is by this ordinance imposed upon the company for a failure to comply with section 2. No penalty was imposed upon the company by the original ordinance for a failure to comply with section 12. The company is not subject to any fine. But it is said that the company is subject to forfeiture, and that the state can commence an action if the company fail to perform the functions which it agreed to perform. That was exactly what the state could have done at any time, and this ordinance does not for the first time create that right. To say that this ordinance interferes with the right of the state to maintain such a proceeding is to say that which would not be justified either by the law or by the facts.

[14] The state has committed to the city of Minneapolis the care of its streets, and the enforcement of all regulations for controlling the operation of cars upon its streets. It has the exclusive right to regulate its streets, not only for the people who live here, but for all people who come here. The complainant's claim that a resident of Lac Qui Parle county coming to Minneapolis has rights in the streets given by the state which the city cannot take away is entirely unfounded.

[15] Now I come to section 3 of the ordinance which says:

"That whenever any passenger shall be admitted into any of said cars in excess of the carrying capacity thereof as in said ordinance defined, said Minneapolis Street Railway Company shall forfeit and pay to the city of Minneapolis the sum of \$50 for each and every passenger so admitted."

I omit for the present the proviso in that section. What does that section provide so far? It provides no more than if the company receives persons in excess of 75 into a car it shall pay \$50 for each person in excess of that number. There is nowhere found in that section any provision requiring or authorizing the company to receive more than 75 persons. It expressly forbids the taking into a car of more than 75 persons; and expressly forbidding that, of course it altogether abolishes and entirely puts to one side any obligation on the part of the street railway company to stop to take on passengers when there are more than 75 persons in a car. The street railway company with 75 persons in one of its cars has the right to refuse to carry any more passengers in that car.

Counsel speaks of the common-law obligation of the company to stop at crossings and take on passengers; but here the common-law obligation to do that has been modified and necessarily restrained, and practically abolished by this ordinance. The city council has the right to regulate the running of street cars in that respect. If it says in the exercise of its power, as it may say, that after 75 people are in a car no more shall be taken on, that would undoubtedly relieve the company of its obligation to stop and take on passengers. The company would have a perfect right to run a car from one end of the line to the other, if there are 75 people in it, without stopping anywhere except to allow passengers to alight. This ordinance does not require the company to stop a car after 75 people are in it, and imposes no penalty if it refuses to do so.

[16] It has been argued that the ordinance is invalid, because, so far as interurban passengers are concerned, it would require the stoppage at the city line of a car having more than 75 persons in it coming from St. Paul, and the ejectment of some of the passengers. There is nothing whatever in the ordinance which would justify any such construction. It relates to the city of Minneapolis, and the only prohibition is that the company shall not in the city take on any passengers after the prescribed number has been reached. It does not prohibit them from bringing into the city of Minneapolis a car with 80 to 100 people on it.

[17] It has been suggested that this ordinance is defective in not providing for extraordinary occasions, such as football games, baseball games, grand opera, and entertainments of that nature, when there are a very large number of people to be carried. But the ordinance does not in any manner change the law in respect to those matters from what it is now. The law does not compel the company to take on these people if the car is crowded (and in contemplation of the law more than 75 passengers would crowd a car) under a penalty for not doing so; neither did the old law before this ordinance was passed make any such requirement.

It was suggested in the argument that on the occasion of a grand opera entertainment in St. Paul people from Minneapolis on one day all returned on the Selby-Lake line, which was swamped thereby, and that on the next day they all returned on the Como-Harriet line, and the consequence was that those cars were overcrowded. It was urged that it would be a great hardship if the street railway company were liable in that case for not furnishing cars sufficient to meet the demands of the traffic. Under the law as it stood at the time of this occurrence, the company was subject to a suit by the state for its failure to comply with section 12 of the ordinance of 1875. But in such a case it would have been undoubtedly a complete defense to show that the occasion was an extraordinary one. So, under the new ordinance, if there should be at an unusual hour or occasion an extraordinary demand for cars, and the company should not be able to furnish them, it would be liable to a suit by the state. But, it would be a complete defense to say that the demand was extraordinary. In any event, however, this ordinance nowhere imposes any penalty upon the company for a failure to furnish sufficient cars either for this or for any other occasion.

[18] Now, I come to the proviso contained in section 3, which declares as follows:

"Provided, that such payment shall not be required in any case wherein another car on the same line, proceeding on the same track and in the same direction and containing fewer passengers than the carrying capacity thereof, shall at the time be within 300 feet of the point where said excess passenger is admitted."

That, to my mind, is the weakest part of the ordinance, and shows that the city council expressly allowed the public to do what they refused to allow the street car company to do. They refused to allow the company to overcrowd its cars, but did allow the public to do so. I can see no reason whatever for any such proviso in the ordinance. If it is an evil to crowd 150 people into a car, it is just as much of an evil when there is another car within 300 feet as it is when there is another car following within 600 feet. I see no defense whatever for that proviso. But the fact that I see no reason for putting that proviso into the ordinance is no ground for saying that the whole ordinance is unreasonable, or that the company has been deprived of its property without due process of law, or that the ordinance impairs the obligation of the contract between the street car company and the city.

What does this proviso in fact require? It has been said that it requires the company to run its cars 300 feet apart during the hours named in the ordinance. I find no provision of that kind whatever in the ordinance. There is nothing in the ordinance in this section 3 or in the proviso, from which any such requirement as that can be spelled out. The ordinance in section 2 says that the company shall furnish cars sufficient in number for the convenience of the public; but it nowhere says that they shall be run 300 feet apart. The fact is that, so far from the proviso imposing an obligation upon the company, or depriving it of its property without due process of law, it relieves the company from the obligation imposed upon it in another

part of the ordinance. In other words, the city did not go as far as it might have gone. It might have prohibited the company from receiving more than 75 persons in a car at any particular time, whether there was a car following it or not; but by this proviso it relieved the company from such obligation, and said that it might receive, under certain circumstances, more persons in a car than 75. While I think the proviso is entirely unjustifiable from the standpoint of public policy, yet I see nothing in it which would justify the court in declaring that it infringes the Constitution of the United States. It is not for the court to make regulations, that duty is intrusted to the legislative power. All the power which this court has in a case of this kind is simply to determine whether the Legislature has violated any constitutional provisions.

[19] The decisions to which I have heretofore called attention defining the powers of city councils have declared that where the regulations are for public convenience, public safety, or public health, they are proper regulations with which the companies must comply. Those decisions also hold that a company must comply with these regulations at its own expense, no matter what that expense is. It is readily seen that in the case of *West Chicago Railroad v. Chicago*, which involved the construction of a tunnel under the Chicago river, the expense must have been very large; yet that expense being required by the public in the interest of navigation, was cast upon the company and not upon the city. So in the *New Orleans Case*, the expense of the removal of the gas pipes in the streets of the city to accommodate the system of drainage must have been very great; yet that burden was cast upon the company and not upon the city. So it would seem that the question of the expense to which a company is put in order to comply with the terms of an ordinance, is not important.

But, waiving that point, I am asked to consider the expense to which this company would be put in complying with this ordinance, as far as it appears from the proper allegations in the bill. It is alleged in the bill that the ordinance would require the purchase of 2,400 cars, and the employment of many more employes, and that the total expense thereof would be over \$14,000,000. But it is admitted that such estimate is based upon a construction of the ordinance which requires cars to be run on every line 300 feet apart during the hours named. That construction is not warranted by anything found in the ordinance. There is no ground for saying that the company is required to run cars 300 feet apart; and there is no ground for saying that it is required to buy cars sufficient in number to fulfill such a condition. This statement as to expense being based upon that assumption, and that assumption being incorrect, it follows that there is no allegation in the bill which the court can consider as to what the additional cost to the company would be, in order that it might comply with the terms of the ordinance. It certainly cannot cost anywhere near the sum alleged in the bill, because the sum mentioned is arrived at by an entirely inaccurate assumption.

[20] It is said that the case must be determined by the allegations in the bill. That is true, but where the allegations in the bill are based

upon a construction of the ordinance which, upon the face of that ordinance, is seen to be unwarranted, then it is the duty of the court to disregard the allegations of the bill.

The case from the city of Detroit was much commented on by counsel for the complainant. But all argument of that kind is completely answered, by reading the first section of the ordinance there in question. That section is as follows:

"Every person, firm or corporation operating cars upon the streets of the city of Detroit shall, between the hours of 5 o'clock a. m. and 8:30 o'clock a. m., and between the hours of 11:30 a. m. and 2 o'clock p. m. and between the hours of 4:30 o'clock p. m. and 6:30 o'clock p. m., Sundays excepted, provide a sufficient number of cars of sufficient capacity to accommodate and provide for the transportation of passengers, so that no car, in consequence of the failure to so provide, shall carry a greater number of passengers than the seating capacity of said car and one-half as many more."

That is practically as the ordinance here reads:

"Provided that it shall not be lawful for any car, when it is filled with passengers to or in excess of the number herein specified, to pass by without stopping for additional passengers, or decline to receive passengers, whenever so signaled, unless another car on said line and following in its rear is within a distance of two hundred feet."

That ordinance is very different from this ordinance. That ordinance also provided in section 5 that "any violation or failure to comply with the provisions of this ordinance shall be punished by a fine not to exceed one hundred dollars." That ordinance in one breath prohibited the company from carrying more than 75 passengers in a car, and in the next breath required it to carry more than 75 passengers in a car; so that it in fact required the company to carry any number of persons that might be got into a car, but for each person over 75 required the company to pay a fine. That is the legal effect of the ordinance. Under that ordinance, if a car has 75 persons in it, and a person wants to get on, the car must stop, and the company must take him on, but it must pay for that person a fine of between \$5 and \$100. The only way by which the company could be released from this liability was by running cars every 20 seconds. That would impose so tremendous a liability and obligation upon the company in the purchase of new equipment, that the ordinance was held by Judge Swan to be unreasonable and void. That decision seems to be based largely upon the fact that so large an equipment could not be provided within the time given by the ordinance. If we had here such an ordinance as that I should find no difficulty whatever in coming to the same conclusion as was reached in that case.

But here we have no such ordinance; we have an ordinance which prohibits the company from taking on more than 75 people. Under the terms of this ordinance, the company, as I have said repeatedly, is under no obligation whatever to take on more passengers. The company cannot be punished if it refuses to take on more. The only remedy is for the city to proceed by quo warranto to forfeit the company's charter for a failure to furnish sufficient accommodations for the traveling public.

The conclusion at which I have arrived is that this ordinance does not impair the obligation of the contract between the street railway company and the city, and does not deprive the company of its property without due process of law.

That being my conclusion, the result, of course, follows that the motion for a temporary injunction must be denied.

BRANAMAN v. HARRIS.

(Circuit Court, W. D. Missouri, W. D. May 25, 1911.)

1. POST OFFICE (§ 26*)—FRAUD ORDER—REVIEW BY COURTS.

The only cases in which the courts will disturb a fraud order made by the Postmaster General are when it is tainted with fraud, absolutely without authority of law, clearly outside of the statute, or, perhaps, clearly, palpably, and obviously wrong.

[Ed. Note.—For other cases, see Post Office, Dec. Dig. § 26.*]

2. POST OFFICE (§ 26*)—FRAUD ORDER—GROUND FOR ISSUANCE.

What might otherwise be a legitimate business or profession may be so conducted as to render it a vehicle of fraud and deception and bring it within the purview of Rev. St. §§ 3929, 4041, as amended (U. S. Comp. St. 1901, pp. 2686, 2749), authorizing the Postmaster General to refuse the use of the mails in furtherance of schemes to defraud.

[Ed. Note.—For other cases, see Post Office, Dec. Dig. § 26.*]

Nonmailable matter, see note to *Timmons v. United States*, 30 O. C. A. 79.]

3. POST OFFICE (§ 26*)—FRAUD ORDER—REGULARITY OF PROCEEDING.

A fraud order issued by the Postmaster General after an extensive hearing on two weeks' notice to the party affected is not rendered invalid because of the denial of a general request for a continuance made without any showing of facts to support it.

[Ed. Note.—For other cases, see Post Office, Dec. Dig. § 26.*]

4. POST OFFICE (§ 26*)—FRAUD ORDER—EVIDENCE TO WARRANT ISSUANCE.

Evidence on which a fraud order was issued by the Postmaster General against complainant, who was conducting by mail the business of treating cases of deafness as a specialist, considered, and *held* not only to warrant the making of the order, but amply to sustain it.

[Ed. Note.—For other cases, see Post Office, Dec. Dig. § 26.*]

5. POST OFFICE (§ 26*)—FRAUD ORDER—SUIT TO ENJOIN ENFORCEMENT—PRELIMINARY INJUNCTION.

On an application for a preliminary injunction to restrain the enforcement of a fraud order, the presumption is in favor of the legality of the action of the Postmaster General, and a strong showing is necessary to warrant the granting of the order.

[Ed. Note.—For other cases, see Post Office, Dec. Dig. § 26.*]

In Equity. Suit by George M. Branaman against Joseph H. Harris, Postmaster. On motion for preliminary injunction. Motion denied.

Marley & Grover, for complainant.

Leslie J. Lyons, for defendant.

VAN VALKENBURGH, District Judge. This is a bill in equity to enjoin the defendant, postmaster at Kansas City, Mo., from executing against the complainant an order of the Postmaster General of date September 29, 1910, forbidding the said postmaster to pay any postal money orders drawn to the order of complainant or to the Dr. Branaman Remedy Company, and its officers and agents; as such, and directing the said postmaster to inform the remitter of any such postal orders that payment thereof has been forbidden, and that the amount thereof will be returned upon the presentation of the proper order, and further instructing said postmaster to return all letters, whether registered or not, and other mail matter which shall arrive at his office directed to the said concern and parties, to the postmaster at the offices at which they were originally mailed, to be delivered to the senders thereof with the words: "Fraudulent. Mailed to this address. Returned by order of Postmaster General"—plainly written or stamped upon the outside of such letters or matter; for the reason, that the said Postmaster General, upon evidence satisfactory to him, had found that the said Dr. George M. Branaman and the said Dr. Branaman Remedy Company were at the time of the issuance of such order engaged in conducting a scheme or device to obtain money through the mails by means of false and fraudulent pretenses, representations, and promises in violation of the acts of Congress in such cases made and provided.

It appears: That, upon complaint of numerous persons who had had business dealings with the complainant herein and the Remedy Company above named, the Post Office Department of the United States, through the post office inspectors of the Kansas City division, made an investigation of the business of complainant; said investigation extending over a considerable period. That on the 16th day of May, 1910, the written report of the post office inspectors was forwarded to the Postmaster General, accompanied by numerous exhibits in support thereof. That thereafter, on the 26th day of July, 1910, the Postmaster General, through the Assistant Attorney General for the post office department, forwarded to the complainant, in his own name and in the name of the Dr. Branaman Remedy Company, a notice to show cause why a fraud order should not be issued against them, in accordance with the provisions of sections 3929 and 4041 of the Revised Statutes as amended (U. S. Comp. St. 1901, pp. 2686, 2749). This notice was accompanied by a memorandum outlining the charges made and designated August 10, 1910, at 10:30 a. m., as the time when the respondents might appear and make reply to the charges set forth in the memorandum. This notice and the accompanying memorandum were duly received by the complainant, and on the date named the complainant, representing himself and the Remedy Company, appeared in person and further by Francis G. Hanchett, of Chicago, his attorney, and W. H. Ketcham, Esq., whom he had employed to make certain investigations for his defense in this proceeding. The hearing before the post office department occupied three days, and upon the conclusion thereof complainant, through his attorney, asked and received three weeks' time within which to file a brief. During this period a brief and argument of 38 printed pages was filed and considered. There-

after, on September 29, 1910, the Postmaster General issued the order above referred to denying to the complainant and the Dr. Branaman Remedy Company, its officers and agents, as such, the use of the mails in the manner specified. Thereupon complainant filed his bill in equity in this court to restrain the enforcement of this order, alleging that his business and that of the Remedy Company aforesaid is and always had been a lawful one; that the action of the Postmaster General was the result of a conspiracy involving the American Medical Association, the Jackson County Missouri Medical Association, Drs. John S. Wever, and Halsey M. Lyle of Kansas City, Mo., Drs. Porter A. Wells and Oscar Wilkinson of Washington, D. C., Paul V. Keyser, Assistant Attorney General of the United States, George A. Leonard, Post Office Inspector of the United States at Kansas City, and the Assistant Attorney General for the Post Office Department, which had been formed as alleged for the purpose of destroying the complainant's business; that the charges made against complainant were wholly false and fraudulent; that said hearing before the post office department was held without reasonable and sufficient notice; that at said hearing there was no evidence to show or tending to show that the complainant or the Remedy Company were conducting or had ever conducted a scheme or device for obtaining money or property through the mails by means of false or fraudulent pretenses, representations, or promises; that the finding of the Postmaster General was without any evidence upon which the same might legally be based; that the whole matter was without the jurisdiction of the Postmaster General; and that the Postmaster General was without authority in law for making said order.

To this bill of complaint the United States Attorney for the Western District of Missouri made answer, and the cause came on for hearing upon the question of the issuance of a temporary injunction. At said hearing there was introduced, by common consent, all the matters in evidence before and under consideration by the Postmaster General. In addition thereto, the complainant offered a large number of affidavits in support of his contention. The government offered affidavits of the United States Attorney and Post Office Inspector Leonard controverting certain statements more particularly affecting their personal connection with the controversy. The matter was exhaustively argued. Meantime, without the intervention of a restraining order, the status quo was preserved, with some modification, by agreement of parties.

[1] The law governing the authority of the Postmaster General in cases of this nature has been clarified and settled by recent exhaustive opinions both by the Supreme Court of the United States and the Court of Appeals for this circuit. It has been the settled law in this country for more than 100 years that courts will not interfere to control an executive officer in the discharge of a duty involving the exercise of judgment and discretion. Beginning with the opinion of Chief Justice Marshall in *Marbury v. Madison*, 1 Cranch, 166, 2 L. Ed. 60, this doctrine has been steadily maintained. In that case it was said:

"Whatever opinion may be maintained of the manner in which executive discretion may be used, still there exists, and can exist no power to control that discretion." *Noble v. Union River Logging Railroad*, 147 U. S. 171, 13

Sup. Ct. 271, 37 L. Ed. 123; *Decatur v. Paulding*, 14 Pet. 515, 599, 10 L. Ed. 559, 609; *Gaines v. Thompson*, 7 Wall, 347, 19 L. Ed. 62; *United States ex rel. Dunlap v. Black*, 128 U. S. 40, 9 Sup. Ct. 12, 32 L. Ed. 354; *Burfenning v. Chicago, St. Paul, etc., Ry. Co.*, 163 U. S. 323, 16 Sup. Ct. 1018, 41 L. Ed. 175; *Johnson v. Drew*, 171 U. S. 93, 18 Sup. Ct. 800, 43 L. Ed. 88; *Gardner v. Bonestell*, 180 U. S. 362, 21 Sup. Ct. 399, 45 L. Ed. 574; *In re Rapier*, 143 U. S. 110, 12 Sup. Ct. 374, 36 L. Ed. 93; *Enterprise Savings Association v. Zumstein*, (C. C.) 64 Fed. 837; *American School of Magnetic Healing v. McAnnulty*, (C. C.) 102 Fed. 568; *Id.*, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90; *United States ex rel. Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 23 Sup. Ct. 698, 47 L. Ed. 1074; *Bates & Guild Co. v. Payne*, 194 U. S. 106, 24 Sup. Ct. 595, 48 L. Ed. 894; *Public Clearing House v. Coyne*, 194 U. S. 497, 24 Sup. Ct. 789, 48 L. Ed. 1092; *Harris v. Rosenberger*, 145 Fed. 449, 76 C. C. A. 225, 13 L. R. A. (N. S.) 762; *Missouri Drug Co. v. Wyman* (C. C.) 129 Fed. 623; *Bank v. Gilson*, 161 Fed. 286, 88 C. C. A. 332.

In the foregoing cases the supervisory control retained by the courts over the acts of executive officers is well defined. If fraud is present and the executive officer acts arbitrarily and without substantial and credible evidence to support his conclusions, or entirely beyond the limits of his powers, and without the authority of any law, the citizen is not without his remedy. But what is the extent of the court's inquiry in such cases? It will examine into the charges of fraud, if any; it will note whether the administrative officer has acted in the matter within his authority; it will ascertain what proceedings were had and what evidence was produced before him; and, if it finds that there was no fraud, that the officer has acted within the authority conferred upon him by statute, and that there was credible evidence before him tending to sustain his decision, then it will properly proceed no further with that inquiry, because it has no jurisdiction to do so. It cannot review his decision and substitute its judgment for his upon the questions of law and fact confided by law to his discretion. To hold otherwise would be to set at naught the well-considered and consistent decisions of our courts of last resort for more than a century. "The reason for this," says Mr. Justice Miller in *Gaines v. Thompson*, *supra*, "is that the law reposes this discretion in him for that occasion, and not in the courts. The doctrine, therefore, is as applicable to the writ of injunction as it is to the writ of mandamus."

In *United States ex rel. Dunlap v. Black*, *supra*, the same learned justice said:

"The court will not interfere by mandamus with the executive officers of the government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law; the court having no appellate power for that purpose."

In *Decatur v. Paulding*, *supra*, Chief Justice Taney said:

"If they (the courts) supposed his decision to be wrong, they would, of course, so pronounce their judgment. But this judgment, upon the construction of the law, must be given in a case in which they have jurisdiction, and in which it is their duty to interpret the acts of Congress, in order to ascertain the rights of the parties before them."

In *Re Rapier*, *supra*, Mr. Chief Justice Fuller, asserting the power of Congress over what shall or shall not be carried in the mails through the governmental agencies which it controls, said:

"That that power may be abused furnishes no ground for a denial of its existence if government is to be maintained at all."

Similarly, in *American School of Magnetic Healing v. McAnnulty* (C. C.) 102 Fed. 568, Judge Thayer said:

"On this ground a strong plea was made that the courts should if possible, so construe the statute as to enable them to control the exercise of the power in question by reviewing the decision of the head of the Post Office Department, in whom the power has been lodged. In answer to this suggestion it is sufficient to say that in whosoever hands power is lodged, whether in the judicial or executive branch of the government, it is liable at times to be abused, or erroneously exercised; and the fact that a particular authority may be abused is in itself no reason why a court should assume a jurisdiction to control its exercise which does not of right belong to it. Moreover, if the action of the Postmaster General was liable to be arrested on any and every occasion where a party complaining of his action sees fit to appeal to the courts, it is probable that the statute would not afford as efficient means for preventing the misuse of the mails as Congress intended it to afford."

In the opinion of Mr. Justice Peckham in *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90, the following propositions were assumed:

"(1) That Congress has full and absolute jurisdiction over the mails, and that it may provide who may and who may not use them, and that its action is not subject to review by the courts.

"(2) The conclusive character of the determination by the Postmaster General of any material and relevant questions of fact arising in the administration of the statutes of Congress relating to this department.

"(3) That when a question of fact arises, which, if found in one way, would show a violation of the statute in question in some particular, the decision of the Postmaster General that such violation had occurred, based upon some evidence to that effect, would be conclusive and final, and not the subject of review by any court."

It was there held that the case then under review, as gathered from the statement of the bill of complaint and admitted by the demurrer, was a case without the law and not within the jurisdiction of the Postmaster General under the fraud statute. And, because of a misapprehension of some of the language in that opinion, this case has been urged as justifying a practically unlimited power in the courts to review the acts of executive officers. But in the later case of *United States ex rel. Riverside Oil Company v. Hitchcock*, Mr. Justice Peckham makes certain the exact extent to which his former opinion was intended to go. He says:

"Whether he decided right or wrong is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction. The court has no general supervisory power over the officers of the land department, by which to control their decisions upon questions within their jurisdiction. * * * Neither the case of *Roberts v. United States*, 176 U. S. 221 [20 Sup. Ct. 376, 44 L. Ed. 443], nor that of *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94 [23 Sup. Ct. 33, 47 L. Ed. 90], decides anything opposing these views."

In *Missouri Drug Co. v. Wyman*, supra, Judge Thayer said:

"Congress having declared that certain kinds of printed matter shall be nonmailable, and that the mails shall not be used to accomplish fraudulent schemes, whether certain mail matter belongs to the prohibited class, or whether a person is in fact making a fraudulent use of the mails, is within the jurisdiction of the executive branch of the government, the determination of which is not reviewable by the courts if sustained by any credible evidence."

And again, in *American School of Magnetic Healing v. McAnnulty*, Mr. Justice Peckham said:

"In overruling the demurrer we do not mean to preclude the defendant from showing on the trial, if he can, that the business of complainants as in fact conducted amounts to a violation of the statute as herein construed."

In *Public Clearing House v. Coyne*, the Supreme Court, speaking through Mr. Justice Brown, said:

"If the ordinary daily transactions of the departments, which involve an interference with private rights, were required to be submitted to the courts before action was finally taken, the result would entail practically a suspension of some of the most important functions of the government. Even in the recent case of *School of Magnetic Healing v. McAnnulty*, 187 U. S. 94 [23 Sup. Ct. 33, 47 L. Ed. 90], the constitutionality of the law authorizing seizures of this kind by the Postmaster General was assumed, if not actually decided; the only reservation being that the person injured may apply to the courts for redress in case the Postmaster General has exceeded his authority or his action is palpably wrong. * * * We think it within the power of Congress to intrust him (the Postmaster General) with the power of seizing and detaining letters upon evidence satisfactory to himself, and that his action will not be reviewed by the courts in doubtful cases."

In *Bank v. Gilson et al.*, supra, the Court of Appeals for this circuit, speaking through Judge Sanborn, and after an exhaustive review of the cases, held:

"In a doubtful case within his jurisdiction in the absence of fraud or a gross mistake of fact where there is some evidence which is satisfactory to the Postmaster General to sustain a fraud order issued under sections 3929 and 4041 of the Revised Statutes, as amended, his decision of a question of fact upon which the order is founded is conclusive, and it will not be reviewed by the courts."

The only logical deduction from the foregoing pronouncements, and many others which might be added, is that the only cases in which courts will disturb such a decision are when it is tainted with fraud, absolutely without authority of law, clearly outside of the statute, or perhaps clearly, palpably, and obviously wrong. In other words, where the question of wrong admits of no doubt. The decision will be upheld if sustained by some credible evidence.

Mindful, no doubt, of these unavoidable conclusions, complainant seeks to bring this case within some of the exceptions stated, by charging fraud in the form of an unconscionable conspiracy, by insisting that the fraud complained of was a matter of opinion only, not of fact, and not susceptible of judicial determination, and, in any event, that the Postmaster General had before him no evidence upon which such a finding could be predicated.

Respecting the conspiracy charge, it must be stated that its presentation at the hearing took the form of bald assertion without pretense

of plausible substantiation. Such a conspiracy, if it existed, would no doubt form a strong basis for review by the courts; but, involving, as it does, high officials of the government in a number of distinct departments, and citizens of high standing in separate walks of life, the presumption is strongly against its existence, and it could be entertained and considered only upon the clearest and most convincing proof. At the hearing before the Postmaster General, as well as that before this court, still another conspirator was implicated, though not included in the bill of complaint. This was Mr. Leslie J. Lyons, now United States Attorney for this district. Before the Post Office Department Dr. Branaman testified as follows:

"I went to see him (Lyons) and asked him to let me go before the grand jury and tell what I know about the case. He said: 'I wouldn't think of it for a minute.' He said: 'I want to indict you, and I would not allow any information to get before the grand jury in your interests in any way. If I let you go before them, I know I could not indict you.' He said that was the instructions from the department. I said to him: 'Is it not a fact that the department is urged by the American Medical Association and that the Jackson County Medical Association is after you?' He said: 'That's it.'"

These statements are practically reiterated by one W. D. Egolf, who claims to have purchased the greater part of Dr. Branaman's business. To these statements Mr. Lyons interposes an emphatic denial. Involving, as they do, the official and personal dishonor of a public official of known high standing, as well as that of the Department of Justice, from which his instructions were supposed to have been issued, the court has no hesitation in pronouncing these charges, so far as this hearing is concerned, to be wholly without foundation.

Nor is it true that the charges preferred by the Post Office Department involved matters of opinion only, and not cases of actual fraud in fact, in regard to which opinion formed no basis. In his memorandum for the Postmaster General the Assistant Attorney General for that department says:

"The department has not undertaken to decide the scientific question of the propriety of the use of electricity for deafness. The question with the department is instead entirely different, and is whether this business is based on actual fraud in fact. Is Dr. Branaman honestly practicing his profession and curing and trying to cure patients, or is he simply using that as a guise to perpetrate a deliberate fraud upon the public and by false and fraudulent representations, pretenses, and promises get money through the mails? I find as a matter of fact that he is not honestly trying to cure those who answer his advertisements and pay him money."

[2] An inspection of the evidence before the Postmaster General clearly shows that such was the theory upon which the hearing was conducted. It can now no longer be doubted that what might otherwise be a legitimate business or profession may be so conducted as to render it a vehicle of fraud and deception and within the purview of these statutes. *Missouri Drug Co. v. Wyman* (C. C.) 129 Fed. 623-630; *Miller et al. v. United States*, 133 Fed. 337, 66 C. C. A. 399; *Harris v. Rosenberger*, 145 Fed. 449, 76 C. C. A. 225, 13 L. R. A. (N. S.) 762; *Horn v. United States* (C. C. A.) 182 Fed. 721. Nor does the fact that certain physicians on both sides gave expert opinion testimony upon some phases of the case convert it into one based upon

false opinions instead of actual fraud in fact. Such opinion testimony is commonly used in various fields of litigation, and serves properly to aid the judgment in cases where the facts which form the real foundation of the action are disputed.

[3] The undisputed testimony is that two weeks' notice was given of this hearing before the Post Office Department. It is true that the complainant asked a continuance, which was not granted. The application, however, was merely general in form and contained no statement of facts from which its necessity could be determined. No showing was made as to witnesses required, nor what they might be expected to establish. The parties appeared and introduced a large amount of testimony of the nature which they deemed essential and important. Furthermore, this investigation had been pending for some months prior to the date of this hearing; and that complainant considered the inquiry to be a serious one is evidenced by the fact that in May this same Egolf, to whom reference has heretofore been made, as alleged business manager of the George M. Branaman Company, employed W. M. Ketcham of Chicago, who is, as he says, connected with the business of a legal and investigating character, to institute an investigation of the mail-using methods of the business of the company. Ketcham conducted an extensive investigation by inquiry and correspondence and placed before the Post Office Department the results of his labor. The showing made convinces that the complainant was neither without anticipation of that hearing nor preparation for his defense. Furthermore, all the time requested for the preparation of brief and argument was granted. It cannot be said that the complainant did not have his day in court, as that term is used in connection with such investigation.

[4] It remains to consider then whether the Postmaster General had before him evidence upon which he could found the conclusion reached by him. Bearing in mind that these investigations are not in contemplation of law invested with the formalities which attend trials in the courts of competent jurisdiction, there must be evidence of a legal character to sustain the finding of the administrative officer; but necessarily it need not in some particulars be presented in the strict form demanded in court trials. It is contemplated that these hearings take place at the seat of government, that the witnesses are in many instances widely separated, and that the personal attendance of those who testify is not always practicable on the part either of government or respondent. The department makes use of the written reports and investigations of its sworn agents, and affidavits in large part take the place of personal testimony. In this manner the hearing was conducted on both sides, and without objection from any source.

The finding of the Post Office Department was that the business conducted by complainant is a scheme and device for obtaining money through the mails by means of false and fraudulent pretenses, representations, and promises, in that Dr. Branaman is not honestly practicing his profession, and trying to cure patients, but that he is simply using his profession as a guise to perpetrate a fraud upon the public; that he pays little attention to symptom blanks and solicits practically

every one who answers his advertisements to buy his head cap and medical treatment; that his promises and treatments are issued recklessly and without good faith and with the end in view of procuring a greater number of patients and getting their money without regard to the results to be attained. Is this finding sustained by some or any credible evidence upon which it may be legally founded?

It is deemed neither necessary nor advisable to attempt an exhaustive review of the voluminous evidence in this case. It will be sufficient to call attention only to such leading features thereof as may be sufficient for the determination of this crucial question. To test the sincerity of complainant's business methods and to determine his intent, Inspector Leonard, who was detailed upon this case, prepared and caused to be prepared and sent out 13 test letters with their subsequent symptom blanks, and received in return responsive diagnoses from complainant during the period between January 14 and April 5, 1910. His inquiries were made under various different names adopted for this purpose. One diagnosis was dated January 14th, another February 2d, another February 3d, another February 10th, another March 1st, two on March 3d, one on March 10th, two on March 25th, one on April 2d, and two on April 5th. The responses of the alleged patient on the symptom blanks were in most cases, with the assistance of experts, so framed as to indicate clearly either cases of deafness that were incurable, according to tests laid down in complainant's own literature, as having been caused by explosions, brain fever, including meningitis and the like; cases involving an accident such as a violent blow to the nose in which catarrh, if present at all, existed only as an incident; and cases in which neither catarrh nor any other disease was present. Some of the troubles complained of were of long standing; others covering a very short period, such as two weeks. From the symptom blanks sent the complainant must necessarily, if acting in good faith, have found either that the diseases complained of were incurable, which he expressly announced he would not accept, or were due to causes other than catarrh, or that the answers indicated no specific trouble at all, or were too meager to justify any diagnosis whatever. In his literature and advertisements complainant had invited correspondence upon the claim that he was merely seeking to benefit suffering humanity; that he wanted no money; and that he would send two months of his treatment free, provided the sufferers would make known to him their condition. In all of the 13 cases, covering this short period, the trouble was diagnosed either as catarrh, or deafness caused by catarrh as the case might be, and of such a deep seated and chronic nature that cure by drugs alone was out of the question, but that a combination treatment, including the head cap at a price of \$8, was absolutely necessary, and that in case this cap should be purchased the two months' medicines would be sent free as advertised. Dr. Branaman, when brought face to face with these symptom blanks at the hearing before the Post Office Department, did not pretend to justify his diagnosis in most cases. After reflection and analysis he makes the following explanation of these cases in an affidavit presented at the hearing of this case. He says that three of them, to wit, Dunne, Barrett, and Le Barre, were

received and diagnosed by his assistant, Dr. Perkins, in his absence; that four of them, to wit, Bammer, Durrall, Murray, and R. Brown, were properly diagnosed; that five, to wit, Giesman, Leonard, G. W. Brown, Hampshire, and Thomas, were erroneously diagnosed; how, he cannot explain, unless the papers became mixed during his examination. Of the Mary Lorimer cases he says nothing. But he practically confesses that but 4 out of the 13 received a proper diagnosis, thereby, at least, largely confirming the opinions of the government's expert witnesses, to which exception is taken in the argument of counsel. In fact, an inspection of these papers discloses, even to the layman, the absurdity of the conclusions reached. Furthermore, the diagnoses of admittedly widely differing cases were practically identical and made upon printed forms. In fact, all the diagnoses sent out were upon printed forms, and this is true of a large number, in fact all, of the cases which were brought to the attention of the department. In these stock printed forms the explanation or excuse for not sending the free medicines as advertised was always incorporated. The statement respecting the deep seated and chronic nature of the disease and absolute necessity of the head cap was also thus anticipated in stereotyped phraseology. And so uniform and universal was this practice that the inference of a premeditated intent to assume this attitude towards prospective patients may legitimately, if not necessarily, be inferred.

The four cases in which complainant insists his diagnosis was correct are the only ones in which there could be any pretense apparently of a catarrhal condition at all. In the case of Richard Brown a case of cancer was framed; in that of Zenia Durrall a constitutional trouble of like seriousness; Joseph T. Murray was hit eight months before on the right side of his nose with a baseball, since which time his right nostril had been closed. In these three cases it is obvious that catarrh, if present at all, was merely an incident; more serious trouble being clearly indicated. The stock diagnosis was employed. In the case of Susan Bammer the symptom blank affirmatively stated only the following:

"That she is a little girl fourteen years old; has had something the matter with her right ear; her hearing in that ear is not good; she has been troubled that way just a short time, and doesn't know what caused it."

In that case the complainant makes the regular stock diagnosis of a general catarrhal inflammation of the membrane of the nose, throat, and the middle ear, which has become so deeply seated that the head cap is necessary. At the hearing it was urged on behalf of complainant that the court had before it only 13 cases out of all the thousands thereof during the 16 years of complainant's practice. But 13 identical experiences out of 13 tests sent within a period of less than three months give certainly a very high percentage.

Corroborative incidents might be multiplied, but this is deemed unnecessary to indicate the basis of the decision in this case. It is evident from the reading of the evidence that Dr. Branaman, finding the mail treatment of the class of patients described by him to furnish greater promise than the large, lucrative, and legitimate office business which he claims to have built up, abandoned the latter for the former. The

plan seems to have been a smaller individual margin of profit upon a larger volume of business with patients so far removed that professional responsibility is reduced to the minimum. The object is to get in touch with the sufferer. This is followed by a stock diagnosis, in every case, of catarrh, deafness, asthma, or head noises; all founded upon catarrhal trouble. Utter indifference is exhibited as to what may be indicated by the symptom blank. The object is to get the patient and as much of his money as possible. Not only was the conclusion reached by the Post Office Department sustained by the evidence before it, but it is difficult to see how it could have arrived at any other decision. It should be said here, however, that the court has not considered the evidence in this case with the view of substituting its judgment for that of the Postmaster General, but merely for the purpose of ascertaining whether that officer acted within the authority conferred upon him by statute, and whether there was credible evidence before him tending to sustain his decision.

[5] It is earnestly urged upon the court, by counsel for complainant, that this is not the final hearing of the case, and that it is sufficient to justify the granting of a temporary restraining order if the complainant shows the existence of a *prima facie* right with a threatened injury to that right by the defendant, and that the granting of such an order will be less injurious to the defendant than the refusal to grant it will be to the complainant. This is no doubt a correct statement of equity practice in cases to which it applies. But we start here with certain presumptions in favor of the action of an administrative officer of the government which must be overcome by a strong showing to the effect that his discretion has been improperly exercised. This showing, in the view of the case already expressed, the complainant has failed to make; nor is it probable that he can be more successful on final hearing. The additional evidence produced before this court was little more than an amplification of that produced before the Postmaster General. It added no new features and little, if any, additional weight; nor has complainant indicated that he can present his contention more effectively upon final hearing.

It is therefore not perceived that the situation is one that would justify the issuance of a temporary injunction to preserve the status quo pending final hearing, and the application of complainant will be denied.

UNITED STATES v. KANSAS CITY SOUTHERN RY. CO.

(District Court, W. D. Arkansas. July 3, 1911.)

No. 216.

1. RAILROADS (§ 230*)—SIXTEEN-HOUR LAW—CONSTITUTIONALITY.

Act March 4, 1907, c. 2939, 34 Stat. 1415 (U. S. Comp. St. Supp. 1909, p. 1170), limiting the hours of service of railway employes, is constitutional.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 230.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. RAILROADS (§ 230*)—SIXTEEN-HOUR LAW—CONSTRUCTION.

Act March 4, 1907, c. 2939, 34 Stat. 1415 (U. S. Comp. St. Supp. 1909, p. 1170), limiting the hours of service of railway employes, should be liberally construed to accomplish its purpose to prevent accidents to trains and consequent injury to passengers and employes.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 230.*]

3. STATUTES (§ 228*)—PROVISOS—OFFICE.

Ordinarily the office of a proviso in a statute is to modify or restrain the enacting clause.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 310; Dec. Dig. § 228.*]

4. RAILROADS (§ 254*)—SIXTEEN-HOUR LAW—CONSTRUCTION.

A railway company, sued for violating Act March 4, 1907, c. 2939, 34 Stat. 1415 (U. S. Comp. St. Supp. 1909, p. 1170), limiting the hours of service of employes, must bring itself strictly within the letter as well as within the reason of the proviso in section 3, exempting liability where delays result from act of God, etc.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 254.*]

5. RAILROADS (§ 254*)—SIXTEEN-HOUR LAW—"ACT OF GOD."

An "act of God" within Act March 4, 1907, c. 2939, § 3, 34 Stat. 1415 (U. S. Comp. St. Supp. 1909, p. 1170), exempting railway companies from penalty for permitting employes to work overtime in case of "act of God," etc., is something which occurs exclusively by the violence of nature, and is an act which implies entire exclusion of all human agencies (citing 1 Words & Phrases, pp. 118-126).

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 254.*]

6. RAILROADS (§ 254*)—SIXTEEN-HOUR LAW—"CASUALTY."

A "casualty" within Act March 4, 1907, c. 2939, § 3, 34 Stat. 1415 (U. S. Comp. St. Supp. 1909, p. 1170), exempting railway companies from penalty for working employes overtime in case of "casualty," etc., is an act proceeding from an unknown cause or an unusual effect of a known cause.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 254.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1003, 1004; vol. 8, p. 7597.]

7. RAILROADS (§ 254*)—SIXTEEN-HOUR LAW—"UNAVOIDABLE ACCIDENT."

An "unavoidable accident," within Act March 4, 1907, c. 2939, § 3, 34 Stat. 1415 (U. S. Comp. St. Supp. 1909, p. 1170), exempting railway companies from penalties for working employes overtime in case of "unavoidable accident," is an inevitable accident which could not have been foreseen and prevented by using ordinary diligence, and resulting without the company's fault.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 254.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7149-7151; vol. 8, p. 7822.]

8. TRIAL (§ 139*)—WITHDRAWING QUESTION FROM JURY—WHEN PROPER.

A question is properly withdrawn from the jury only when all reasonable men, exercising fair and impartial judgment, would draw the same conclusion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 338-341; Dec. Dig. § 139.*]

9. RAILROADS (§ 254*)—SIXTEEN-HOUR LAW—EXEMPTIONS—"UNAVOIDABLE ACCIDENT."

Act March 4, 1907, c. 2939, § 3, 34 Stat. 1415 (U. S. Comp. St. Supp. 1909, p. 1170), exempting railway companies from penalty for working trainmen overtime in case of unavoidable accident or where delay results from an unforeseen cause, etc., does not apply where a delay in starting after

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a crew has gone on duty is caused by a connecting train being late, or through side-tracking to give passenger or superior freight trains right of way, or by hot boxes or through the locomotive getting out of steam.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 254.*]

Action by the United States against the Kansas City Southern Railway Company. Verdict was directed for defendant. On motion by the plaintiff for new trial. Motion granted.

"This is an action instituted by the government to recover penalties for violations of the act of Congress entitled "An act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes thereon," approved March 4, 1907, c. 2939, 34 Stat. 1415 (U. S. Comp. St. Supp. 1909, p. 1170). There are 25 counts, each one charging a violation of the 16-hour provision of that act. The offenses were committed by requiring or permitting 5 employes on 5 trains of defendant to remain on duty for a longer period than 16 consecutive hours in connection with the movement of freight trains between Stilwell, in the state of Oklahoma, and Mena, in the state of Arkansas. Counts 1 to 5, inclusive, relate to the excess service of the train crew of train No. 73, drawn by engine No. 520, alleging that the employes on that train were on duty from 7:30 a. m. on February 7, 1910, to 1:25 a. m. on February 8, 1910, a period of 17 hours and 55 minutes. Counts 6 to 10 relate to the excess service of the train crew drawn by locomotive No. 519, alleging that the employes on this train were on duty a period of 17 hours and 35 minutes. Counts 11 to 15 relate to the excess service of the train crew on freight train drawn by locomotive No. 512, alleging that the employes on this train were on duty a period of 20 hours and 55 minutes. Counts 16 to 20 relate to the excess service of the train crew of freight train drawn by locomotive No. 477, alleging that the employes on this train were on duty a period of 17 hours and 20 minutes. Counts 21 to 25 relate to the excess service of the train crew of the freight train drawn by locomotive No. 527, alleging that the employes on this train were on duty a period of 16 hours and 45 minutes. As all the counts are practically identical except as to the number of the train and locomotive propelling it, the dates on which the violation is alleged to have been committed, the time during which the crews were on duty and the name and occupation of the employes, it is only necessary to set out the material allegations of one of the counts.

The first count, after alleging the jurisdictional facts, charges that "In violation of the above act of Congress the defendant, beginning at the hour of 7:30 a. m. on February 7, 1910, upon its line of railroad at and between the stations of Stilwell, in the state of Oklahoma, and Mena, in the state of Arkansas, within the jurisdiction of this court, required and permitted its certain conductor and employé, to wit, G. S. Harrison, to be and remain on duty as such for a longer period than 16 consecutive hours, to wit, from said hour of 7:30 a. m. on said day to the hour of 1:25 o'clock a. m. on February 8, 1910; that said employé, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train No. 73, drawn by locomotive No. 520, said train being then and there engaged in the movement of interstate traffic."

The answer of defendant denies all the material allegations in each count, and in bar to the action sets up the following pleas: "(3) If said employé did remain on duty for a longer period than 16 consecutive hours his remaining on duty was unavoidable, and was due to casualty and to unavoidable accident and to the act of God, and such delay was the result of a cause not known to the defendant or its officers or agents in charge of said employé at the time said employé left the terminal, and said delay could not have been foreseen." "(4) Further answering, the defendant states that if said delay occurred it occurred because said employé was acting as a crew of a wrecking or relief train."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

The cause was tried to a jury, the late lamented Judge Rogers presiding. At the close of the evidence a peremptory instruction directing a verdict for the defendant on all counts was given by the court, and thereupon this motion for a new trial was filed on behalf of the government. That eminent jurist having departed this life before the hearing of this motion, the same came on for hearing before the writer of this opinion, presiding by assignment over the courts of the Western district of Arkansas.

Although the answer denies all the material allegations of the complaint, at the trial they were admitted to be true, and the cause was heard solely upon the third and fourth pleas of defendant to each count. The evidence on behalf of the defendant establishes the following facts:

The causes of the delay to the train which is the basis of the first five counts are as follows: The train started from Stilwell 2 hours and 50 minutes late, of which 15 minutes was on account of delay caused by meeting a passenger train; 30 minutes switching, as there was no switch engine there; 20 minutes making the air test; 45 minutes waiting for a connection, and 1 hour to meet another freight train. The next delay was 20 minutes at Windsor caused by a hot box; the next was 1 hour at Salisaw meeting trains; 40 minutes at Spiro picking up and setting out cars; 25 minutes at Panama setting out and picking up cars; 15 minutes at Shady Point meeting train; 1 hour and 55 minutes at Poteau of which 1 hour and 30 minutes delay was caused by being blocked by other trains; 15 minutes taking coal and water, and 10 minutes weighing cars; 10 minutes at Howe moving a car to the Rock Island station; 20 minutes at Houston cleaning fire by reason of poor coal the steam having given out; 50 minutes at Mile Post 363 waiting to get up steam.

The causes of the delay to the train which is the basis of counts 6 to 10 are as follows: Delayed at Stilwell 25 minutes by passenger train; 25 minutes making up the train; 15 minutes making the air test, and 15 minutes meeting a train; 10 minutes were lost at Brushy meeting a train; 20 minutes at Spiro for lunch; 45 minutes at Spiro meeting extra train; 15 minutes at Poteau to take coal and water and 40 minutes cleaning the fires; 20 minutes at Howard meeting a train; 1 hour and 5 minutes at Houston on account of another train taking water from the pipe direct as the tank had fallen down on February 19th and was not ready for use until March 10th; 50 minutes at Black Fork taking water for the engines; 1 hour and 30 minutes at Page meeting train; 50 minutes at Mile Post 359 the helper engine having run out of water necessitating getting it from the nearest water tank; 1 hour and 10 minutes at Howard waiting to get up steam.

The train upon which are based counts 11 to 15 was delayed for the following reasons: At Stilwell, the starting point, 10 minutes switching caboose; 35 minutes picking up ties; 20 minutes blocked by work train; 15 minutes to make air test; 15 minutes to take out bad order cars; at Bunch 15 minutes waiting for orders; 50 minutes at Gans meeting trains; at Spiro 30 minutes for lunch, and 10 minutes waiting for orders; Panama 15 minutes picking up cars, and 25 minutes for orders; 30 minutes at Mile Post 324 by reason of pulling out drawbar; at Poteau 20 minutes to take coal and water, 15 minutes setting out cars and 15 minutes waiting for orders; 20 minutes at Howe blocked by an extra train; 15 minutes at Heavener setting out cars; 1 hour and 10 minutes at Houston to let trains pass; 40 minutes at Mile Post 355½ by reason of an extra train getting water; 35 minutes at Mile Post 358 let extra train get steam; Howard 35 minutes in order to get steam, 25 minutes to let train pass, and 1 hour and 30 minutes to meet two other trains; 40 minutes at Mile Post 363 backing to Howard in order that other trains might pass.

The causes of the delays of the train on which counts 16 to 20 are based were as follows: At Stilwell, the starting terminal, 15 minutes by reason of being blocked by trains, 1 hour and 10 minutes on account of switching, 20 minutes testing air; 20 minutes at Lyon waiting for extra train; 50 minutes at Brushy waiting for trains; 25 minutes at Spiro for lunch; 25 minutes at Panama waiting for orders; Poteau 50 minutes for cleaning fires in locomotive,

15 minutes for taking coal and water, and 15 minutes for switching; 45 minutes at Heavener fixing a hot box and bad train line, and 25 minutes waiting for other trains; 45 minutes at Howard waiting for train.

The causes of delay for the train on which are based counts 21 to 25 are as follows: Stilwell 45 minutes making up train, 25 minutes testing the air, 20 minutes blocked by train, 5 minutes repairs on engine; at Lyons 15 minutes meeting a train; Spiro 50 minutes cleaning fires, and 25 minutes for eating; Panama 15 minutes setting out and picking up cars; 15 minutes at Shady Point meeting train; 20 minutes at Mile Post 322 to get steam; Poteau 2 hours and 5 minutes cleaning fires, 20 minutes taking coal and water, 10 minutes waiting for trains; Heavener 10 minutes to set out cars.

John I. Worthington, U. S. Dist. Atty., and P. J. Doherty, Sp. Asst. Atty.

Read & McDonough, for defendant.

TRIEBER, District Judge (after stating the facts as above). [1] The constitutionality of this act has been conclusively settled by the Supreme Court in *Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 31 Sup. Ct. 621, 55 L. Ed. 878. Therefore, the only questions of law left for determination are the construction of the provisions contained in the proviso of section 3 of the act, so far as the evidence applies to them. That proviso reads:

"Provided that the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officers or agents in charge of such employé at the time said employé left a terminal, and which could not have been foreseen; provided, further, that the provisions of this act shall not apply to the crews of wrecking or relief trains."

As there was no evidence whatever tending to show that the delay in any of the counts occurred because the employés or any of them were acting as members of the crew of a wrecking or relief train, the plea in the fourth paragraph of the answer may be disregarded, leaving for determination the defenses set up in the third paragraph only.

[2] The act being remedial, for the purpose of preventing accidents to trains and consequent injuries to passengers and employés, it is the duty of the courts to construe it liberally in order to accomplish the purpose of its enactment. *Johnson v. Southern Pacific R. R. Co.*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363.

Experience has shown that many serious accidents to trains causing great loss of life or permanent disabilities to passengers, as well as employés, are often due solely to the fact that members of the train crew had become exhausted by reason of being required or permitted to remain on duty for too long a period, and therefore unable to give that care and attention necessary for the safety of the train. To prevent accidents from such causes the Congress, in its wisdom, enacted this statute prohibiting railroads not only from requiring any employé subject to the act to remain on duty for a longer period than 16 consecutive hours, but also "permitting" it.

[3] The defenses set up in defendant's third paragraph are in a proviso. The office of a proviso ordinarily is to restrain or modify the enacting clause of a statute. *United States v. Dickson*, 15 Pet.

141, 165, 10 L. Ed. 689; Dollar Savings Bank v. United States, 19 Wall. 227, 22 L. Ed. 80; Leavenworth, etc., R. R. Co. v. United States, 92 U. S. 733, 758, 23 L. Ed. 634; Ryan v. Carter, 93 U. S. 78, 23 L. Ed. 807; Schlemmer v. Buffalo, etc., R. R. Co., 205 U. S. 1, 10, 27 Sup. Ct. 407, 51 L. Ed. 681; Boston Safety Deposit Co. v. Hudson, 68 Fed. 758, 15 C. C. A. 651; Gould v. New York Life Ins. Co. (D. C.) 132 Fed. 927; McRae v. Holcomb, 46 Ark. 306.

As to how a proviso should be construed Mr. Justice Story, in *United States v. Dickson*, said:

"The general rule of law which has ordinarily prevailed and become consecrated, almost, as a maxim in the interpretation of statutes, is that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its meaning. In short a proviso carves special exceptions only out of the enacting clause, and those who set up any such exception must establish it as being within the words as well as within the reason thereof."

[4] From these authorities it follows that the defendant, to sustain its plea, must bring itself strictly within the letter as well as within the reason of the proviso in order to escape the penalty provided by that act.

[5] None of the evidence on behalf of the defendant would justify a finding that the delays were caused by "an act of God." While it is not advisable to give an exact definition of that phrase which will cover every phase, it has been generally defined as something which occurs exclusively by the violence of nature; at least an act of nature which implies an entire exclusion of all human agencies. In *Gleeson v. Virginia Midland R. R. Co.*, 140 U. S. 435, 439, 1 Sup. Ct. 859, 35 L. Ed. 458, an accident was caused by a landslide caused by a heavy rain, and this, it was claimed, was an act of God relieving the defendant from liability. This contention was overruled by the court, Mr. Justice Lamar delivering the opinion of the court, saying:

"There was no evidence that the rain was of extraordinary character or that any extraordinary results followed it. It was a common, natural event; such as not only might have been foreseen as probable, but also must have been foreknown as certain to come. Against such an event it was the duty of the company to have guarded. Extraordinary floods, storms of unusual violence, sudden tempests, severe frosts, great drouths, lightnings, earthquakes, sudden deaths, and illness have been held to be 'acts of God'; but we know of no instance in which a rain of not unusual violence, and the probable results thereof in softening the superficial earth, have been so considered."

In *The Majestic*, 166 U. S. 375, 386, 17 Sup. Ct. 597, 41 L. Ed. 1039, it was held that the "act of God" which would exempt one from liability is an act in which no man has any agency whatever.

In *Bullock v. White Star Steamship Co.*, 30 Wash. 448, 70 Pac. 1106, it was held that "an act of God to relieve from the performance of a contract must be such as a person of reasonable prudence and foresight could not have guarded against."

For additional authorities on this subject see 1 Am. & Eng. Ency. Law (2d Ed.) 584, *Harrison v. Hughes*, 128 Fed. 860, 60 C. C. A. 442, and 1 Words & Phrases, pages 118 to 126.

[6] Does the evidence establish the fact that there was any casualty or unavoidable accident within the meaning of the proviso? Casualty has been defined as an act which proceeds from an unknown cause or is an unusual effect of a known cause. *Chicago, etc., R. R. Co. v. Pullman Southern Car Co.*, 139 U. S. 79, 86, 11 Sup. Ct. 490, 35 L. Ed. 97. As there is no evidence to warrant a finding that any of the delays were caused by "casualty" within the meaning above described, that question need not be considered further.

[7] While some authorities hold that "unavoidable accident" is synonymous with "act of God," the better definition, in the opinion of the court, is that it must be an inevitable accident which could not have been foreseen and prevented by the exercise of that degree of diligence which reasonable men would exercise under like conditions and without any fault attributable to the party sought to be held responsible.

In *Clyde v. Richmond & D. R. R. Co.* (C. C.) 59 Fed. 394, it was held that "an unavoidable accident is one which occurs without any apparent cause, at least without fault attributable to any one."

In *Fish v. Chapman*, 2 Ga. 349, 46 Am. Dec. 393, it was held that,

"An unavoidable accident is synonymous with inevitable, and means any accident produced by physical causes which are inevitable, such as lightning, storms, perils of the sea, earthquakes, inundations, sudden death or illness."

In *Dixon v. United States*, 1 Brock (U. S.) 177, Fed. Cas. No. 3,934, the court held "the words 'unavoidable accident' must be construed as any accident which renders a breach of the condition inevitable."

This question has been frequently before the courts in the construction of the 28-hour law relating to the transportation of live stock. In *Newport News & Mississippi Valley Co. v. United States*, 61 Fed. 488, 9 C. C. A. 579, Mr. Justice Lurton, then Circuit Judge, delivering the opinion of the court in an action arising under the act of March 3, 1873, c. 252, 17 Stat. 584, digested as section 4386 R. S. (U. S. Comp. St. 1901, p. 2995) said:

"An effect attributable to the negligence of the appellant is not an unavoidable cause. The negligence of the carrier was the cause; the unlawful confinement and unreasonable detention but an effect of that negligence."

The exception in that act was "unless prevented from so unloading by storm or other accidental cause." The trial judge in that case had charged the jury in substance:

"That if they found that the live stock had been confined in the cars of the defendant company for a longer period than 28 consecutive hours without unloading for rest, food, and water it would be no defense that such confinement had been caused by an accident to the train due to the negligence of defendant."

This charge was approved by the appellate court as a correct interpretation of the statute.

In the later 28-hour law, enacted June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1909, p. 1178), the exception reads:

"Unless prevented by storm or by other accidental or unavoidable cause, which cannot be anticipated or avoided by the exercise of due diligence and foresight."

The construction of this exception by the courts has been uniform that only some unavoidable cause which could not have been guarded against by the exercise of due diligence and foresight is within its meaning. *United States v. Southern Pacific R. R. Co.* (D. C.) 157 Fed. 459; *United States v. A. T. & S. F. Ry. Co.* (D. C.) 166 Fed. 160; *United States v. Union Pacific R. R. Co.*, 169 Fed. 65, 94 C. C. A. 433; *United States v. Atlantic Coast Line*, 173 Fed. 764, 98 C. C. A. 110. Other cases not arising under the 28-hour law, but holding as was held in the case above cited, are *Clyde v. Richmond & D. R. R. Co.* (C. C.) 59 Fed. 394; *The Olympia*, 61 Fed. 120, 9 C. C. A. 393.

In *United States v. A., T. & S. F. Ry. Co.*, it was held that, for a carrier to avail itself of a breakdown or wreck as an excuse, it must be shown that the circumstances relied on resulted from a cause which could not have been avoided by the exercise of due diligence and foresight.

In *United States v. Atlantic Coast Line* it was held that the failure of a conductor to examine a waybill is not a legal excuse.

In *Welles v. Castles*, 69 Mass. 325, it was held the term "unavoidable accident" has a much more restricted meaning, and comprehends only damage and destruction arising from supervening and uncontrollable forces or accident. Other cases to the same effect are *Dreyer v. People*, 188 Ill. 40, 58 N. E. 620, 59 N. E. 424, 58 L. R. A. 869; *Smith v. Southern Railway Co.*, 129 N. C. 374, 40 S. E. 86; *Tays v. Ecker*, 6 Tex. Civ. App. 188, 24 S. W. 954; *Crystal Springs Distillery Co. v. Cox*, 49 Fed. 556, 1 C. C. A. 365.

[8] Applying these rules to the facts as established by the evidence in this case, did they justify a peremptory instruction to return a verdict for the defendant? The rule of law is well settled that it is only when all reasonable men in the exercise of a fair and impartial judgment would draw the same conclusions from the facts which condition the issue that it is the duty of the court to withdraw that question from the jury.

[9] Is a delay in starting caused by reason of the fact that another train is late an excuse within the meaning of the proviso? That was a matter which was known to the carrier or its officers in charge of the employes at the time they left the terminal, and they knew that it would cause delay in the employes getting off duty. There is nothing unforeseen in this.

But it is contended by learned counsel for defendant that the time during which the train was delayed should not be included within the time the crew was on duty. No reason is given for such a construction, and there is nothing in the act to justify it. The employe goes on duty when required by the rules of the employer to report for duty, and if for any reason he is delayed unless it is for some cause excepted by the proviso of the act the time he is on duty runs. *United States v. Illinois Central R. R. Co.* (D. C.) 180 Fed. 630. Any other construction would, to a great extent, defeat the object of the statute

to prevent employes of railroads from working for so many hours as to unfit them to discharge their duties intelligently and with safety to the train. It may and does happen frequently that trains are delayed in starting five or six or even eight hours. If the employes composing the crew on that train are required to remain on duty during that time and then remain on duty for 16 hours while the train is being operated, would they be in physical condition to manage that train with safety?

It is claimed that time lost by reason of side-tracking to give passenger or superior freight trains the right of way is an excuse, but it has been expressly held in *United States v. Southern Pacific Railway Co.* (D. C.) 157 Fed. 459, that this is no excuse if the meeting of such trains could have been anticipated at the time the train was dispatched from its starting point. Of course the roadmaster or chief train dispatcher of defendant must have known that other trains would be met, and, as shown by the evidence of the witnesses for the defendant, passenger trains and certain other freight trains were superior trains and had the right of way over those trains, and it was their duty to take the side track to enable the superior trains to pass.

There was some time lost by reason of hot boxes, and this it is claimed was an unavoidable accident. It is a matter of universal knowledge that science has not yet been able to discover the means of preventing hot boxes entirely, but a careful examination of them before starting a train and examination at stopping points will reduce accidents of that nature to a minimum. But in no event can it be said that a hot box is an unavoidable or unforeseen accident. The officials of defendant could reasonably anticipate that hot boxes are likely to occur on every train, more especially on freight trains such as these were, and it was their duty to take that fact, as well as the frequency with which other trains would be met, into consideration in establishing the division or terminal yards and determining the distances for them. If they failed to do so, and by reason of such failure the crews on its trains are required to remain on duty for a longer period than 16 consecutive hours, it is guilty of a violation of this act. *United States v. A., T. & S. F. Ry. Co.* (D. C.) 166 Fed. 160.

The time lost by reason of the locomotive getting out of steam or cleaning fires could by the exercise of reasonable diligence certainly have been anticipated and prevented. The coal, although testified to that it was as good as that sold to other railroads, evidently was not a good steam coal, or else the engines must not have been in proper condition. In fact, the evidence of the engineers of defendant shows that the engines used on the train were old and the coal, owing to a good deal of slack, would cake and not burn as freely as lump coal. If fires will give out as frequently as the evidence in this case shows, there must certainly be a remedy for it. What would become of the defendant's through passenger trains if this condition existed on their locomotives? All the delays shown by the evidence to have occurred could have been prevented by the exercise of reasonable diligence or at least anticipated, and the court is unable to find, after a careful reading of all the testimony, that any delays were caused by casualty,

unavoidable accident, or act of God, or by any cause which could not have been foreseen. The view most favorable to the defendant is that the cause is one which ought to have been submitted to the jury for determination.

Entertaining these views the court, with great reluctance, in view of the high regard it has always entertained for the learning and ability of the great jurist who tried this case, feels that it is its duty to sustain the motion for a new trial, as the responsibility rests upon it.

FRENCH v. BUSCH.

(Circuit Court, E. D. New Yark. July 28, 1911.)

1. CORPORATIONS (§ 262*)—STOCKHOLDERS—SUBSCRIPTION LIABILITY—DEFENSES.

Where in proceedings by an insolvent corporation's receiver to recover a stock subscription liability stock assessed under a decree of the court in which the insolvency proceedings were pending exceeded in amount the stock issued as bonus to bondholders under a mortgage, an objection that all claims against the corporation except those of bondholders had been paid, and that defendant owned no stock except bonus stock, was insufficient as a complete defense, though it might have been urged as a partial defense to a definite part of the assessment.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 262.*]

2. CORPORATIONS (§ 246*)—INSOLVENCY—ACTION AGAINST STOCKHOLDER—NATURE OF LIABILITY.

Where a receiver of an insolvent corporation had title to the right to call for an assessment on stockholders under a decree of the court in insolvency proceedings against the corporation, the stockholders' liability was several and not joint.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 981, 982; Dec. Dig. § 246.*]

3. CORPORATIONS (§ 268*)—STOCKHOLDERS—LIABILITY—PLACE OF PAYMENT.

Where a decree in insolvency proceedings against a corporation imposed a statutory liability on stockholders and directed payment to the receiver, and a notice was given requiring payment to be made to the receiver within a specified time, a complaint to enforce such liability was not defective for failure to allege the place where payment was to be made.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 268.*]

4. CORPORATIONS (§ 268*)—STOCKHOLDERS—STATUTORY LIABILITY—COMPLAINT.

Where an action against stockholders of an insolvent corporation brought by the receiver to enforce a statutory liability for unpaid stock, was based on a chancery decree in insolvency proceedings, the complaint was not objectionable for indefiniteness in that it was impossible to tell whether it was based on the statute of the state of the corporation's domicile or on the language of an agreement supposed to have been entered into as a definition of the statutory liability imposed by that statute.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1129-1141; Dec. Dig. § 268.*]

5. CORPORATIONS (§ 243*)—STOCK—"SUBSCRIPTION"—BONUS TO BONDHOLDERS.

Where corporate stock was given to bondholders of a corporation as a bonus to induce them to purchase the bonds, their acceptance of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

stock as such bonus constituted a subscription sufficient to carry any liability that might attach thereto.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 952; Dec. Dig. § 243.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6727-6732.]

6. CORPORATIONS (§ 268*)—STOCK SUBSCRIPTION—STOCKHOLDERS' LIABILITY—ENFORCEMENT.

Where a corporation's receiver, in a suit to enforce a stockholder's liability on shares issued as a bonus to purchasers of bonds, showed that the subscription to the bonds to which the stock passed as an incident, was received prior to the time of the corporation's suspension, the complaint was not defective for failure to definitely allege that the corporation was entitled to assess such stock at the time of its suspension.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1129-1141; Dec. Dig. § 268.*]

7. CORPORATIONS (§ 268*)—INSOLVENCY—STOCKHOLDERS' LIABILITY—ASSESSMENT.

Where an assessment was levied on stockholders of an insolvent corporation by a decree in insolvency proceedings, an allegation in an action against a stockholder to enforce such assessment, that he had notice thereof, was sufficient.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1129-1141; Dec. Dig. § 268.*]

8. PLEADING (§ 216*)—COMPLAINT—DEMURRER.

In an action to enforce a stockholder's liability under a decree imposing a stock assessment in insolvency proceedings, a defense that defendant had no notice of the decree could not be determined on demurrer.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 216.*]

9. PLEADING (§ 217*)—DEMURRER TO ANSWER—OBJECTIONS TO COMPLAINT—LIMITATIONS.

On demurrer to an answer, the demurrer could not be carried back and sustained to the complaint because plaintiff did not affirmatively show that the cause of action was not barred by limitations.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 540-548; Dec. Dig. § 217.*]

10. CORPORATIONS (§ 268*)—STOCKHOLDERS' LIABILITY—ASSESSMENT—PLEADING.

Where a stockholder sued while receiver of a corporation to recover a statutory liability, divided a defense into three parts as applied to three separate holdings of stock, such partial defenses should have been stated as a complete defense to a part of the cause of action, and the three so-called partial defenses united into one defense with three several statements as to the acquisition of stock, or else should specify that each acquisition of stock is an answer to a particular portion of the complaint represented by one-third of the stock referred to.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. 268.*]

11. CORPORATIONS (§ 243*)—STOCKHOLDERS' LIABILITY—BONUS STOCK.

That bonus stock to be delivered to subscribers for bonds of a corporation was transferred to a trust company holding the mortgages securing the bonds, and by it transferred to the bondholders on their purchase of bonds, could not relieve the latter from their statutory liability as stockholders with respect to creditors of the corporation.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 243.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 189 F.—31

12. CORPORATIONS (§ 268*)—INSOLVENCY—STOCKHOLDERS' LIABILITY—DEFENSES.

In an action to enforce a stockholder's liability for unpaid stock, an allegation that defendant had paid for a part of the stock by a conveyance of certain real estate stated a sufficient defense *pro tanto*.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 268.*]

13. CORPORATIONS (§ 243*)—STOCK SUBSCRIPTION—DEFENSES.

In an action by a receiver of an insolvent corporation to recover a stock assessment, an allegation that B. was to receive the entire capital stock in consideration of certain services and that all the stock was to be held in trust by defendant until it was available, by mutual agreement, the use of B. stated no defense to a proper call on the record holder of the stock for payment of an assessment.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 243.*]

14. CORPORATIONS (§ 262*)—STOCK ASSESSMENTS—DEFENSES.

In an action on a corporate stock assessment made by a court in insolvency proceedings, an allegation that defendant held certain of the stock as collateral security with certain bonds for a loan made by him, was demurrable as a collateral attack on the jurisdiction of the court making the assessment against defendant as owner of the stock.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 262.*]

15. CORPORATIONS (§ 268*)—STOCK ASSESSMENT—COUNTERCLAIM.

In an action against a stockholder of an insolvent corporation on a stock assessment, a counterclaim alleging that defendant held bonds of the corporation amounting to \$202,900 with interest at 5 per cent. from June 1, 1902, and that he was entitled to set off such amount against his alleged subscription liability of \$206,250 was not demurrable.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 268.*]

Action by Thomas E. French as receiver of the Agnew Company against Clarence M. Busch. On demurrer to defendant's answer. Overruled in part and sustained in part.

Burlingham, Montgomery & Beecher (Herman S. Hertwig and Morton L. Fearey, of counsel), for plaintiff.

W. Russell Osborn, for defendant.

CHATFIELD, District Judge. A New Jersey corporation for conducting a sanitarium at Atlantic City has been in the hands of a receiver under the laws of New Jersey, and that receiver has brought suit in this district against an individual stockholder who was also a holder of certain bonds of the company, and therefore a presumably secured creditor thereof. It is shown by the papers that the assets realized much less in amount than the claims of the secured creditors, and that therefore a large deficiency upon the bonds is in existence and that there are, or were, also, a number of unsecured claims. The complaint alleges that the subscriptions to certain stock were not paid although the stock was issued, and the receiver has made a demand, under the New Jersey law and under a decree of the New Jersey Court of Chancery, for the amount of these subscriptions from the stockholders. His present action is based upon this demand, and he asks that the defendant be compelled to pay over to him the amount of the assessment levied, viz., \$206,250, with interest from February 1, 1908, the date of making demand, the shares being \$50 each, and the receiver needing some \$250,000

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to cover the balance of the secured claims and the unsecured claims, with the expenses of the receivership proceeding. As has been said, the defendant is the largest one of the various stockholders who are alleged to be in similar case, and the amount of the demand upon these various stockholders totals about the amount of the unpaid balance of debts and expenses. In the Court of Chancery of New Jersey a decree has been made directing that the stock of these various individuals be assessed in the amounts referred to in the demand in question. The defendant herein was allowed by such decree, upon bonds held by him, \$147,700, and, as general creditor, \$1,008.25, but it was ordered that payment of these claims be deferred until defendant, as in the case of the other stockholding creditors, pay the contribution or assessment fixed by such decree.

The plaintiff in his complaint recites these allegations with others, charging that the defendant has utterly failed to respond to the demand, and asks for judgment for the amount of the assessment with interest, as has been stated. The defendant has answered setting up a denial on information and belief as to certain allegations and an absolute denial as to others (with the exception of admitting that he was a stockholder or incorporator of the company) thus covering the entire bill of complaint. He then interposes as separate defenses what he calls a first, second, and third complete defense to the complaint, fourth and fifth partial defenses to the complaint, and sixth, an offset or counterclaim based on his alleged ownership of bonds totaling \$202,900, with interest. The plaintiff has demurred to the first, second, and third distinct defenses, to the fifth partial defense, and to the counterclaim, charging in general that these defenses and counterclaim are insufficient, and that the court has not jurisdiction of the counterclaim as to subject-matter nor under the provisions of section 501 of the New York Code of Civil Procedure. The general denial and alleged fourth partial defense do not seem to be questioned by demurrer. It will be necessary to take these matters up point by point, although an elaborate discussion of each point need not be had.

[1] The first defense which is demurred to on the ground that it is insufficient in law is an allegation that the insolvent company provided (in the mortgage to secure which the bonds referred to were given) that each purchaser of bonds should receive a bonus of stock, and that by agreement among the bondholders themselves, no liability can now be shown against these stockholders to pay for the stock which they received as such bonus, and that the receiver has no claim on account of this right, inasmuch as there are no creditors but the bondholders. This point was covered by the decree in New Jersey, but that decree was based upon a finding that obligations for the payment of which an amount could be had were then outstanding. The pleadings herein show that all claims except those of bondholders have been paid, and that the stock alleged to have been given as a bonus was taken by these bondholders with knowledge thereof. Inasmuch, however, as the stock assessed exceeds in amount the stock issued as bonus, it would seem to be no defense to an assess-

ment on stock under a statutory liability, to show that, as to some of the stock, the bondholders might be estopped from demanding contributions from each other to the extent of the stock issued as a bonus to the bonds which others received. If this defense were urged as a partial defense to a definite part of the assessment, it could be considered on the merits. But as a complete defense it is not available on the pleadings and the demurrer should be sustained.

[2] There seems to be no misjoinder of causes of action, and the receiver has title to the right to call for such an assessment, and may sue in any jurisdiction where the suit can be maintained, upon the decree of the New Jersey court establishing the rights of the New Jersey corporation for its creditors. The defendant herein is said to have been duly served, and his obligation to the corporation or its creditors has been fixed in the chancery suit. His liability is several, not joint with any other stockholder.

[3] The defendant on the argument of the demurrer to his answer has gone back to an examination of the complaint in order to search that for defects, under the theory that a demurrer to a subsequent pleading will take the court back to the first deficient pleading in the case. As a result of this examination the defendant claims that the notice of call to pay the assessment referred to, as set forth in the complaint, does not specify a place of payment, citing Statutes of New Jersey, General Laws 1896, c. 185, § 22. The defendant cites a number of cases to show that such a notice should strictly comply with the statute as in *Schenectady & Saratoga Plank Road v. Thatcher*, 11 N. Y. 102; *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536. But in the case at bar, the place of payment was to the receiver. Certainly, the creditors would have no difficulty in finding or in knowing the place of business of the court officer who was required by the very conditions of his appointment to hold himself within reach of the persons having to do business in the particular matter, and the notice is plainly a demand under the decree that within a certain time the same be paid to the receiver, which is sufficiently definite to comply with the statute.

[4] A second objection to the complaint is that of indefiniteness in that it is said to be impossible to tell whether it is based upon the statute of New Jersey above referred to, or whether it is based upon the language of the agreement supposed to have been entered into, as a definition of the statutory liability imposed by that statute. The decree in chancery being a part of the proceeding upon which the complaint is based, and the complaint referring to a statutory liability enforced by that decree, there would seem to be no merit in this objection, which is a collateral attack on the decree itself.

[5] 3. The defendant alleges that, if the plaintiff be claiming under the statute, the statute bases liability solely upon the shares of stock subscribed for. The defendant claims that the record of the complaint shows that these shares of stock had been received, but not subscribed for. This is a question that has already been disposed of by the decree in chancery in New Jersey, which had jurisdiction to determine that question for this court. But it may

be said that the purchase of a certain number of shares of stock in connection with the purchase of bonds would certainly be a subscription for those shares and would carry any liability that might attach thereto. An acceptance of the stock would be sufficient to bring the purchaser or beneficiary within the terms of a statutory subscription, if the stock were liable to any further burden.

[6] 4. In following out this last point the defendant objects to the complaint because of a lack of definite statement that the right to call the assessment in question belonged to the company at the time of its suspension, or, in other words, that the shares of stock were subscribed to prior thereto. But the complainant does show that they had been received prior to that time as a bonus, with whatever obligations followed thereupon, and hence this objection is of no weight.

[7] 5. The defendant also suggests that the complaint seems to charge an appearance by the defendant in the proceeding with reference to the assessment of the stockholders. They point out from the copy of the order attached that no formal recital of appearance upon the second proceeding, with respect to the present defendant, can be found.

[8] An allegation that the defendant had notice is sufficient as pleading, but without extraneous testimony the affirmative defense of lack of notice cannot be determined, hence cannot be disposed of on demurrer by a party admitting thereby the denial of actual jurisdiction of the New Jersey court.

[9] 6. The defendant next raises the statute of limitations as a defense and suggests that the statute begins to run from the time when a right to assess accrues; citing *Bernheimer v. Converse*, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163, which applies the New York statute.

Whether or not the statute of limitations is a defense cannot be disposed of upon demurrer, because the right to assess might not occur until the stock was delivered under the subscription. The date of organization of the company, which preceded the 6-year period by 34 days, is not fixed as the time from which the affirmative defense must run, and the defendant does not rely upon any allegation to that effect, nor is *any answer* interposed on this ground. The complaint, therefore, cannot be dismissed for this reason. In fact, the statute of limitations is a defense, and to hold that the plaintiff must negative all defenses in the form of its complaint is a novel suggestion even upon the argument of a demurrer to an answer.

Points 7, 8, and 9. It is urged that the demurrer to the separate partial defenses should be dismissed for the reason that, taken together, the three partial defenses make a complete defense. It may be assumed that if a party undertakes to unite three separate holdings of stock as the foundation for claiming that he is not liable upon an assessment, then he must plead a complete defense depending upon three allegations of fact.

[10] If he wishes to divide this defense, upon the theory that the cause of action is separable into three parts, then his partial

defense should be stated as a complete defense to a part of the cause of action. Hence, it follows that technically the demurrer should be sustained and the three so-called partial defenses must be united into one defense with three several statements as to the acquisition of stock; or else should specify that each acquisition of stock is an answer to the particular portion of the complaint (if that portion can be specified) represented by one-third of the stock referred to.

[11] 10. The next defense to which demurrer is interposed alleges that the rights of action for such an assessment were transferred to the trust company holding the mortgages as security for the bonds. But it must be held that the terms of such a trust agreement cannot relieve parties from the statutory liability with respect to creditors and the demurrer to this defense must therefore be sustained.

[12] 11. The next defense is an allegation that the defendant has paid for his stock by a conveyance of certain real estate as a consideration for some of the stock in question, and that this was a fair and reasonable consideration therefor. It would seem that a demurrer admitting the allegations of this defense admits the validity of the defense, inasmuch as it would admit payment for the stock. Such a defense, if maintained, would clearly be good, and hence the demurrer on that point must be overruled. It is suggested that this is pleaded as a complete defense and hence is insufficient, but it is apparent that the defense is urged merely to a part of the cause of action and can be defined by proof.

[13] 12. The defense that one Wilmer R. Batt was to receive the entire capital stock in consideration for certain services, and that all of the stock was to be held in trust by the defendant until it was available by mutual agreement the use of the said Batt, would seem to be no defense to proper call upon the record holder of the stock for the payment of an assessment. Whether or not Batt might be brought in as the real party in interest, or whether under the New Jersey laws he might be liable in any way to pay the assessment, does not seem to relieve the defendant from liability, and hence this is not a defense, and the demurrer should be sustained.

[14] 13. An alleged partial defense, that the defendant holds certain of the stock simply as collateral security with certain bonds, for a loan made by him, would again question the jurisdiction of the New Jersey court in assessing him as owner, and would further make the defendant allege that stock which he held as a record owner as valid for the purpose of security, was invalid as an actual issue of stock, because he, the holder of the security, happened to be the owner of the stock. This would be plainly bad, and the demurrer should be sustained.

[15] The only remaining ground of defense is an alleged counterclaim to the effect that the defendant holds bonds to the amount of \$202,900, with interest at 5 per cent. from June 1, 1902, which he suggests as a set-off against the subscription of \$206,250, with interest, which is claimed for the stock. The plaintiff demurs to this counterclaim upon the ground that the New Jersey court has fixed the liability for the assessment and that this court cannot speculate as to whether or not the bondholders will receive back the entire amount

of bonds if the entire stock subscription be paid up, or whether if any of the subscribers fail, a particular bondholder may ultimately receive less than he has to pay. But the record does not show that that question of counterclaim was before the New Jersey court, nor do the amounts correspond. The demurrer admits the allegation of the counterclaim as to the amount of the holding by defendant, but proof will be needed to determine the exact rights of the parties.

It is urged that this counterclaim is not sufficient in form under the laws of New York, and that permission to urge the counterclaim against the officer of the New Jersey court has not been obtained. But these grounds of demurrer do not seem good, nor does it seem that the validity of the counterclaim can be passed upon on demurrer, for again the plaintiff is relying upon his own pleading in the complaint, as denied by the answer, to establish the allegations upon which he attacks the answer, and the defendant has a right to contest those allegations by evidence.

The demurrer to the counterclaim should, therefore, be overruled.

The various demurrers will be overruled in part and sustained in part as indicated herein, and the defendant may plead over where necessary.

LOONEN v. DEITSCH et al.

(Circuit Court, S. D. New York. May 2, 1911.)

1. TRADE-MARKS AND TRADE-NAMES (§ 22*)—CHARACTER OF MARK—SUGGESTIVENESS.

Where a red cross, used as a trade-mark on toothbrushes prior to 1905, was only suggestive of asepsis and general cleanliness, and not descriptive of the general character of the brush, and was not intended to imply consent or approval of its use by the Red Cross Society, it was not objectionable as being either illegal or deceitful in itself.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 25; Dec. Dig. § 22.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 22*)—VALIDITY—BAD FAITH.

Where complainant used a red cross as a trade-mark on toothbrushes, the fact that he added the words "Red Cross Brush" or "Red Cross" did not convict him of bad faith as indicating that the brushes had been adopted by or had anything to do with the Red Cross Society.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 25; Dec. Dig. § 22.*]

3. TRADE-MARKS AND TRADE-NAMES (§ 31*)—EXTENT OF USE.

Plaintiff adopted a red cross as a trade-mark on toothbrushes with the words "Red Cross Brush." Before 1904 the only brushes bearing the mark had been a line of "Comilo" brushes. In 1904 complainant, finding the sales of these brushes to be falling off, began making and sending a bone brush to supply his trade in the United States, to which he added the red cross mark and the words "Red Cross Hygienic," which brushes he continued to ship in large quantities, and the "Comilo" in small quantities, until suit was brought, also shipping other brushes without the mark. *Held*, that the mark was not originally used to indicate "Comilo" brushes only, and complainant was not limited to its use on such brushes.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 35; Dec. Dig. § 31.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. TRADE-MARKS AND TRADE-NAMES (§ 93*)—CHARACTER OF MARK—QUALITY.

Evidence *held* insufficient to indicate that complainant adopted the red cross as a trade-mark for toothbrushes to indicate quality only.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. § 93.*]

5. TRADE-MARKS AND TRADE-NAMES (§ 2*)—NATURE OF MARK—PUBLIC POLICY.

Under Acts Cong. Jan. 5, 1905, c. 23, 33 Stat. 599 (U. S. Comp. St. Supp. 1909, p. 1038), and June 23, 1910, c. 372, 36 Stat. 604, declaring that the use of the red cross as a trade-mark should be permitted where its use antedated 1905, it could not be said that the use of such trade-mark on toothbrushes antedating that date was contrary to public policy.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. § 2.*]

6. TRADE-MARKS AND TRADE-NAMES (§ 25½,* New, vol. 6, Key No. Series)—NUMBER OF TRADE-MARKS.

Where complainant, a manufacturer of toothbrushes, used as trade-marks on the back a star-inclosed "L" and the word "Comilo," and thereafter placed on the front of the handle a red cross and the legend "Red Cross Brush," and the latter mark was shown to have been accepted by the public as indicating brushes made by complainant, it was no objection to complainant's use thereof that he had previously adopted and still used the marks on the back.

In Equity. Bill by Charles Loonen against Charles Deitsch and another. Decree for complainant.

See, also, 152 Fed. 1023.

Archibald Cox and C. P. Goepel, for complainant.

Joseph L. Levy, for defendants.

HAND, District Judge. The defense here is based upon six lines: First, that the mark is bad because adopted for purposes of deceit and therefore not primarily a mark of ownership at all; second, because the use has not been sufficiently shown to justify the presumption of a trade-mark; third, because the complainant, being guilty of fraud, has no standing in a court of equity; fourth, because the original use was to indicate only Comilo brushes and could not be extended to bone brushes, after the defendants had begun to make them; fifth, because it is against public policy to allow the Red Cross to become a mark at least without "lawful right" prior to 1905, which has not here been shown; sixth, because a man may not use more than two marks on the same class of goods.

[1] As to the first point, Loonen swears that he adopted the mark because his star mark was too small, and he wanted something showy to catch the eye. Though he denies that he supposed the symbol meant anything hygienic or sanitary, I cannot help thinking that he did attach some such meaning to its use in spite of his disclaimer. It is almost incredible that he should otherwise have chosen that particular mark for that particular purpose. However that may be, the question at this time is not what he meant but what he did. There is without a doubt a suggestion in the term that is related to asepsis and sanitary conditions, and it is almost certainly the case that the commercial uses of the symbol arose from the fact that the Red Cross Society was con-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cerned with field surgery and with the care of, and supplies for, the sick and wounded in battles and great public catastrophes. All such commercial uses have, I believe, been of a kind congruous and analogous to the activities of the society itself, or at least vaguely suggestive of asepsis and general cleanliness. No one, for example, would be likely to sell Red Cross umbrellas, or Red Cross neckties or Red Cross ink. Those goods which are benefited by cleanliness and hygienic preparation are the only ones which so far as I know have been covered by the mark. The spread of popular information regarding the therapeutic value of cleanliness has created a strong predilection for anything suggestive of such methods. Merchants have been quick to take advantage of this education of the public and to indicate that their wares partake of such a character. The Red Cross is an easily caught symbol with an indefinite atmosphere, a kind of aseptic aura, connotating clean preparation and careful protection from dirt. The complainant did only what others have done in exploiting that popular conviction, and the conclusion is pretty clear that those who so selected it not only had some such reason in mind, but succeeded in making the suggestion they intended to others. That, however, is not enough to make the mark bad. Of course it must not be descriptive; but suggestion is one thing, and description, another. A good collection of the authorities may be found in *Trinidad Asphalt Mfg. Co. v. Standard Paint Co.*, 163 Fed. 977, at pages 986-988, 90 C. C. A. 195; *Johnson v. Seabury*, 71 N. J. Eq. 750, 67 Atl. 36, 12 L. R. A. (N. S.) 1201, 124 Am. St. Rep. 1007, does not decide the question, because the court treated the case as one of secondary meaning. Perhaps that was due to the fact that originally the complainant had deliberately stated that the mark was used with the authority of the society, but the case still remains inconclusive here. *Johnson v. Brunor* (C. C.) 107 Fed. 466, is too scantily reported to know what was the basis of Judge Lacombe's decision. Nor does *Johnson v. Bauer & Black*, 82 Fed. 662, 27 C. C. A. 374, pass upon it. The authorities therefore appear to be inconclusive. Suggestiveness not being a defect, the question comes down, therefore, to this: Does the mark actually mean that the society is in any way concerned with the manufacture of the goods? I think not. We have become familiar with it in the past for many other uses than that of the society, though happily such uses will now slowly disappear. It has been used on hospital ambulances, upon medications, upon doctors' motor cars, upon barber shops, upon laundries, and for military field service not connected with the Red Cross Society. In short, until the legislation of 1905 (Act Jan. 5, 1905, c. 23, 33 Stat. 599 [U. S. Comp. St. Supp. 1909, p. 1038]), it had been quite instinctively adopted for many uses which were congruous with the chief objects of the society, but which did not indicate that the society had anything to do with them, or certainly with the frequency of the use ceased to do so. Finally, Congress has clearly recognized that fact by permitting all those who prior to 1905 had used the mark lawfully, to continue. This appears beyond question in the act of June 23, 1910, c. 372, 36 Stat. 604. Such "lawful use" does not imply the consent of the society, but only that there should be such use as would create a

mark were it not the Red Cross. Therefore, the mark is not invalid as being either illegal or deceitful in itself.

The next point is of the insufficiency of the use proved. I cannot understand the defendants' position in this regard, for it is hardly comprehensible that they actually suppose, as they keep repeating that only three shipments were made. All the complainant's witnesses testify to a continuous shipment and sale of toothbrushes so marked, either Comilo or bone, from August, 1899, down to the beginning of the suit. The single thread of justification for this disregard of all that testimony is the fact that Lotter from the books identified the entry of the first shipment of each number, "42," "2742," and "1498." That this was his only purpose is apparent to anyone who reads the testimony in the least impartially or as a whole, because no one can construe the testimony as confining the shipments to those three without perversely twisting its sense.

[2] The third defense is of the complainant's bad faith, disqualifying him from relief in a court of equity. This is to a large extent involved in the prior consideration of the mark, and in so far forth it falls with a decision that the mark is good, as neither descriptive nor misleading. There is, however, the question of whether it was fraudulent to add the words "the Red Cross Brush," or "Red Cross," to the symbol itself. The phrase "Brush of the Red Cross" is quite a different matter from "Red Cross Brush" and Loonen only used the latter. "Brosse de la Croix Rouge" does not mean "Brush of the Red Cross," but "Red Cross Brush." It would be meaningless in French to say "Rouge Croix Brosse," and on that account a strictly literal translation of the French phrase which Loonen used does not correctly represent even what he did in France. "Red Cross Brush" is like "Red Cross Pharmacy" or "Red Cross Plaster;" it means as much and no more that the brush has anything to do with the Red Cross Society, as the symbol alone, for it neither adds to, nor takes from, the suggestion and the connotation of the symbol itself. There was then in this no more fraud than if the legend had been omitted.

[3] The fourth defense is that the mark was specific to the Comilo brush, and its use upon the bone brush, an attempt to create a new mark. Before 1904 the only brushes bearing the mark had been the Comilo, and it was coupled with the words "The Red Cross Brush." It does not certainly appear that all Comilo brushes bore the mark and legend, though I think it fairly plain from Gibson's testimony that if any such brushes did not bear the mark they were few, and what he calls "seconds." Moreover, it appears that between 1899 and 1904 the complainant shipped other brushes to the United States than the Comilo, so that all his goods did not bear the Red Cross. In 1904 finding the sale of Comilo brushes to be falling off—possibly because the defendants had already begun to use his mark in 1903—the complainant began making and sending a bone brush which is in evidence and which bears the Red Cross and the words "Red Cross Hygienic." These bone brushes he continued shipping in large quantities and Comilo in small quantities until the suit was brought, also shipping other kinds of brushes without the mark. Now the only

possible ground for saying that the use of the Red Cross only on Comilo brushes limited it to such brushes is this: That it thereby became a mark for that quality or grade of brush, because certainly no one can suppose that a mark actually intended, and supposed, to express origin becomes any the less effectively a trade-mark because it is used only upon a part of the maker's goods. If Loonen wished to push this particular brush, the Comilo, more than others, there is no more reason why he should not have put upon it his best and most showy mark, than why he should not have given it a disproportionate amount of advertising, or made his name more prominent upon it than on his other brushes. In short, there is no necessary connection between the use of a mark upon a limited class of the maker's wares and its denoting that class of wares.

[4] The question, therefore, is whether, as matter of fact, this mark did denote quality and quality only. First, it must be noted that this kind of brush already had a name, "Comilo," coined by the patentee, Loonen's assignor, and composed out of the names of the chemical elements which went to make up the handle. This was indubitably one name for that kind of brush, which Loonen had not invented, and which meant the brush made under Wallach's patent. Was the Red Cross Brush another name for the same kind of brush or was it a mark of Loonen's make? So far as intent goes, the only evidence is that of Loonen himself, and he says that it merely meant his manufacture. There is no reason to suppose that he affixed it so that the public or anyone else should identify the word with that particular brush which had been so long before given a name of its own. Did, then, the name come to be understood as meaning that kind, and that only, whatever it may have originally been intended to cover? Where the mark was not intended to cover a quality, but general origin, there must be some affirmative proof that it has got a use other than that for which it was intended, before it can be set down as the name of a species only, because the presumption is that it means to others what it was intended and used to mean. There have been several cases where words originally used to indicate qualities or grades have in time got an added significance of the origin or make and have so become good trade-marks, but I know of none where a mark originally used for a trade-mark has come to be understood for a quality, because of its limited use upon only one kind of goods. There might, of course, be such a case in theory, but I doubt whether there ever has. In any event, such testimony as there is in the case at bar, and it is ample in amount, is that the mark always remained what it was meant to be, a symbol of general origin, for all the disinterested witnesses in the jobbing trade unanimously swear that they so regard it. The defendants present no one to the contrary, but one employé and Martin, who has been interested in the defendants' business for some years. It is true that the best proof would be from the ultimate consumer to whom such a mark is addressed, but that is practically not accessible, and the opinion of the jobbing trade is as near as one can get to the ultimate facts of what the consumer really understood the Red Cross to be. In the case of a commodity like a

toothbrush it is in addition extremely unlikely that consumers would distinguish the showy mark and legend as being only the name for one species of the brush made by the man whose name appeared upon the back of the handle in very small type. The chances are rather that they looked at and remembered only what caught their eye upon the front.

[5] The fifth defense is that it is against public policy to allow the Red Cross to become a trade-mark. This needs no answer after the Acts of 1905 and 1910. Whatever may have been the policy before, Congress has now definitely declared in the proviso of the latter act that it would permit such marks if they antedated 1905. Congress had power so to legalize the use of it; the question of public policy was for it and for it alone, and it is now finally closed. The decisions in the Patent Office appear to have conflicted, but *Ex parte Batcheller Co.*, 85 Off. Gaz. Pat. Off. 1583 is later than *Ex parte Chichester Co.*, 52 Off. Gaz. Pat. Off. 1061, and overrules it. The idea that the mark consists of the flag of a foreign nation deserves no notice.

[6] The sixth and final defense is that, having two marks already upon the brush, it was not lawful for Loonen to add a third, which he did when he added the Red Cross to the two marks, the star-enclosed "L," and the word "Comilo." Now, in principle, there is no possible ground for refusing to recognize any number of trade-marks which are really such. That is to say, if a man can show that the public has in fact come to recognize six marks each as separately indicating his manufacture, even though they are used together, it should be no concern of the court to interfere. The hypothesis presupposes that the public does interpret the marks each as indicating origin or manufacture, and that is simply a question of fact, though it might be a very hard thing to prove, especially if the marks were all put near together on the article. If a man uses four or five marks together, it may be, therefore, doubtful whether as matter of fact any single one had ever got to mean his goods, but the trouble is merely one of fact, and there is no reason that I can see, why if that fact exists, the court should take from him the means he has created of identifying his wares. In *Candee v. Deere*, 54 Ill. 439, 5 Am. Rep. 125, there is talk of confusion, but that begs the question, for if it be a true trade-mark alone, there can be no confusion. Certainly if the public has solved that difficulty of more than one mark, the court becomes officious in forbidding the maker from continuing to use what the public already understands.

So the question here is whether, in spite of Loonen's other marks, the public should be supposed to have become used enough to the Red Cross to understand it for his trade-mark, when used alone. Both the Comilo and the star-inclosed "L" were on the back of the handle close together, and both were small, indeed, the star-inclosed "L" requires some perceptible effort of attention to observe. On the other hand the Red Cross is on the front of the handle and in the midst of the legend, "The Red Cross Brush." Together they catch the eye as nothing else on the brush does, being sprawled all across the whole top of the handle, as the brush lies on its back. What-

ever the public may have thought of what was on the back, they could not but have been impressed by the conspicuousness of the legend and symbol. The man in the street would have no possible trouble in deciding upon what would catch the eye, and remain in the memory of most users. As matter of fact there is not the least question to my mind that a man using this toothbrush would remember it as "the Red Cross Brush," not as Loonen's, or "Comilo," or by the star-inclosed "L." If the question were whether the Red Cross mark might not have swamped the other marks, I should find it less plain.

One authority, *Candee v. Deere*, supra, at page 457, 54 Ill. (5 Am. Rep. 125), contains a passage that no one may have more than one mark, but, so far as I can see, it was a purely obiter generalization at the outset of the opinion, not called for by any of the facts and the basis of no part of the reasoning upon which the decision depended. *Albany Perforated, etc., Co. v. John Hoberg Co.* (C. C.) 102 Fed. 157, contains a dictum in agreement, but the case went off on the idea of marks of quality. These are the only cases which I have seen which even suggest that the law will not recognize more than one mark, if the public already has done so. There are, it is true, other cases in which the question is suggested without being answered, showing perhaps, that the court regarded it as still open, but they are not authorities to the contrary. On the other hand, in *Wheeler v. Johnston*, 3 L. R. Ir. 284, the Vice Chancellor of Ireland directly held the contrary. Several of the other cases which the complainant cites did not involve this question, and are not properly applicable. In *Capewell Horse Nail Co. v. Mooney* (C. C.) 167 Fed. 575; *Id.*, 172 Fed. 826, 97 C. C. A. 248, the marks were not used together, but one was used on the box and another on the nails. That makes it of less authority than if both marks had been on the nails, but in so far as *Candee v. Deere*, supra, can be supposed to rest upon any principle of law, which I must confess with deference I do not altogether see, this case is an answer to it, because *Candee v. Deere* was based upon the possibility of confusion between the marks, and there is as much danger of confusion when the marks are used one on the nail and the other on the box as though both were always used on either or both. Indeed, I should think that the risk of confusion was greater where they were not used together. Therefore, while the authority is small, what there is of it accords with my judgment that there is no objection to as many trade-marks as the trade will in fact assimilate.

There is nothing in the defendants' multitudinous objections to the testimony. All testimony not dependent upon the witnesses' memory could be struck from the record and it would show by the most unquestionable evidence that the sales in this country have been large and continuous since 1899.

Now that the interference proceedings have been decided the complainant may likewise include in his decree the registered mark. His own trade is interstate, and so is the defendants', and the mark is valid under the statute as well as at common law, though I have considered it throughout as a common-law case.

Let the usual decree pass, with costs on both grounds.

KOUNTZ v. TOLEDO, ST. L. & W. R. CO.

(Circuit Court, N. D. Ohio, W. D. February 29, 1908.)

1. DEATH (§§ 85, 89*)—ACTION FOR NEGLIGENT DEATH—DAMAGES—PECUNIARY LOSS.

The damages to a widow for the negligent death of her husband include, as pecuniary damages, the value of the care and attention which a husband gives a wife, though she may not recover for mental anguish.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 111, 118; Dec. Dig. §§ 85, 89.*]

Mental anguish as element of damages for wrongful death, see note to Chicago, R. I. & P. Ry. Co. v. Caulfield, 11 C. C. A. 563.]

2. DEATH (§ 103*)—ACTION FOR NEGLIGENT DEATH—MORTALITY TABLES—EVIDENCE.

The jury, in an action for negligent death, are not bound by the accepted tables of mortality.

[Ed. Note.—For other cases, see Death, Dec. Dig. § 103.*]

3. DEATH (§ 99*)—NEGLIGENT DEATH—EXCESSIVE DAMAGES.

A verdict for \$4,000 in favor of a widow for the negligent death of her husband, 66 years old with a life expectancy of 12 or 15 years, and earning \$300 per year at a healthful occupation, is not excessive.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125-130; Dec. Dig. § 99.*]

At Law. Action by Charles D. Kountz, administrator, against the Toledo, St. Louis & Western Railroad Company, for damages for the negligent death of decedent, earning \$300 per year. Motion for new trial denied.

C. A. Thatcher, for plaintiff.

Brown, Geddes, Schmettau & Williams, for defendant.

TAYLER, District Judge. I think this was a close case on the facts, but there certainly was testimony upon which the jury had a right to conclude that this man was killed because his foot was caught in an unblocked frog. As to the other circumstances affecting the right of recovery, the way in which he approached the track and whether or not he was engaged in the business of his employer, it was for the jury to say, under all the circumstances, what was the fact.

The verdict was rather large; and there was some misconduct of counsel. I have considered whether the misconduct was such as to justify me in setting aside the verdict. I hope I may not be required to set aside a verdict on account of the misconduct of counsel, but I came very close to the point where I felt that this was a case in which I ought to do it. I cannot feel, however, that it had such an effect on the jury as to make it proper for me to set it aside.

[1] Besides that, I take this opportunity of stating that, in a death case, I do not think such a sharp definition as counsel give to it can be made of the limitations within which a jury may rightly go in determining the damage that is sustained by one who is in such close relations to the dead man as the widow in this case. I do not mean close relations in the sense that damage ought to be given for feelings

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that are hurt; but because of the relations that exist between persons so circumstanced, there is a pecuniary loss growing out of the destruction of the life of one upon whom another is measurably dependent that is not wholly determined by the money which the dead person earns. The value of the attention and of the care which a wife gives a husband or a husband gives a wife is pecuniary in the last analysis, and is a thing that can be recovered for. We distinguish it from the suffering which the one who is left endures, and for which there is no right of recovery under the statute in Ohio.

[2] Nor can we say that a jury is bound to be governed by the accepted tables of mortality. In the first place, they are not right. They furnish a basis upon which we can act with some degree of intelligence, but they are old, and, more than that, they are archaic; I mean in respect to their being truthful in a specified case.

[3] It is not for the court to say that because the jury has said the widow may recover \$4,000 for the death of her husband with whom she lived—that husband 66 years old—therefore the verdict is manifestly so large as to have been influenced by passion or prejudice. I do not think it is unnecessarily large under all the circumstances of this case. Her husband might have survived the 12 or 15 years fixed by these tables. He had a healthful occupation, at least; that is to say, he was out of doors, which would be good for a man of his habit. I think that the value of that life to this woman as a mere asset is not excessively appraised at \$4,000.

So the motion will be overruled.

Exception by defendant. Bond fixed at \$5,000, and 60 days granted within which to file bill of exceptions.

VREELAND v. MICHIGAN CENT. R. CO.

(Circuit Court, N. D. Ohio, W. D. December 2, 1910.) †

No. 2,187.

1. DEATH (§§ 85, 89*)—NEGLIGENT DEATH—DAMAGES.

In an action under the federal employer's liability act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1909, p. 1171]) for negligent death, the jury, in estimating the damages to the surviving widow who is the only beneficiary, may consider the relation of husband and wife, and determine what it would reasonably have been worth to the widow in money to have had the care and advice of her husband, but may not allow damages for mental anguish as a result of her loss.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 111, 118; Dec. Dig. §§ 85, 89.*]

Mental suffering as element of damages for wrongful death, see note to Chicago, R. I. & P. Ry. Co. v. Caulfield, 11 C. C. A. 563.]

2. DEATH (§ 99*)—DAMAGES—EXCESSIVE DAMAGES.

Decedent at the time of his negligent death was 45 years old with a life expectancy of 25 years. He earned from \$125 to \$175 per month. He had been a railroad engineer for 12 years. He had no children, and lived happily with his wife who was 38 years old. He brought his pay

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

checks to her, and she controlled the proceeds and paid the bills, and deposited the surplus of \$50 a month. *Held*, that a verdict for \$12,000 was not excessive.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125-130; Dec. Dig. § 99.*]

8. NEW TRIAL (§ 76*)—EXCESSIVE DAMAGES—POWER OF COURT TO SET ASIDE.

The trial court may not set aside a verdict as excessive unless convinced that the jury acted from passion or prejudice.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 153-156; Dec. Dig. § 76.*]

At Law. Action by Daniel B. Vreeland, administrator of Albert Wisemiller, deceased, against the Michigan Central Railroad Company. Motion for new trial overruled.

C. A. Thatcher, for plaintiff.

Potter & Potter, for defendant.

KILLITS, District Judge. This case was tried during the present term of court under the new federal employer's liability act, resulting in a verdict for the plaintiff, administrator of the estate of Wisemiller, for the benefit of the next of kin, for \$12,000, and is now before the court on a motion for a new trial, raising some questions presented to and determined by the court during the progress of the trial, with which determination the court is still satisfied, and, as further grounds, contending that the verdict is excessive, and that the court erred in its charge to the jury in stating the measure of damages by including a proposition stated in this language, quoted from the charge:

"In addition to that, independent of what he was receiving from the company, his employer, it is proper to consider the relation that was sustained by Mr. Wisemiller and Mrs. Wisemiller, namely, the relation of husband and wife, and draw upon your experiences as men, and measure as far as you can what it would reasonably have been worth to Mrs. Wisemiller in dollars and cents to have had during their life together, had he lived, the care and advice of Mr. Wisemiller, her husband."

[1] There seems to be no direct authority from an appellate court for or against the correctness of the proposition stated in the quotation above given from the charge as one of the elements of damage in behalf of a wife in an action for the death of her husband. In many cases, this element has been included for the benefit of children of a deceased parent, to the approval of a court of review, and in behalf of a wife it has been given to juries by trial courts.

In a case tried in this court, entitled *Kountz, Administrator, v. Toledo, St. Louis & Western Railway Co.*, 189 Fed. 494, a verdict of \$4,000 was rendered, and there the decedent was 66 years old, earning but \$300 per year, and, had he lived the full expectation of his life, he would have received in wages but a little over \$3,000. In this case, the direct pecuniary loss to the family resulting from the deprivation of decedent's earnings alone could not have reached the sum of \$2,000, or one-half the amount of the verdict, computed upon

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his expectancy of life. The jury did not receive an instruction such as quoted from the case at bar, but, in passing upon the motion for a new trial, Judge Tayler used this language:

"I take this opportunity of stating that, in a death case, I do not think such a sharp definition as counsel give to it can be made of the limitations within which a jury may rightly go in determining the damage that is sustained by one who is in such close relation to the dead man as the widow in this case. I do not mean close relations in the sense that damages ought to be given for feelings that are hurt; but because of the relations that exist between persons so circumstanced, there is a pecuniary loss growing out of the destruction of the life of one upon whom another is measurably dependent that is not wholly determined by the money which the dead person earns. The value of the attention and of the care which a wife gives a husband or a husband gives a wife is pecuniary in the last analysis, and is a thing that can be recovered for. We distinguish it from the suffering which the one who is left endures, and for which there is no right of recovery."

The judgment was sustained by the Circuit Court of Appeals.

In the case at bar, in addition to the instructions given to the jury of which quotation has been made, the court very emphatically instructed the jury that they might not award damages by way of a balm to the widow's feelings or upon the assumption that she suffered anguish and sorrow as a result of her loss; that considerations of this sort should be dropped out of the case absolutely. In the absence of any authority which appears to the court at all controlling, we are content with the charge in this particular, and believe that the element of damage involved in it is a proper one to be left with the jury in a case of this kind, as being as susceptible of measurement in money as other elements of pecuniary damage which are well established; and that it is well within the language of the statute, in the expression that the action lies "for such injury or death resulting in whole or in part" from the fault attributable by the statute to the company.

[2] The remaining ground for a new trial has given the court some consideration only because the award of damages exceeded the court's expectation of what the jury would do under the circumstances. The facts were as follows: The decedent, Wisemiller, was an engineer of 12 years' career in that capacity, under the employment of this company; of the age of 45 years; receiving from \$125 to \$175 per month, according to the mileage made by him; accustomed to take 15 or 20 days' vacation each year, otherwise to remain in continuous employment. At the time of his death he had an expectancy of life of a little less than 25 years. He had no children, and apparently lived happily with his wife, the beneficiary in this case, who was 38 years old. The undisputed evidence showed that he brought his pay checks to his wife, who, as the testimony in the cross-examination disclosed, had the control and disposition of their proceeds and the spending of the money; that she paid the bills and deposited what was over their personal expenses, and that their savings amounted to \$50 per month.

The evidence touching the direct financial interest the wife had in her husband's earnings, in the court's judgment, justifies the verdict, especially when there is taken into consideration their very close rela-

tions and the probability that she would be his sole heir. In fact, to assume that her fair share of her husband's earnings, under the circumstances of this family, was \$700 per year, representing her support and what was a fair division to her of the surplus, it would take almost the amount of the verdict to buy an annuity for her in that amount at either 5 or 6 per cent. for the period of his expectancy, or 25 years.

[3] The court finds itself bound by the rule that the verdict cannot be set aside in the belief that it was excessive, unless the amount of it so very greatly differs from what the court's idea is of a just award as to convince the court that the jury acted in passion or prejudice. Nothing in this record suggests that the jury disregarded the court's explicit admonition to adjudge the rights of the parties calmly and dispassionately; and, in fact, the amount of the award measures so closely to what might be said to be proper, having regard only to his earning capacity, that one might almost say that the jury had not given any consideration to that portion of the court's charge wherein they were given leave to include as a measure of damages their estimation of the value of the care and advice of the husband to the wife.

The motion for a new trial is overruled, with exceptions.

GRIEB v. EQUITABLE LIFE ASSURANCE SOCIETY OF UNITED STATES.

(Circuit Court, E. D. Pennsylvania. June 26, 1911.)

No. 379.

1. REFORMATION OF INSTRUMENTS (§§ 19, 20*)—GROUNDS—MUTUAL MISTAKE.

Reformation of a contract will not be granted by equity unless there has been a mutual mistake, but where there has been a mistake of one party, accompanied by fraud of the adverse party, the instrument may be made to conform to the agreement according to the intention of the parties.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 74-78, 79-80; Dec. Dig. §§ 19, 20.*

Reformation of instrument as dependent on mutuality of mistake, see note to *American Ass'n v. Williams*, 93 C. C. A. 10.]

2. REFORMATION OF INSTRUMENTS (§ 36*)—PLEADING—BILL—SUFFICIENCY.

A bill to reform a \$10,000 tontine life policy, binding insurer for an annual premium for 20 years to pay \$10,000 on insured's death within the 20 years, and to pay insured, if living at the expiration of that period, \$10,000 with surplus equivalent to the full proportionate share of the profits of insurer's business earned by the policy, or at the option of insured to issue a paid-up policy, or to issue a life annuity, which alleges that insurer induced insured to accept the policy and to pay the premiums by fraudulent representations that by experience of insurer, and with like experience in the future, the policy would entitle insured at the maturity thereof to an option of \$17,570 in cash, or a paid-up policy of \$37,600, or a life annuity of \$1,400, and that the policy would yield such results unless variations in current rates of interest, in mortality, lapsing, or other variable quantities, would prevent insurer from having the same experience in the future, that the representations were made to insured by insurer's authorized agent orally and by printed

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

blanks attached to the policy, stipulating that insured at the tontine period had three methods of settlement as shown by the representations, does not state a cause of action, since the contract of insurance, as evidenced by the policy issued, is in accordance with the intention of the parties as disclosed by the allegations of the bill.

[Ed. Note.—For other cases, see Reformation of Instruments, Dec. Dig. § 36.*]

3. ACCOUNT (§ 12*)—ADEQUACY OF REMEDY AT LAW.

A bill for discovery and accounting, which alleges that a policy issued by defendant on complainant's life requires defendant to pay a specified sum, with a dividend, equivalent to the full proportionate share and profits of defendant's business earned by the policy, and which avers that complainant was assured that the past experience of defendant would entitle him to a specified sum, shows that complainant has an adequate remedy at law, on the theory that defendant is bound by the representations, and in an action at law complainant need only prove the fact that there has been no difference in condition since the execution of the policy from those existing prior thereto, and he may compel, under Rev. St. § 724 (U. S. Comp. St. 1901, p. 583) a production of defendant's books on that question.

[Ed. Note.—For other cases, see Account, Cent. Dig. § 65; Dec. Dig. § 12.*]

4. REFORMATION OF INSTRUMENTS (§ 25*)—SCOPE OF REMEDY.

A court will not reform an instrument where the legal construction of the instrument as reformed will be the same as before reformation, and the court will not reform a tontine life policy where, if reformed, the rights of the parties would not be changed.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 84-90; Dec. Dig. § 25.*]

5. ACCOUNT (§ 17*)—DISCOVERY—PLEADING.

Where a bill seeks both discovery and an accounting, the discovery is deemed incidental to the accounting, and where there is no right to an accounting, the bill is bad on demurrer, especially where plaintiff has an adequate remedy at law, and may, under Rev. St. § 724 (U. S. Comp. St. 1901, p. 583), compel the production of defendant's books to disclose the facts.

[Ed. Note.—For other cases, see Account, Dec. Dig. § 17.*]

In Equity. Suit by Harry Grieb against the Equitable Life Assurance Society of the United States. Demurrer to bill sustained.

Henry P. Erdman and Preston K. Erdman, for complainant.

George Douglas Hay, B. Gordon Bromley, and Thomas De Witt Cuyler, for respondent.

HOLLAND, District Judge. To this bill in equity, praying for a reformation of a life insurance policy and a discovery and accounting by the defendant, a demurrer has been filed denying the right of complainant to a reformation, and raising the question of the court's jurisdiction to order the latter. There are numerous other questions raised by the demurrant, but it will be necessary to consider only those mentioned.

The defendant is in possession of the policy as collateral for a loan, and this was made an excuse by the complainant for not having attached a copy to his bill. It is, however, alleged that the date of the policy is June 7, 1889, and that it is known in the insurance business as a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tontine policy, of the face amount of \$10,000, according to the terms of which, in consideration of the payment by the complainant of an annual premium of \$494, for the period of 20 years, defendant agreed to pay the sum of \$10,000 to the executors of the complainant, in case of his death within the period of 20 years from the date of the policy, and in case the insured should be living at the expiration of that period, to pay to him the sum of \$10,000, together with the further sum, denominated as dividend or surplus, equivalent to the full proportionate share of the profits of the defendant's business earned by this policy, or else, at the option of the complainant, to issue to him a certain paid-up policy of insurance, payable at death, or as a further option, to issue to him a certain life annuity.

It is further averred that the complainant was induced to accept the said policy and to pay the stipulated premiums by certain false and fraudulent representations made to him by defendant, to the effect that the experience of the defendant with similar policies issued by it was such that with like experience in the future, the complainant's policy would entitle him, at the maturity thereof, according to its terms, to an option of \$17,570 in cash, or a paid-up policy, payable at death, of \$37,600, or a life annuity of \$1,400, and that the policy would yield these results to the complainant, unless variations in current rates of interest, in mortality, lapsing, or other variable quantities, would prevent the defendant from having the same experience in the future that it had with similar policies which had expired or which had then run for a period of 18 years; and that these representations were made to the complainant by the defendant's authorized agent, communicated to him orally, and by a printed blank which was attached to the insurance policy, a copy of which is made part of this bill, in which we find the statement, "the policy holder has at the tontine period a chance of three methods of settlement, shown in the following illustration, based on the actual results of tontine policies issued in the past. The results of policies issued hereafter will, of course, depend upon the future experience of the society." Then follow the three methods of settlement, to wit, (1) cash value \$17,570; (2) paid-up value policy, payable at death, \$37,600; (3) life annuity \$1,400.

On March 18, 1909 defendant notified the complainant that at the maturity of his policy on June 7, 1909, if then in force, it would settle with him therefor as follows: It would give to him an option (1) in cash \$12,194.80; or (2) a paid-up policy of \$24,500; or (3) a life annuity of \$774.96—with the statement that this was all the complainant was entitled to receive.

The complainant insists that, by reason of the matters and things alleged in his bill, he is entitled to an accounting of the earning of his policy of insurance, and that the same is too complicated to be settled in an action at law, and to a discovery of the defendant's experience with similar policies at the time it presented to the complainant the illustration blank, and particularly, the results of its business in the year 1888, and to have the policy of insurance reformed and payment made in accordance with the terms thereof as reformed, and that the policy be produced by the defendant in court.

The following is the prayer for reformation:

"That the said policy of insurance No. 429,539, issued by the defendant to your orator, be reformed so that it shall read that your orator should be entitled at the maturity of the said policy, if then living, at his option, to a cash value, consisting of matured endowment and surplus of \$17,570, less such sum, if any, as defendant can show was caused by variation in rate of interest, maturity, value of investments, or other variable quantity, during the term of the policy, from the same quantities prevailing immediately previous to the date of said policy, and that the defendant be ordered to make payment to your orator in accordance with the policy so reformed."

[1] Is the complainant, upon the averments of his bill, entitled to the reformation prayed for? Reformation of a contract will not be granted by a court of equity unless there has been a mistake which is mutual and common to both parties to the instrument. It must appear that both have done what neither intended. A mistake on one side may be a ground for rescission, but not for reforming a contract. Where there has been a mistake of one party, accompanied by fraud or inequitable conduct of the remaining parties, in such cases the instrument may be made to conform to the agreement or transaction entered into according to the intention of the parties. *Pomeroy's Equity Jurisprudence*, §§ 1375, 1376 and notes; *Hearne v. Marine Insurance Co.*, 87 U. S. 488, 22 L. Ed. 395; *Simmons & Co. v. Doran*, 142 U. S. 417, 12 Sup. Ct. 239, 35 L. Ed. 1063; *Boyce v. Fire Insurance Co.*, 24 Pa. Super. Ct. R. 589.

[2] The contract of insurance, as stated by the plaintiff's bill, is, in our judgment, in accordance with the intention of the parties. The insurance company stated, through its agent and by its illustration blank attached to the policy, that a policy holder was entitled, at the end of the tontine period, to the advantages of three methods of settlement, based on the actual results of tontine policies issued in the past, and one of these advantages of settlement was cash value, consisting of matured endowments and surplus amounting to \$17,570, but it is added, and so stated in the plaintiff's bill, that "the results of policies issued hereafter will of course depend upon the future experience of the society"; that is to say, that it was represented by the defendant that up to the time of issuing the policy to the complainant the experience of the society from policies of this kind issued in the past was such that the complainant would be entitled to a cash value consisting of matured endowments and surplus amounting to \$17,570, but that thereafter (i. e., after the date of complainant's policy) the cash value of such policies would "depend upon the future experience of the society." So that it seems to me that the policy, with the stipulation above referred to, as set forth in the plaintiff's bill, is in accord with the intention of the parties, and a court of equity is not warranted in making a new contract under the guise of a reformation.

[3] The bill alleges the contract of insurance requires defendant "to pay your orator the sum of \$10,000, together with a further sum, denominated as dividend or surplus, equivalent to the full proportionate share and profits of the defendant's said business earned by its policy," etc. The plaintiff was assured that the past experience of the company would entitle him to \$17,570, and this assurance was conveyed to him,

according to the averments of the bill, verbally by their agent, and by a written illustration blank filed as part of the contract.

The defendant is bound by that representation, and would be estopped from denying that its past experience was otherwise than that it would entitle the plaintiff to \$17,570, so that the plaintiff has a complete remedy at law for the balance due him on his contract, which, according to the allegations in his bill, is the difference between what he already received and \$17,570, and in such a suit, it seems to me, the plaintiff would only be required to establish the fact that there was no difference in condition since the execution of the complainant's policy from those existing prior thereto, and if he is entitled to this information from the defendant company, he has ample authority under section 724 of the Revised Statutes (U. S. Comp. St. 1901, p. 583) to compel a production of all its books and papers on this point.

[4] It has also been held that a court will not reform an instrument merely for the sake of reforming it, and it is a good defense to point out whether on demurrer or by answer that the reformation would be useless and of no effect. 34 Cyc. 946. Where the legal construction put on the instrument would be the same as before reformation, there is no necessity for a court of equity to take action. *Thompson v. Phoenix Insurance Co.* (C. C.) 25 Fed. 296-298; *Liggett v. Shira*, 159 Pa. 350, 28 Atl. 218.

If the policy be reformed as prayed for, the complainant's rights would not be altered. According to the averments in his bill he is entitled to recover the \$17,570 in cash, unless variations in current rates of interest, in mortality, lapsing, or other variable qualities prevented the same experience in the future that the society had with similar policies that had run for 18 years at the time of the issuing the policy to the complainant.

If the contract be reformed in accordance with the prayer of the bill, the right of the complainant to recover would not be altered. The maximum amount would be no more than \$17,570, subject to any reductions which might occur as a result of dissimilar experiences by the society during the running of the policy, so that the plaintiff, by his averments in the bill, shows that he is not entitled to a reformation of the contract, because (1) it at present represents what the parties originally intended; and (2) that if reformed, the rights of the parties would not be altered. For these reasons, the demurrer as to the reformation is sustained.

[5] There is also a prayer in the bill for a discovery and an accounting, upon the ground that the society had failed to apportion to the complainant his policy's entire share of the surplus.

In a case on all fours with the one at bar, *Judge Buffington*, in *Everson v. Equitable Life Assurance Society* (C. C.) 68 Fed. 258, affirmed by the Circuit Court of Appeals, 71 Fed. 570, 18 C. C. A. 251, held that the relation between the holder of a matured semitontine policy and the insurance company is that of debtor and creditor merely, and involves no trust relation; and a policy holder who is dissatisfied with the amount of the surplus which is apportioned to him by the company, pursuant to the terms of the policy, cannot maintain a bill

for accounting and discovery when there are no sufficient allegations of fraud. Where a bill seeks both discovery and an accounting, the discovery must be regarded, *prima facie*, as incidental to the accounting, and, if there is no right to an accounting, the bill will be held bad upon demurrer. And this, it seems to me, is no hardship, because we think the plaintiff has an adequate remedy at law to recover the amount to which he may be entitled under his contract, and as pointed out in Street's Federal Equity Practice, §§ 1860, 1861, and 1862, the complainant, under the provisions of section 724 of the Revised Statutes, may compel the production of books and papers and all documents necessary for the plaintiff's case without being hampered by the existence of a procedural rule drawn from the practice in English Chancery in regard to the production of documents upon bills of discovery.

The demurrer, denying plaintiff's right to a reformation and also to the jurisdiction of the court to compel a discovery and accounting, is sustained.

THE ARMORICA.

(District Court, E. D. North Carolina. April 15, 1911.)

1. SHIPPING (§ 83*)—LIABILITIES OF VESSELS—INJURY TO FISH NETS.

A vessel which unnecessarily and deliberately runs into and injures fish nets, set where they do not obstruct navigation, is liable in damages.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 336; Dec. Dig. § 83.*]

2. SHIPPING (§ 79*)—LIABILITIES OF VESSELS—INJURY TO FISH NETS.

While the right of navigation and of fishing both exist in navigable waters, the right of navigation is paramount, and a steamer having a raft of logs in tow, proceeding from one point to another on the shore of Albemarle Sound in stormy weather, which rendered it unsafe for her to take her raft far from shore, in the absence of wantonness or malice, is not liable for an injury to fishing nets which were set extending two miles from shore and across the steamer's proper course.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 333-348; Dec. Dig. § 79.*]

In Admiralty. Libel by J. L. Pritchard against the steamer *Armorica*. Decree for respondent.

Roscoe Turner and W. A. Worth, for libellant.

W. L. Cahoon, E. F. Aydlett, C. E. Thompson, and R. T. Thorp, for libelee.

CONNOR, District Judge. Libellant filed his libel in this court on May 30, 1910, alleging that on February 25, 1910, his nets were set for the purpose of catching fish in the waters of Albemarle Sound in the Eastern District of North Carolina, in a plain, conspicuous place, not obstructing navigation, and being operated under the superintendence and care of competent persons; that on said day the steamer *Armorica* carelessly, negligently, and without cause ran into said nets and damaged them; that said act was "negligently and unnecessarily

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

done, that there was abundance of room for said steamer to pass said nets without injury to them, without hindrance or delay, but that she deliberately and carelessly ran into said nets and destroyed them." Libelee moved the court to dismiss the libel for that upon the allegations in the libel the steamer was not liable, etc. This motion is denied.

[1] Certainly if the steamer unnecessarily and deliberately ran into the nets when she had ample room to pass them without hindrance or delay—that they were not obstructing navigation—such conduct would be wanton and willful, severely approximating malice, and for this there can be no question that she is liable for the damage done to the nets. Libelee answered, denying the material allegations of the libel, and for further defense alleged that:

"The said steamer was a steam tug of 30 tons and of 6½ feet draught; that she can ply only in the navigable waters of the United States, and has never, at any time, plied in any other waters of Albemarle Sound than such as are public, navigable waters; that, under the laws of the United States, fishing nets and seines placed in public, navigable waters are necessarily obstructions to navigation," etc.

The case was referred to George J. Spence, Esq., commissioner, with direction to hear the testimony and report to the court his findings of fact. He reported:

(1) That libellant, J. L. Pritchard, on and prior to February 25, 1910, was the owner of certain nets located by him in the Albemarle Sound at a point between Little river and Pasquotank river known as Big Flatty creek. That said nets were being operated on said day and had been so operated for some time prior thereto.

(2) That said nets were placed at said point on Big Flatty creek, and "extended a distance of about two miles out in the Sound."

(3) That on and before said day W. M. Partridge was part owner of the steamer *Armorica*, and was on said day in command as master of said steamer.

(4) That on the morning of February 24, 1910, he was anchored near Lister's pier in Little river.

(5) That on the morning of February 25, 1910, at 2 o'clock, under the command of said W. M. Partridge, the said steamer "pulled out of the mouth of Little river and took a course for Pasquotank river."

(6) That between 9 and 11 o'clock on the morning of February 25, 1910, the said steamer, while on a course from Little river to Pasquotank river, ran into the nets belonging to libellant, damaging them to the amount of \$100.

(7) That when the said W. M. Partridge "pulled out of Little river" on the morning of February 25th "the wind was blowing a gale—that the mouth of Little river, with a wind blowing a gale from the northwest, is a safe harbor."

(8) That said Partridge knew that the nets were placed in the Albemarle Sound at a point between Little river and Pasquotank river known as Big Flatty creek, and that said nets extended a distance of about two miles out into the Sound, and he knew that in sailing the course which he took from the mouth of Little river, and hugging the

northern shore of Albemarle Sound, he would necessarily come in contact with these nets.

The commissioner was of the opinion, and so reported, that upon these findings said W. M. Partridge ran into the nets "negligently, carelessly, and without cause." Libelee filed a number of exceptions to the findings of the commissioner. Since filing the report the commissioner has requested permission to change his finding in regard to the hour at which the steamer left her anchorage at Lister's pier and pulled out of Little river. There is a manifest error either in the hour fixed by the commissioner, 2 o'clock in the morning of February 25th, or in the hour fixed by the libelant's witnesses when the nets were run into. All of them say that it was between 9 and 11 o'clock, except one Maston, who says that it was 11 o'clock, that he examined his watch, and one W. A. Tillett says that it was between 8 and 12 o'clock. Capt. Partridge says that at 1 a. m. he ordered steam, and at 2 a. m. he pulled out of the mouth of Little river and steered southeast course for one mile, and then changed to east course, steered about five and a half miles, which placed him for Wade's Point at 7 a. m. He is sustained in this statement by the entries made in his log. Libelant introduces several witnesses who say that Capt. Partridge did not leave Little river before 7 a. m. It is clear that, if Capt. Partridge's testimony be correct, he could not have passed the nets at or near the hour fixed by libelant's witnesses. He says that he was not aware that he ran into any nets off Big Flatty creek. He fixes the hour of his arrival at Old Trap Wharf, and is corroborated in his statement at an hour which, considering the distance from Lister's pier, corresponds with his other statement. There is evidence that another steamer, the *Gazelle*, corresponding in appearance with the *Armorica*, was in these waters on the morning of February 25th. It is possible that the witnesses mistook her for the *Armorica*. The evidence in respect to the *Gazelle* being there is also contradictory. It is impossible to reconcile the testimony. Some one is wrong, either in memory or otherwise. Considering the distance from which the witnesses saw a steamer run into the nets, the condition of the weather, and their uncertainty as to time, in the light of Capt. Partridge's testimony and proof of his good character, I am of the opinion that libelant has not successfully carried the burden of proof and established his allegation that the *Armorica* ran into the nets.

[2] In view of the contention made by libelant, in respect to the rule of liability upon persons navigating the waters of Albemarle Sound when seines and nets are injured and the large public interests involved, I am of the opinion that the law should be declared to the end that persons exercising the right of navigation and fishing may control their conduct accordingly. Assuming, therefore, that at the time named by libelant's witnesses the steamer *Armorica*, in passing from the mouth of Little river to Pasquotank river ran into the nets under the circumstances insisted upon by libelant, or sustained by the weight of the evidence, the case comes to this: Libelant's nets were placed in the Sound for the purpose of catching fish. They extended out from the shore two miles. They were properly placed. It is

immaterial whether lights were upon them. The steamer *Armorica*, with a raft in tow, was on the morning of February 25, 1910, in the mouth of Little river and a due course in towing the raft took her from the mouth of the river to the mouth of Pasquotank river, between which points the nets were set. It is immaterial whether prudence for her safety required that she should remain in Little river. That was a question to be decided by her captain. The presence of the nets was not a factor in the decision of that question. He was as a matter of right entitled to make his trip by the safest route and course consistent with prudent navigation. When he left the mouth of Little river, he took his bearings from Reed's Point light to Wade's Point light. These were the proper points for him to take. He knew that in going from Reed's Point light to Wade's Point light he would pass through the waters in which the nets were set and pass over them. He knew that, in the condition of the weather, the course and velocity of the wind, safety for his boat and the raft required that he should hug the shore and not go out into the Sound. These conditions are shown by the testimony. In taking the course, under the circumstances, was he exercising his right of navigation; and is he liable for the injury sustained by the nets in doing so? The answer to this question depends on a few simple and well-settled principles. The right of navigation and of fishing both exist in the public without regard to any riparian ownership. Grants of land bounded by navigable water do not carry any several right of fishing is well settled in a very able and exhaustive opinion by Ruffin, Chief Justice, in *Collins v. Benbury*, 25 N. C. 277, 38 Am. Dec. 722. The right of navigation being paramount to that of fishing in these public navigable waters, the usual rules prescribing the mutual rights and duties of the public in using the state's highways do not prevail. The latter must give way to the former, as said by Pearson, C. J., in *Lewis v. Keeling*, 46 N. C. 299, 62 Am. Dec. 168. In this case the plaintiff had placed his nets in Albemarle Sound running out from the shore. Defendant for the purpose of bringing his boat to the shore, with knowledge of the placing of the nets, ran into and destroyed them. The court held that, in the absence of wantonness or malice, he was not liable to plaintiff. In his usual clear and direct manner of applying general principles to given facts, the Chief Justice says:

"Both rights exist, not as private rights, depending on grant or riparian ownership, but as rights in common, to which one citizen is entitled as well as another. The right of navigation is paramount, because it is of most importance to the public weal. The difficulty is to lay down a rule by which to allow the free and full exercise of this paramount right in such a way as to leave room for the other right to stand on, except as a matter of sufferance. * * * We have concluded that the line made by the law is a very broad one, and that, in fact the fishing interest has no ground on which to stand, except as a matter of sufferance. * * * It is argued that it never would do to require a steamboat or other vessel to stop or go out of the way in order to avoid a set net, or seine, because, if obliged to stop for one, they may be obliged to stop for a thousand, and there would be no getting along. But it is contended that the defendant had no right to come to the bank at the time and place he did, and is therefore bound to pay all damages that resulted from the fact of his doings so. Thus the question is, Had

the defendant a right to come to the bank at the time he did so, at the time and place he did? He says that by reason of the paramount right of navigation he had a right to come to the bank at any time and at any place there was a bona fide necessity for him to do so in the pursuit of his vocation; that in this particular instance, without any wantonness or malice, he did only so much as his business required him to do and took pains to avoid doing any unnecessary damage to the plaintiff. * * * But the gravamen of the plaintiff's (argument) is that no skill or care could have brought the boat in without doing damage to the seine, and therefore it was, in contemplation of law, negligent and wrongful for the defendant to attempt to do it. So we come finally to the issue, Must a steamboat stop until a seine can be drawn out of the way, or has the boat a right to go to the bank at any time and at any place, when there is a bona fide necessity for doing so? * * * A boat on a navigable stream has a right to 'take her course' and go to the bank when and where it is necessary to do so, doing no unnecessary damage and acting without wantonness or malice."

It appears that the nets were run into at a distance estimated at about 900 feet from shore. An examination of the chart made from the government's survey shows that the steamer was in water of safe depth, and the weight of the testimony shows that it would have been dangerous for her to have gone further out into the Sound with her raft. The uncontradicted testimony also shows that Partridge is a man of good character and a prudent navigator and acquainted with the Albemarle Sound.

Applying these principles to the facts in this case, taken in their reasonable aspect, I am of the opinion that the steamer *Armorica* was within her right of navigation in passing from the mouth of Little river to Pasquotank river, and that for any injury sustained by libellant's nets the owner is not liable. Cases may be found in which the right of fishing in navigable waters is given larger protection against injury by those navigating, but it will be noted that, as in England, the several right of fishing is granted either by the crown or by the state. The rule laid down in *Keeling's Case*, *supra*, has been followed in this state. It is difficult to see how the relative rights of the public in navigation and fishing in navigable waters can be otherwise preserved. It is to be regretted that this case, involving so small an amount, should have involved such large costs, while within the admiralty jurisdiction it would seem that it should have been disposed of in the state court where the method of trial is much more simple and inexpensive. The material facts were simple and could have been easily established.

The libel must be dismissed, at the cost of the libellant.

JACKSON v. SEDGWICK.

(Circuit Court, E. D. New York. July 22, 1911.)

1. BANKRUPTCY (§ 161*)—ASSETS—TRANSFER—PREFERENCES.

Where a preferential assignment of accounts belonging to a corporation, to one of its directors, was made more than four months prior to the filing of a petition in bankruptcy, it could not be set aside under Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), as a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 261-263; Dec. Dig. § 161.*]

2. BANKRUPTCY (§ 178*)—PREFERENCES—ASSIGNMENT OF ASSETS TO DIRECTOR—RIGHTS OF CREDITORS.

A preferential assignment of assets of a corporation to a director is subject to the rights of creditors in so far as the value of the assets exceeded the genuine consideration involved, and, if made to keep such assets away from the creditors, would be void at any time, if the intent to interfere with the collection of claims actually existing against the corporation was present in the minds of the parties.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 178.*]

3. BANKRUPTCY (§ 178*)—PREFERENCES—TRANSFER OF ASSETS.

Where a corporation transferred certain accounts to a director as a creditor for advances previously made, but the transfer was not followed by delivery, the corporation retaining possession and collecting the assigned accounts so far as possible, and finally turning over to its trustee in bankruptcy the balance not collected, the transfer was invalid as to creditors, the burden being on the transferee to account for and restore what she had received, and on the corporation's trustee to show that she did receive something for which she was bound to account.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 178.*]

4. BANKRUPTCY (§ 178*)—PREFERENCES—TRANSFER OF ACCOUNTS—EVIDENCE OF INTENT.

Where accounts of a corporation were transferred to a director to secure her for advancements, but the transfer was not followed by delivery, and there was no entry of the transfer on the books of the corporation, it continuing to make collections and pay over the amounts thereof to the director, such method of bookkeeping and payment was evidence of fraudulent intent.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 178.*]

5. BANKRUPTCY (§ 186*)—PREFERENCES—LIABILITY OF TRANSFEE.

Where a corporation while insolvent transferred certain accounts to a director to secure advances, and such transfer was void as against the corporation's creditors, the director was only bound to return what she had received pursuant to such assignment, either in collections made or by transfer to the corporation's trustee in bankruptcy of the assigned accounts remaining uncollected, less the actual present consideration paid therefor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 285; Dec. Dig. § 186.*]

In Equity. Suit by Thomas W. Jackson, as trustee for the creditors of the United Syndicate Buyers, against Henrietta A. Sedgwick. Decree for plaintiff.

Frank Benjamin, for plaintiff.

Robert J. McDermott, for defendant.

CHATFIELD, District Judge. This is an action in equity to set aside the transfer of some \$8,638, face value, of merchandise accounts, made December 15, 1906, by the United Syndicate Buyers, a corporation doing business in the city of New York and organized under the laws of the state of New Jersey, and for an accounting as to collections from these accounts. This corporation had very little capital and hardly any stock, but bought goods for export and discounted or pledged the bills or accounts for these sales, in order to meet the bills becoming due for goods previously purchased and disposed of in other transactions. The secretary and active man in the business was a son of the present defendant. The defendant became a director and stockholder and participated in the business in order to help her son, who was not yet 21 years of age and could not engage in business as he wished on that account. This son became of age before the transactions in question, and his mother ceased then to act as director, but seems to have remained legally a member of the board. The corporation not only had an unusual business, but conducted this business in an unusual manner, and negotiated loans substantially with two men, who received interest on the advances, being protected by an agreement on the part of the corporation, to refund or purchase back all of the accounts which were not paid within the time in which the debt to secure which they were assigned fell due. The defendant was frequently called upon to advance money to help the corporation out in taking over or repurchasing these bills which were not paid promptly, and it appears that in the month of December, 1906, about \$1,000 was due to her in this way. She also had a claim for money loaned of \$500, and at that time advanced \$500 more by check. To secure this the corporation assigned to her some \$9,000 worth of accounts, which had then not been paid or were of doubtful value, and had been taken back from the pledgees. The corporation then proceeded, within the next few months, to borrow from the two gentlemen who had previously made loans over \$5,000 more, with which they paid all the creditors having claims at the time of the assignment. Ultimately, in the month of February, 1907, a proceeding was brought in New Jersey to have the corporation liquidated, and for the appointment of a receiver. At this time the corporation was insolvent. But, this plan not working out as was expected, a petition in bankruptcy filed in the Southern District of New York in July, 1907, caused the assets of the corporation to be taken in charge of by the bankruptcy court. Ultimately a trustee was appointed, who brought the present action against Mrs. Sedgwick, on the ground that the transfer to her in December previous to the filing of the petition was with intent to hinder, delay, and defraud creditors, and therefore void.

[1] It is apparent that this transfer was more than four months prior to the filing of the petition, and, while the circumstances were such that the assignment seems to have been plainly preferential, nevertheless the proceedings in bankruptcy were not brought within the period in which a preferential payment could be attacked. The trustee therefore seeks to show that the transfer was not only intended to prefer but was actually fraudulent—that is, that the corporation was

rendered insolvent by this transfer—that the corporation, that is its officers and its secretary, Mrs. Sedgwick's son, and Mrs. Sedgwick herself, as a director, knew or should have known of the condition of the company, and that a transfer of these accounts, if absolute, would have been void unless it had been for a present cash consideration.

[2] Inasmuch as it was made to a director of the corporation, it would be subject to creditors' rights over and above the payments of the genuine consideration involved, and, if made under the circumstances alleged for the purpose of keeping the assets away from other creditors, it would plainly be intended to hinder, delay, and defraud these other creditors, and hence would be void at any time that the intent to interfere with the claims actually existing in the bankruptcy proceedings might be present in the minds of the parties.

[3] The situation has been greatly complicated by the fact that the sale of these accounts to Mrs. Sedgwick was not followed by delivery. The books and unpaid accounts themselves were actually retained in the possession of the corporation, and those uncollected were finally taken possession of by the receiver and the trustee in bankruptcy, or were within the control of the bankruptcy court. The proof does not show how much of the proceeds are in the possession of Mrs. Sedgwick or of any one for her, but, on the contrary, it does show that these accounts were actually left within the control of the bankrupt or Mrs. Sedgwick's son, who was an officer of the bankrupt, and that the assignment to her conveyed nothing but a naked title, while the business went on as before.

Such a transfer would plainly not be valid as against creditors, if attacked in time. In *re* George W. Shiebler & Co., 174 Fed. 336, 98 C. C. A. 408. Further, a transfer of accounts for a past consideration, or even for a present inadequate consideration, where the circumstances as well as the books and instruments themselves indicate that the transfer was not intended to be absolute, but was merely to keep assets from other creditors, and as security to the assignee, must be held void. The burden is therefore upon the defendant in this action to account for and restore what she received, and the burden is upon the plaintiff to show that the defendant did receive something for which to account. It would appear from the testimony that, as has been said, the face value of the accounts was some \$9,000. The amount of the debt for which they were transferred was about \$2,000, and the defendant shows by the testimony that she has received from \$700 to \$1,000 collected by the corporation.

The fact that the creditors whose subsequent claims for loans have been proven in bankruptcy did not know of the transfer to Mrs. Sedgwick, and did not succeed in getting good collateral for their loans, or in keeping track of the business and accounts which were actually left in the hands of the corporation, does not give the trustee any rights as against Mrs. Sedgwick.

[4] But the methods of bookkeeping and the payment of collections to Mrs. Sedgwick without the use of a ledger account do show that the assignment of the accounts was used as a means of disposing of

what were the company's assets, even if pledged, and are evidence of intent of the parties. Mrs. Sedgwick either had collateral for which she should account, or else was concealing assets under an assignment, void for the most part. But it must be held that the plaintiff has not shown that Mrs. Sedgwick has now in her possession any assets, over the cash received, except the naked title conveyed by the assignment, even though the agreement purporting to sell her certain accounts should be declared void.

[5] In so far as the defendant has offered testimony, she seems to have admitted the receipt of what actually came into her possession and for which she should be held responsible, but the mere fact that she was a director, and therefore should be held to a director's responsibility for the corporation's accounts, does not mean that she must restore to the corporation property which she did not receive and for whose loss she is not responsible even as a director. The accounts in question should have been located and their recovery sought in bankruptcy; but inasmuch as there seems to have been some dispute as to whether or not Mrs. Sedgwick had title thereto, and inasmuch as it appears that her alleged title was invalid, the plaintiff may have a decree that Mrs. Sedgwick has no title in any of the accounts in question; that she should execute the necessary conveyance to revest these accounts in the estate; and that she pay back what she received.

A further defense has been interposed, inasmuch as it is claimed that the testimony does not show that the corporation was insolvent in December, at the time of the assignment of these accounts. The disposition which has been made of the matter has been based upon the conclusion that the history of everything concerned in collecting these accounts and winding up the affairs of the concern would indicate that it was losing money at the time of these transactions, and, if it had been compelled at that time to liquidate, its liabilities would have considerably exceeded its assets.

If any of the uncollected accounts were actually in the hands of Mrs. Sedgwick, and the assignment claimed by her to be absolute and not as security, or if the transfer were merely preferential, it might be necessary to consider this defense more in detail, in order to see if her claim of solvency could be sustained. But as the case stands such scrutiny is unnecessary, and the plaintiff is entitled to a decree, with a reference, if necessary, to determine the amount of money collected by the bankrupt and turned over to Mrs. Sedgwick, but against which should be offset the sum of \$500 cash actually advanced for this assignment.

IN RE GREER.

(District Court, W. D. Arkansas, Texarkana Division. August 2, 1911.)

1. BANKRUPTCY (§ 136*)—PROCEEDINGS AGAINST BANKRUPT—WITHHELD ASSETS—TRUSTEE'S PETITION—DEFINITENESS.

Where a trustee's petition to compel the bankrupt to turn over assets, alleged to have been withheld, only charged that by reason of a prior statement made by the bankrupt August 5, 1910, showing that he had a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

surplus of \$22,815, and that his schedules filed October 13th following indicated a loss of \$27,745.76, of which only \$19,295.78 had been accounted for, and that the bankrupt necessarily had failed to turn over the balance, it was subject to a motion to compel the trustee to make his petition more definite and certain, and to state specifically what moneys or property the bankrupt had in his possession or control that he had not surrendered.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 136.*]

2. BANKRUPTCY (§ 136*)—COMPELLING SURRENDER OF ASSETS BY BANKRUPT—EVIDENCE.

The transcript of the testimony of the bankrupt at his examination before the referee, is admissible on the hearing of the trustee's petition to compel the surrender of assets claimed to be in the bankrupt's hands, after the bankrupt had testified that his testimony so given was true.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 136.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Ethma B. Greer. On petition for review of a referee's order requiring the bankrupt to turn over to the trustee \$7,010.15. Reversed and remanded.

Webber & Webber and Sam T. Poe, for trustee.

G. G. Pope, for bankrupt.

YOUMANS, District Judge. [1] In October, 1910, Ethma B. Greer was adjudicated a bankrupt. On November 8 and 19, 1910, he was examined before the referee. On the 1st of December, 1910, the trustee filed the following petition:

"Your petitioner, Will Steel, trustee of the above-named estate, respectfully represents that Ethma B. Greer, the bankrupt herein, on and after the 13th day of July, 1910, and on and after the 5th day of August, 1910, owned and had in his hands and possession real and personal property amounting in the aggregate to the sum of \$22,815 over and above the debts then owing by him; that said bankrupt's schedules filed herein show that on the 13th day of October, 1910, the date of the adjudication in bankruptcy, said bankrupt owned and was possessed of assets, including the property claimed by him as exempt, of the aggregate value of \$7,501.55, while his debts at said date amounted to the sum of \$12,432.31; that between the first-mentioned dates and the date of the adjudication in bankruptcy said bankrupt shows a loss in business of \$27,745.76, of which sum said bankrupt in his testimony given at the first meeting of creditors herein accounted for the sum of \$19,295.79, leaving a balance of \$8,450.17 which he failed and refused, and still fails and refuses, to account for; that said sum of \$8,450.17, either in money or other property should have been in possession of said bankrupt at the date of the adjudication; and your petitioner alleges that said sum of money or property of the value of \$8,450.17 is at this time in the possession or control of said bankrupt, Ethma B. Greer, that it belongs to this estate in bankruptcy, and that said Ethma B. Greer is fraudulently concealing and withholding the same from the trustee herein. Wherefore your petitioner prays an order of this court citing and directing the said Ethma B. Greer, bankrupt, to appear and show cause herein, if any he have, why he should not be required to pay over to petitioner the sum of \$8,450.17, or turn over to petitioner property of said value."

On the 12th of December, 1910, the bankrupt appeared and moved the court, in writing, to require the trustee to make his petition more definite and certain, and to state specifically what moneys or property the bankrupt had in his possession or control. This motion was over-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ruled by the referee, to which action the bankrupt excepted. Together with said motion, and reserving his rights thereunder, the bankrupt filed a response to the petition, and alleged that he had surrendered to the receiver all assets of every kind belonging to his estate. At the hearing on the petition the bankrupt was sworn and interrogated by the attorneys for the trustee. He was shown the transcript of his testimony given on his examination of November, 1910, and was asked if that testimony was true. He answered that it was. Thereupon the attorneys for the trustee offered said transcript as evidence on the hearing on the petition, to the introduction of which the bankrupt objected. The objection was overruled and the transcript was introduced, and the trustee rested. Thereupon the bankrupt was examined by his attorneys for the purpose of explaining his testimony given before the referee at his examination. The referee held that the bankrupt had in his possession or under his control the sum of \$7,010.15 and that he withheld and concealed the same from the trustee. The bankrupt filed his petition for review, setting out four grounds therefor, as follows: (1) Error on the part of the referee in overruling the motion to require the trustee to make his petition more definite and certain. (2) Error on the part of the referee in admitting in evidence, over the objection of the bankrupt, the testimony given by the bankrupt in his examination. (3) Because the finding of the referee was contrary to the testimony. (4) Because the order of the referee was contrary to law.

In my opinion the motion to require the trustee to make his petition more definite and certain should have been sustained. In the examination of the bankrupt it was brought out that he had on the 5th of August, 1910, made to his creditors, or some of them, the following statement:

Exhibit A.

E. B. Greer, Dealer in General Merchandise and Yellow Pine Lumber.

Fouke, Arkansas, 7/13, 1910.

Financial statement shown by E. B. Greer on June 1st, 1910, as per close estimate.

| | | |
|--|------------|--------------------|
| Amount of merchandise on hand at cost..... | \$4,600 00 | |
| Amount of notes and mortgages..... | 3,400 00 | |
| Value of open accounts..... | 1,300 00 | |
| Value of 2 sawmills, timbers and planer..... | 8,000 00 | |
| Value of lumber on hand | 5,000 00 | |
| Value of homestead | 1,500 00 | |
| Value of other real estate..... | 1,400 00 | |
| Value of real estate in Texas..... | 2,500 00 | |
| Value of fixtures and personal property..... | 1,200 00 | |
| Total assets | | \$28,900 00 |
| Owing for merchandise, due..... | \$1,785 00 | |
| Owing for merchandise not due..... | 400 00 | |
| Owing for borrowed money | 3,700 00 | |
| Owing on teams | 200 00 | |
| Total liabilities | | 6,085 00 |
| Total assets less liabilities | | \$22,815 00 |

It will be observed that this statement shows no cash on hand. On November 8, 1910, the bankrupt was asked to furnish a statement of his financial condition on the 5th of August, 1910. On the resumption of his examination, on November 19, 1910, he was asked if he had the statement, and he replied that the statement above quoted was a correct statement of his financial condition on that day. Taking this statement as a basis, in connection with his schedules, he was examined on behalf of the creditors, as follows:

"Q. Now, Mr. Greer, I want to get back on that account, now. You have submitted this statement here as a statement of your condition on that date. If this is not a true statement of your condition on that date, then you have not complied with the order of the court here, and we will want that statement if you are going to stand by it. A. I will stand by that statement as it appears there. Q. Well, then, don't refer to it as being an estimate. Now then, as I said a while ago, you had \$22,815 more than you owed on the 5th day of August, 1910; that's correct, is it? A. Yes, sir. Q. On the 13th day of October, 1910, you owed \$4,930.76 more than you had. That's correct, is it? A. Yes, sir, but I didn't make the figures. Q. Now, I am going to ask you now if you are familiar with the schedules that have been filed herein—filed in this bankruptcy proceeding? A. Yes, sir. Q. And you have sworn to these figures, and they are yours, are they not? A. Yes, sir. Q. Now then, these schedules show that on the 13th day of October that you owed \$4,930.76 more than you had, and the schedules are correct, are they not? A. Yes, sir. Q. If you owed \$4,930.76 on October the 13th, more than you had, then your net worth of \$22,815 had been wiped out, hadn't it? A. Yes, sir. Q. And on top of that you were \$4,930.76 worse off. Now that's correct, isn't it? A. Yes, sir. * * * Q. Now, on the 13th day of October, instead of having more than you owed, you owed more than you had, didn't you? A. Yes, sir. Q. Now then, you owed \$12,432.31, and you had \$7,501.55. Now the difference would represent your net worth, plus or minus? A. Yes, sir. Q. Now then, that difference is \$4,930.76. Then you were worth at that date \$4,930.76 less than nothing, were you not? A. Yes, sir. According to these figures. Q. Now, if you were worth \$22,815 on the 5th day of August, 1910, over and above all your liabilities, and two months later you were worth \$4,930.76 less than nothing, then, if you wanted to ascertain the loss in your business you would add those two items together? A. Yes, sir. Q. That makes a total of \$27,745.76 doesn't it? A. Yes, sir. Q. Then, according to your testimony now, you are \$27,745.76 worse off on the 13th day of October than you were on the 5th day of August, 1910; that's correct, isn't it? A. Yes, sir."

During the examination by attorneys for the creditors who afterwards represented the trustee, it was assumed by them that on August 5, 1910, the bankrupt had property of the value of \$22,815 above his liabilities. The examination of the bankrupt was directed to the total of the valuations set opposite the specific items of property in the statement of August 5, 1910. The result was that the specific property was lost sight of, and the bankrupt was involved in contradictions in endeavoring to account for the property on the basis of the valuations that he had put upon it in an effort to make a good showing to his creditors. In response to the motion to make the petition more definite and certain, the record shows that one of the attorneys for the trustee said:

"It is a physical impossibility for the trustee to be more definite and certain in his allegations than he is, or allege that it is money or property. Of course it would be more satisfactory if we could be more specific, but, as before stated, that is a physical impossibility."

Just what is meant by the words "physical impossibility" is not clear. Physical impediments do not excuse indefiniteness in pleading. There is no logical connection between the two. Besides, the difficulty seems to have been psychical rather than physical. It was certainly physically possible to compare the statement of August 5, 1910, with the schedules filed by the bankrupt in October following, and thus see what articles in the statement were absent in the schedules if any such were absent. It was physically possible to introduce the schedules in testimony, so that the referee could make the comparison himself. But that was not done. The schedules are no part of the record in the hearing on the petition. The only testimony introduced by the trustee at the hearing on the petition was the transcript of the bankrupt's testimony taken at his examination on the 8th and 19th of November, 1910. It was certainly not a physical impossibility for the trustee to indicate what property it was that he maintained was still in possession of the bankrupt as shown by that testimony. Attorneys for the trustee in their brief point out the particular testimony of the bankrupt on which they rely to sustain the finding of the referee. That testimony discloses no more now than it did at the time the motion was made. That testimony was in existence then, and was introduced immediately after the motion was overruled. If it is physically possible now, by means of the testimony of the bankrupt, to designate the property still held by him, it was certainly possible then. The referee in his opinion presents two methods of computation by which it may be determined that the bankrupt has money or property in his possession which he should account for to the trustee. By one of these methods it is shown that the bankrupt has not satisfactorily accounted for \$8,500. The opinion of the referee on that point is as follows:

"It appears from the testimony of the bankrupt that on or about the 13th day of July, 1910, just three months prior to the filing of the petition in bankruptcy, that said bankrupt owned and had in possession a large amount of property with a comparatively small amount of liabilities, leaving him with a net worth of substantially \$22,815. At the date of the filing of the petition in bankruptcy his assets had dwindled down to \$7,501.55, while his liabilities had increased to \$12,466.07, making a total loss in business in the three months of \$27,745.76. At the first meeting of creditors bankrupt was called upon for a statement of his financial condition on or about the 5th day of August, 1910, and also for a statement of the cash and merchandise expended by him on and after that date, and the meeting was adjourned for 10 days in order to give him time to obtain and furnish this data. At the adjourned meeting he submitted a statement of expenditures amounting to \$12,995.99 that falls short of a satisfactory accounting, and, on the hearing herein, re-submitted said statement, and claimed additional expenditures as follows: \$800 paid out, of which no record was kept; \$2,500, the value placed on Texas real estate, which, according to his present account, proves to be worthless; and \$3,000 loss on the Cox & Hudson account, making a total of \$19,295.99, which, taken from \$27,745.76, leaves a balance of \$8,500, in round figures, for which no satisfactory account is given."

By the other method the referee finds that the bankrupt does not satisfactorily account for \$7,010.15 which latter amount the bankrupt is by the referee ordered to pay to the trustee. This amount grows out of certain sales of lumber. The account given by the bankrupt of these sales is not clear. In support of the finding of the referee

reference is made to the testimony given by the bankrupt on his examination of November 8th. That portion of the testimony of the bankrupt was an attempt to account for the assumed shortage of \$27,745.76, and was in answer to the following question by his attorney:

"Where was one of the largest leaks in the business—where did you lose a large amount of money?"

In answer to that question the bankrupt stated in substance that he had bought a large amount of lumber at a certain price and sold it at a less price, and that a large loss resulted from the transaction. It appears that a certain bank had made advances to the bankrupt, controlled the shipments and collected the proceeds of the sale. How much of the proceeds went into the hands of the bankrupt does not appear. It must be remembered that this testimony was taken on November 8th, almost a month before the petition was filed, in support of which it was introduced in evidence on December 12th. The object of the examination was to obtain an explanation of the bankrupt's business, and to ascertain whether he had assets other than those listed in his schedules. The petition should have made definite allegations, so that the bankrupt might know what he was called upon to produce. In no other way could he know what it was that was demanded of him, or account for its absence.

[2] The transcript of the testimony of the bankrupt, or such part of it as tended to prove the allegations in the petition, was admissible. *In re Wilcox*, 109 Fed. 628, 48 C. C. A. 567. It may be that the bankrupt still has in his hands proceeds of the sale of lumber, and that this may be made to appear from proof based upon specific allegations to that effect. If the order of the referee in this case were sustained and should not be complied with, the only method of enforcing it would be by imprisonment for contempt. The bankrupt should not be ordered to do something that he cannot do. The testimony does not satisfy me that he can comply with the order of the referee. That order is therefore reversed, and the matter is remitted to the referee, with directions to sustain the motion of the bankrupt to make the petition of the trustee more definite and certain, and for further proceedings in conformity herewith.

HUNTLEY v. EMPIRE ENGINEERING CORPORATION.

(District Court, W. D. New York. July 19, 1911.)

1. CANALS (§ 30*)—OBSTRUCTION—INJURY TO VESSEL.

Evidence considered, and *held* to show that the sinking of a loaded canal boat while being pushed by libellant's steam canal boat in the center of the Erie Canal, which was the usual place, by striking a stone in the bottom, was due to the negligence of respondent which in working at the place with a dredge had raised or turned the stone, which was embedded in the bottom of the canal, so as to render it a dangerous obstruction to navigation.

[Ed. Note.—For other cases, see Canals, Dec. Dig. § 30.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. CANALS (§ 29*)—CONTRACT WITH STATE FOR IMPROVEMENT—INJURY TO VESSELS—LIABILITY OF CONTRACTOR FOR NEGLIGENCE.

Under a contract with the state for deepening and widening the Erie Canal, which provided that the work should be done "so as not to interfere with the navigation of the present canal," and that all damages of whatever nature resulting from the work during its progress should be borne by the contractor, it was liable for an injury to a canal boat being navigated in the usual manner from striking an obstruction negligently caused by the contractor in doing the work.

[Ed. Note.—For other cases, see Canals, Cent. Dig. §§ 36-39; Dec. Dig. § 29.*]

In Admiralty. Suit by Loren E. Huntley, individually and as trustee and bailee, etc., against the Empire Engineering Corporation. Decree for libellant.

Brown, Ely & Richards, for libellant.

Dana L. Spring, for defendant.

HAZEL, District Judge. On the night of October 28, 1909, four canal boats, the Captain L. E. Huntley, the John Valiant, the Ella May Hamilton, and the Osborne D. Fisk, together with the steam canal boat Paragon, all loaded with grain, were on their way eastward in the Erie Canal from Buffalo, and, while moving slowly in the middle of the canal about one mile west of Spencerport, the Huntley, which was being pushed ahead by the Paragon, struck a submerged rock or boulder, and sunk to the bottom of the canal. The Paragon struck the rock a glancing blow, and sheered off, while the Valiant, which was behind the Paragon and towed by her, struck the rock and stranded.

[1] In support of the libel evidence was given that the damages were sustained by reason of the negligent acts of the defendant Empire Engineering Corporation, which at the time of the accident was engaged in widening and deepening the Erie Canal under its contract with the state of New York, in that it partially rolled over, lifted, or raised the rock with its steam dredge and shovel, and left it unguarded or unmarked. It was shown that the dimensions of the canal boats which struck the rock and their drafts were as follows: The Huntley 97 feet long, 17 feet 6 inches wide, 10 feet 6 inches in depth, and she drew 5 feet 11 inches of water. The Paragon and the Valiant were of the same size, and drew 6 feet and 5 feet 10½ inches, respectively. The Huntley was well fastened to the Paragon, and carried a bow light which illuminated the bank for quite a distance ahead. The same rudder steered the Huntley and Paragon, while the other canal boats followed in the wake of the towboat, and were made fast on a 500-foot line. At the point of collision the canal runs nearly east and west for about three-quarters of a mile. The master of the Paragon, seeing the lights ahead of the defendant's dredge and of a passing canal boat, reduced speed, going ahead slowly, and, as the Huntley proceeded under bridge No. 101, she suddenly struck a hard object in her path—she struck several times. The Paragon promptly stopped her engine, and, as the Huntley

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cleared the obstruction, she broke a coupling rod, and veered out to the north side of the canal, and sank, while the Paragon glanced off, and the Valiant stranded on the rock in the center of the canal.

The submerged rock was from 12 to 18 inches higher than the canal bottom, and it was estimated by the diver and by other witnesses that it measured across its top from 2 to 4 feet. There was 5 feet 7 inches of water over the rock on the night of the accident, while the normal depth of the water in the center of the canal was 7 to 7½ feet. The legal draft of vessels navigating the canal is not more than 6 feet. The defendant was engaged in dredging the canal level near the point of accident, using in its work a so-called digger dredge, having 75 horse power and 51 steel buckets, each bucket measuring 2½ to 3 feet in width and 2 feet in depth with a capacity of ⅓ of a yard. At their digging edges the buckets have teeth which are five or six inches in length.

The libellant contends that the defendant on or about October 23, 1909, raised or shoved the rock out of its position, and then, without making an inspection or taking soundings, negligently left the work incompleated, and went eastward of the bridge No. 101. There is no direct evidence to show that the defendant dredged or dug in such a way as to disturb the rock or to raise it out of the bed of the canal, and, to hold that the defendant was negligent in the performance of its work so as to interfere with navigation, it is necessary to have recourse to the actual situation, the surrounding circumstances, and the probabilities. Concededly the defendant operated its dredge on the canal level close to the place where the Huntley struck and about 25 to 30 feet west of bridge No. 101, and passed through the bridge on October 24th. During the time the work on the west side of the bridge progressed canal boats drawn by horse or mule were towed under the bridge by the defendant, such towing being close to the bank and not in the middle of the canal, and hence they were not subject to the risk of striking the stone. The proofs show that the steam canal boat William Hengerer, going east, struck an obstruction in the center of the canal between the 24th and 28th days of October, and on the 27th day of October a west-bound canal boat drawing five feet eight inches of water also struck the rock, and glanced off and cleared it. Steam canal boats loaded to the permissible depth usually navigated in the center of the canal, and the evidence shows that such boats have passed and re-passed in the middle of the canal for many years without striking the obstruction in question.

One witness for the defendant, however, testified that on an occasion, when a packet was passing his canal boat, he came in contact with an obstruction in the center of the canal which he believed was a rock, and which caused his boat to sheer toward the berm bank. On cross-examination he testified that at various times and seasons of navigation he struck a stone while navigating in the center of the canal at a point where the accident occurred, but without his boat sustaining any injury. Aside from such testimony, the witness Baird testified that he has known of the rock in question projecting in pre-

vious years above the ice that formed on the canal to such height as to enable skaters to sit down to fasten their skates. There was also testimony by said witness to the effect that the submerged rock about 30 years ago projected out of the bed of the canal to such height that it was lowered or further imbedded in the soil by the canal authorities, and he testified that he thought that the rock in subsequent years worked up and out of its foundation. From such testimony the inference is drawn by the defendant that the submerged obstruction existed in the bed of the canal for many years prior to the accident, and that from natural forces it gradually worked upward out of the soil. Such inference, however, is not thought probable. While I am prepared to believe that the witness Fitzgerald in navigating the canal boat of which he was master struck an obstruction in September, 1909, before any work was done by the defendant on the canal level, yet such impact is explained by the fact that a packet passed at the time, which doubtless caused such a displacement of the water as to result in the canal boat striking the stone. His assertion that at other times he came in contact with an obstruction near the bridge loses its probative force in the absence of any showing as to the depth of the canal level at such times and the draft of his canal boat. The proofs show that the rock had been imbedded in the center of the canal about 30 or 35 feet west of the bridge for many years prior to the accident, but at its top it was not more than 2 inches approximately from the bottom of the canal. In this condition it was not a menace to navigation. The presence of a slight ridge in the canal, as shown by libelant's evidence, close to the stone, indicates the proximity of the dredge in its operations, and persuasively points to the conclusion that the dredge either came in contact with the stone and appreciably lifted it out of its foundation, or that in its operation it congested the soil near the rock, and forced it upward in the canal, so that it became an obstruction and interference with proper navigation. There was also evidence to show that the defendant had knowledge on the day of the accident of the obstruction in the canal. The canal boat Hengerer on or about October 25th, after she had struck the rock as above stated, was pulled off by the dredge which had fastened a line to her; and the witness Costello, master of the steam canal boat New York Recorder, testified that shortly after his boat struck, which was about 25 feet west of the bridge, he met the tug Seneca, owned and operated by the defendant, and which was engaged in towing horse canal boats under the bridge, and was advised by her master to navigate close to the towpath, as there was a rock in the canal. There was other evidence to support the presumption that the rock had been raised or turned upward by the dredge in its operations, and there was testimony by the defendant to negative such presumption. I think, however, that the evidence by a fair preponderance points to the conclusion that the defendant did not exercise proper diligence and care to protect steam canal boats from coming in contact with rock or stone raised by it in the dredging operations near bridge 101 and as a result of which libelant sustained injury.

[2] The defendant contends that it cannot be held liable, even

though the facts indicate a failure on its part to take soundings or make inspection of its work or to guard or protect canal boats from obstruction or interference on the ground that its contract with the state does not contemplate any liability for injuries such as specified in the libel. The material part of the contract, clauses 17 and 23, substantially provide that the work shall be conducted "so as not to interfere with the navigation of the present canal and the safety of such banks and structures as may be required for that purpose, between the fifteenth day of May and the fifteenth day of November of each year, during the progress of the work"; and, further, "that all damages of whatever nature resulting from the work during its progress, from whatever cause, shall be borne and sustained by the contractor." A reasonable interpretation of the terms of the contract obligates the defendant to perform the work of widening and deepening the canal without hindering or interfering with the reasonably safe navigation of the canal. It certainly was not merely the intention of the state and the contractor that navigation should not be interrupted or stopped during the continuance of the work. To leave in the bed of the canal a submerged obstruction without warning to navigators, or without safeguarding canal boats plying the canal in either direction, was an interference with navigation such as rendered the defendant responsible for injuries sustained through its negligence. It manifestly was the intention to require the contractor to keep the canal at the place where the work was done in proper condition and repair while the work of widening and deepening was in progress. To perform the work in such a way as to precipitate or raise an obstruction which interfered with proper navigation, and without doing anything to avoid the danger from such an obstruction, was such an act of negligence as to render the defendant liable for injuries sustained. It cannot be assumed that the state after taking the precaution to obligate the contractor not to interfere with boats having the right to navigate the canal would wish to relieve such contractor from responsibility if by its negligence and want of precaution injury was sustained by a vessel rightfully on the highway. While it is true that the state is not liable to the libellant, there being no remedy provided by law (*Locke v. State*, 140 N. Y. 480, 35 N. E. 1076; *Coster v. Mayor of Albany*, 43 N. Y. 399), yet the decisions of the Court of Appeals of the state of New York, which has often considered the question of the liability of a contractor engaged in repairing the Erie Canal to persons sustaining injury through the negligence of the contractor, uniformly hold that the Erie Canal is a public highway and that an action will lie against a contractor employed by the state to maintain in proper condition that portion of the canal which is undergoing repairs. *Robinson v. Chamberlain*, 34 N. Y. 389, 90 Am. Dec. 713; *Fulton Fire Insurance Co. v. Baldwin*, 37 N. Y. 648; *Hicks v. Dorn*, 42 N. Y. 47; *Johnson v. Belden*, 47 N. Y. 130; *Little v. Banks*, 85 N. Y. 258. These cases I think enunciate the principle upon which the liability of the defendant is maintainable.

Counsel for defendant directs attention to a line of cases which

apparently hold that, where a contract is made for the benefit of a third party, the latter cannot sue the promisor, and such cases are applied by him to the present case upon the theory that the improvements in the canal were for the benefit of the libelant and navigators of the canal generally, and also upon the theory that the contract under which the improvement progressed does not include some legal responsibility upon the state. But I think the principle of such cases is not applicable, and that the question of liability of the defendant is controlled by the rule that, as it assumed under its contract with the state for a consideration to improve the canal without interfering with its navigation and thus confer a benefit upon the libelant, it must be held liable for preventing the libelant from enjoying such benefits and for its negligence by which the injury was sustained. In the performance of its work the defendant was bound to exercise ordinary care, and upon ceasing its dredging operations in the canal it should have made an inspection, such as proper soundings, which would doubtless have disclosed the character of the excavation and the elevation of the stone above its normal height.

A decree may be entered in favor of the libelant with a reference to the clerk to ascertain and compute the damages sustained, with costs.

BAY v. SANBORN.

(Circuit Court, D. South Dakota, S. D. March 30, 1911.)

No. 602.

BREACH OF MARRIAGE PROMISE (§ 31*)—DAMAGES—AMOUNT AWARDED.

Evidence considered, and *held* to support a verdict of \$25,000 damages for breach of a contract of marriage, where it showed that plaintiff had actually suffered a pecuniary loss of over \$15,000 by refusing employment during the time of the engagement at the request of defendant, and that defendant was worth not less than \$55,000.

[Ed. Note.—For other cases, see *Breach of Marriage Promise*, Cent. Dig. § 47; Dec. Dig. § 31.*]

At Law. Action by Ella R. Bay against James S. Sanborn. On motion for new trial. Denied.

Joseph Kirby, for plaintiff.

E. R. Winans and C. B. Bates, for defendant.

WILLARD, District Judge. This case stands upon a motion by the defendant for a new trial. So far as the motion is based upon the grounds of (1) newly discovered evidence; (2) insufficiency of the evidence to show a promise of marriage; (3) errors in law occurring at the trial—it is denied for reasons stated at the hearing. To what was then said may be added, however, this further consideration:

Defendant states, to be sure, in his answer, that he never intended

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to marry her, and in his evidence (page 39) that prior to the time when he met the plaintiff at Los Angeles she had never by word or letter suggested to him that there was an agreement or promise to marry her on his part, and that that was the first time he had ever heard of it. In her letter to him of about the date of May 13, 1908, which apparently is a part of Exhibit 65½, and in which she is urging him to abandon the claim that she should receive compensation from his aunt's estate for her services, she says:

"I shall be compelled to testify that I was your agent, with your interests primarily in mind; that I never expected any remuneration from you; and all this will lead up to the inevitable admission that you and I are engaged. Dearest S., this is not my case; it is yours. You have taken me off the pay roll, and, like all women worth while, I am already to aid you in any way I can, being a labor of love; but do not lose sight of the fact that you have already amassed a sufficient competency, with nearly as much more in sight from profits in the sale of the ranch, and there is really no necessity for the pursuit of uncertain dollars."

There remains to be considered the last ground stated in the motion, namely, excessive damages. Her employment with the Kirby-Carpenter Company closed in April, 1907. That from that time she engaged in no other employment, except such as was connected with the defendant's business, is thoroughly established by the evidence; and it is just as thoroughly established that she so acted at the request of the defendant. In her letter of November 20, 1906, she said:

"During the conversation he twice asked me to become a member of the C. C. Company, as he really had more than he could attend to. Told him I was going to loaf as soon as K. C. Co. charter was surrendered in January."

In his letter of November 25, 1906, he said:

"You will never be in the employ of the C. C. Co., so long as I have one piece of bread and strength enough to break it."

In her letter of April 10, 1907, she states that on that day she had closed up the business of the Kirby-Carpenter Company. In his letter of April 14, 1907, he says:

"I have been on the jump, and will be from now on; but it makes me feel good to know your work is at an end, and that makes me want to rustle all the more, for you never shall do another day's work."

In his letter of April 17, 1907, he says:

"But then I am glad your work is now at an end, and hope from now on you will live for yourself and take it easy."

In his letter of April 28, 1907, he said:

"Tell him you are off for a year, and then, when I see you, I will suggest you ask for \$5,000 per or nothing; for you are your own boss now, and nothing would please me more than for you to say that your time is worth the same and a little more."

In his letter of August 2, 1907, he said:

"Take good care of yourself, and take it easy; for you know I am to do all the work."

In the letter of March 13, 1908, above quoted, she says to him:

"You have taken me off the pay roll."

These letters entirely confirm the statement made by the plaintiff that after she left the Kirby-Carpenter Company she ceased to work at the request of the defendant, relying upon the engagement between them. After she left the employment of the Kirby-Carpenter Company, she testified that she worked all the time for the defendant until the engagement was broken in February, 1910. The correspondence between the parties entirely corroborates this statement. A part of the work that she thus did was an attempt to sell an estate of 11,000 acres in South Dakota in which the defendant was interested. In this connection she wrote between 1,500 and 2,000 letters. She had a written option from the defendant and his brother, authorizing her to sell this property. It is suggested by counsel for the defendant that she was working for herself, and not for him, and that if she had sold the estate she would have made a fortune, in which the defendant would have had no share. She testified, however, that whatever she would be entitled to would belong to the defendant, in case a sale was made, and her letters prove that this statement was true. She commenced attempting to sell the land before any option was given her. In her letter of August 1, 1907 (page 186), she said:

"I have told Mr. Baldwin, Mr. Davis, and others that there is not one dollar in the deal for me; that I am simply assisting you in finding a buyer for the land."

In her letter of May 29, 1907, she said (page 159):

"You know, dear, after the way you have been bled, I could never consent to your brother getting one cent of whatever might be realized above prices quoted me."

At the time the engagement was broken, all of the lands had been sold, except about 4,000 acres. How many of the sales were due to the efforts made by the plaintiff does not appear. It appears from her testimony and from the correspondence that her connection with the affairs of the defendant's aunt, which resulted in her taking the management of the property, amounting to over \$105,000, was entirely in the interest of the defendant. He constantly insisted that a compensation should be paid for her services, and, as she testified, stated that she should receive \$10,000 therefor. The correspondence between the defendant and his lawyers with reference to this matter, and the litigation which ensued, show that it was his case, and not hers.

The court charged the jury that in estimating the amount of damages they might consider the abandonment or loss of position by which the plaintiff was earning or could earn wages or salary, if occasioned by the request or act of the defendant. Laying aside the testimony relating to offers from the Lumbermen's National Bank and the Carpenter-Cook Company, and eliminating them entirely from the case, there still remains evidence to show what her services were worth during the time of this engagement. It was proven, and there is no evidence to contradict it, that she received for the three years ending in April, 1907, for her services \$4,300 a year. The defendant himself in his letters apparently valued her services at \$5,000 a

year; and, as has been said, he thought she was entitled to \$10,000 for what she did in connection with his aunt's estate.

It is not necessary, and probably would not be proper, to consider what her services were worth to the defendant during the four years of their engagement, though it appears that he consulted her upon every possible question, business or otherwise, and apparently took her advice upon most of them. It is safe to say that a finding by the jury that she had actually lost more than \$15,000 by reason of the defendant's request that she do no work could not be set aside on the ground that such finding was excessive. She testified that she told him at Los Angeles that their engagement was costing her \$6,000 a year, a luxury which she could not afford. She made no charge to the defendant for any services rendered to him, and expected to receive no pay for them. She paid out on his account during the time of their engagement more than \$2,200. No part of this has ever been paid. She did, however, receive after the engagement was broken, from the property of the defendant's aunt, \$2,500 in settlement of what was really the defendant's claim for her services. That amount she retained, and, of course, it should be considered as a part payment of what the defendant owed her.

In the respects above noted this case is very unusual, and it may be doubted if a similar case ever occurred before, where a woman, by reason of an engagement being broken, had actually suffered a pecuniary loss of more than \$15,000. The obligation of the defendant to pay this sum does not depend in any way upon the amount of money that he has. He would be under the same obligation to pay it, if he had only \$5,000 as if he had \$100,000. It is not the kind of damages that is usually recovered in an action of this character. Those damages are referred to in the charge of the court, wherein the jury were instructed that they could take into consideration the disappointment of the plaintiff's reasonable expectations and what would be the money value or worldly advantages of such a marriage, and also the wound or injury to her feelings and affections, and her mortification and distress of mind.

In considering the damages in these cases, the amount of property which the defendant has can be taken into consideration. He testified that he was worth \$55,000. She testified that he stated to her, when he made a will in her favor, that he was worth \$120,000, and the value of his interest in the ranch besides. However that may be, the difference between her pecuniary loss, over \$15,000, and the amount of the verdict, \$25,000, is not, in my judgment, so excessive as to justify the court in interfering with the admitted province of the jury in such a case.

The motion for a new trial is accordingly denied.

In re KENWOOD ICE CO.

(District Court, D. Minnesota, Fourth Division. July 5, 1911.)

1. BANKRUPTCY (§ 44*)—CORPORATION.

Directors of a corporation have power to put the corporation into bankruptcy, and a vote of the stockholders to that end is not necessary.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 44.*]

2. CORPORATIONS (§ 298*)—DIRECTORS—MEETINGS—MAJORITY—NOTICE TO MINORITY.

Majority directors of a corporation under ordinary circumstances have no right to hold a meeting without notice to the minority.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1298; Dec. Dig. § 298.*]

3. CORPORATIONS (§ 298*)—DIRECTORS—MEETINGS—NOTICE TO MINORITY DIRECTOR.

A corporation had three directors. A directors' meeting was held by two of them without notice to the third, at which a resolution was passed placing the corporation in bankruptcy. The third director was not friendly with his codirectors, and their relations had become so strained that they had resulted in a personal altercation, which ended in his being ejected from the office of the company. He had commenced an action against the corporation and his codirectors, charging fraud in the sale of stock to him, and asking that the contract of sale be rescinded, which suit was pending at the time the meeting was held, and it appeared that he was interested in defeating the resolution in order to sustain an attachment by himself of the corporation's property. *Held*, that notice to him would have been nugatory, and hence a meeting was validly held without such notice.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1298; Dec. Dig. § 298.*]

4. BANKRUPTCY (§ 44*)—CORPORATION—RESOLUTION OF DIRECTORS—PETITION.

Where majority directors of a corporation adopted a resolution authorizing the filing of a petition to place the company in bankruptcy, such petition was not fatally defective for failure to show the resolution on its face.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 44.*]

In Bankruptcy. In the matter of bankruptcy proceedings of the Kenwood Ice Company. On petition to set aside adjudication. Denied.

Henry C. James, for petitioner.

F. W. Booth, for bankrupt.

WILLARD, District Judge (orally). One of the principal objects of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) is to prevent one creditor from obtaining a preference over another creditor. The evidence in this case shows that if this petition in bankruptcy had not been filed A. C. Dodge a creditor of the company would have obtained a preference over the other creditors. It was therefore the plain duty of the company, not being able to pay its debts in full, to go into bankruptcy. The law then in force authorized it to do so, and it owed the duty to the other creditors to take that step. When this petition was filed by

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the officers of the company they did what they could to carry out the purposes of the bankrupt act. In deciding the questions here presented, I approach them with the belief that the act of the directors should be sustained, if it can be done consistently with the law.

[1] The first question that I shall consider is whether the directors of the corporation have the power to put the corporation into bankruptcy, or whether the stockholders alone have that power. Whatever may be the rule in other jurisdictions, if I should put in force the rule asked for by the petitioner, I should find myself in considerable difficulty owing to cases which have already been determined by this court.

My recollection is that several cases have been decided in this district, in which the willingness of a corporation to be adjudged a bankrupt has been evidenced only by its consent given by the board of directors, and no authority from the stockholders has been shown. The board of directors has the same authority to make application under the amended bankrupt law as it had to admit insolvency upon an involuntary petition in bankruptcy.

One case recently decided is that of Tibbs, Hutchins & Co. This corporation was adjudged a bankrupt on its voluntary petition, and the only authority presented was a resolution by the board of directors; no authority from the stockholders was shown. The assets of this corporation exceeded \$2,000,000 and more than \$1,500,000 has already been distributed to its creditors. If I grant the motion to set aside the adjudication in the case at bar, I should have to set aside the adjudication in the Tibbs, Hutchins & Co. case and other proceedings taken therein. Not only that but I think half a dozen cases can be found where similar action has been taken.

This is a very cogent reason for not adopting the view of the petitioners. It is not conclusive, and if I were satisfied that the law is as claimed by the petitioner, I should not consider it. But, so far from being thus satisfied, I am very well satisfied that the law is otherwise.

Considering the cases cited by the petitioners, *In re Bates Machine Co.* (D. C.) 91 Fed. 625, an opinion rendered by Judge Lowell, it is very apparent that Judge Lowell himself was not satisfied at all with the law of Massachusetts which expressly authorized a board of directors to make a general assignment for the benefit of creditors. If he had had the power he would have changed the law, but he was forced to admit that he had no such power, and must submit to the proposition that the board of directors had such authority. His whole opinion is tinged with that prejudice.

I am entirely willing to agree with the law as laid down in *Tripp v. Northwestern National Bank*, 41 Minn. 400, 43 N. W. 60, where the Supreme Court of Minnesota distinctly held that a board of directors had authority to authorize a general assignment under the insolvency law. That was after the act of 1881 (Laws 1881, Minn., c. 148) was passed. Judge Lowell in his decision admits that he is bound by the law of Massachusetts with regard to the power of a board of directors; so I am equally bound by the Minnesota decision,

and it seems to me that upon this question the case of *In re Bates* is no authority at all. In the case of *In re Burbank Co.* (D. C.) 168 Fed. 719, Judge Aldrich took the same view with regard to the question that Judge Lowell did, and apparently followed it without any special discussion. *In re Southern Steel Company* (D. C.) 169 Fed. 702, decided by Judge Hundley, does not in any way hold that the board of directors did not have power to put the company into bankruptcy, or to make admissions of its insolvency and willingness to be put into bankruptcy. The case of *In re Jefferson Casket Co.* (D. C.) 25 Am. Bankr. Rep. 663, 182 Fed. 689, holds nothing contrary to the view which I am disposed to take. There the whole question under discussion was whether a petition in bankruptcy should be followed by an adjudication, where there was no evidence that the board of directors had ever authorized the filing of the petition.

A board of directors ought to have the power to put the company into bankruptcy. They have care of the general business of the corporation. They are the persons who know whether the corporation is able to go on or not. It might very well happen that under the articles and by-laws of the corporation it would be impossible to hold a meeting of the stockholders for months. Under these circumstances the bankruptcy of the corporation might be delayed so long that in many cases the purposes of the bankrupt law would be defeated and preferences given. I am satisfied that the board of directors at a duly called meeting has the power to put the corporation into bankruptcy.

The next question is did the board of directors properly adopt a resolution putting this company into bankruptcy? There were three directors, two of them attended the meeting and participated in the proceedings, the third member neither attended nor was notified. The claim is that this rendered the proceedings illegal.

[2] I shall follow the proposition of law that a majority of the directors, under ordinary circumstances, has no right to hold a meeting without notice to the minority. There is another proposition, however, which applies to this case, and that is, that the law does not compel the doing of a vain and useless thing. It is plain that the sending of notice of the meeting to Dodge would have been useless. Of course the determination of the majority that Dodge would not attend was not at all conclusive. The board of directors had no power to determine that question. They took that risk upon themselves. It is for the court to determine whether upon the evidence here produced notice to Dodge was necessary.

[3] There are two considerations which satisfy me beyond all question that it would not have produced any result. The first is the relations that existed between the other directors and Dodge. The evidence shows that they had become so strained that they had resulted in a personal altercation between one of the directors and Dodge, which ended in Dodge being ejected from the office of the company.

It appears that months before he had commenced an action against the corporation and the two other directors, charging them with

fraud in the sale of stock to him, and asked that the contract by which he purchased the stock should be rescinded. That suit was pending at the time this meeting was held. Any participation by him in a meeting of the directors after this suit was commenced would have been entirely inconsistent with its purpose, and would in all probability have defeated it. The evidence also shows that he had not attended meetings of the directors for nearly a year. These facts justified the board of directors in not giving him notice of that meeting, because they knew to a moral certainty that he would not attend.

There is another and more potent consideration, which is, that Dodge was vitally interested in defeating the resolution. If the corporation had not gone into bankruptcy on that day or on the next day four months would have elapsed since a creditor had made an attachment of the property of the corporation, and had thereby secured a lien upon the same. That creditor was Dodge. As a director it was his duty, as has been said, to put the company into bankruptcy, in order to prevent this preference. As an individual, it was his plain interest to keep the company out of bankruptcy for two or three days longer. His interest as an individual so conflicted with his duty as a director, that he certainly would have had no moral right to vote upon this resolution, even if he had been present. So I am satisfied that notice of the meeting to Dodge was not necessary.

[4] It is further claimed that the petition is not sufficient. In the case of *In re Jefferson Casket Company* there was no evidence before the court that the board of directors had adopted a resolution authorizing the filing of a petition. Here we have a case where there is evidence that the directors had in fact authorized the filing of a petition in bankruptcy. The petition does not show that upon its face. The referee however accepted that petition and made the adjudication. It is now sought to set aside the adjudication, not because there was no authority on the part of the board of directors to ask for that adjudication, but simply because at that time that authority did not appear on the face of the petition. The adjudication having been made, the court should not set it aside for this reason.

As has been suggested by Mr. Booth, the petition is not a transfer of the property. It is not an assignment for the benefit of creditors. It simply sets the machinery of the court in motion. The thing that does transfer the property is not the petition, but the adjudication.

These being the views which I have upon the questions presented, my judgment is that the petition was properly filed, and that the adjudication should stand.

I therefore deny the petition to set it aside.

RISLEY v. PRESIDENT & DIRECTORS OF INS. CO. OF NORTH AMERICA.

(District Court, S. D. New York. April 8, 1910.)

1. SHIPPING (§ 194*)—GENERAL AVERAGE—SUBJECTS OF COMPENSATION—EXPENSE IN PORT OF REFUGE.

Expense incurred by a yacht while on a pleasure voyage, for wages and provisions while in a port of refuge to which she was compelled to go for repairs made necessary by a peril of the sea, constitutes a proper general average charge.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 613-617; Dec. Dig. § 194.*

General average, see notes to *Pacific Mail S. S. Co. v. New York H. & R. Mining Co.*, 20 C. C. A. 357; *The Santa Ana*, 84 C. C. A. 316; *British & Foreign Marine Ins. Co. v. Maldonado & Co.*, 106 C. C. A. 133.]

2. INSURANCE (§ 402*)—MARINE INSURANCE—LOSSES COVERED—GENERAL AVERAGE CHARGES.

Under a marine policy insuring a vessel against sea perils, and providing that "in case of claim repairs to be paid without deduction of new for old, whether the average be particular or general," and that "in the event of loss by fire claim for general average contribution and salvage charges and/or expenses excepted the liability hereunder shall be in proportion," the insurer is liable for all proper general average charges resulting from a peril insured against.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 402.*

Marine insurance general average, see note to *Pacific Mail S. S. Co. v. New York H. & R. Mining Co.*, 20 C. C. A. 357.]

In Admiralty. Suit by George H. Risley against the President and Directors of the Insurance Company of North America. Decree for libellant.

Mr. Forrester, for libellant.

Mr. Kneeland, for respondent.

HOUGH, District Judge. Libellant is the owner of the yacht *Hurricane*, which vessel while bound from Miami to New York injured her propeller by sea peril in such manner that she was reasonably obliged to wait at St. Augustine, Fla., until such time as a new propeller could be obtained. Libellant's expenses for wages and provisions of master and crew during the period of delay at St. Augustine amounted to \$364, and that is the amount in dispute in this action. So far as this litigation is concerned, the language of the policy only directly covers perils of seas, rivers, lakes, and/or other inland waters. It contains, however, the usual sue and labor clause. The effective words of insurance are in a "rider" affixed to a very ordinary form of policy, which policy contains these words: "This company is not liable for wages and provisions except in general average when customary and legal at the port of destination." The omission of these words in the rider is said to be significant. I do not think so. The rider is really a substitute for the policy. It is a complete instrument of insurance in itself, and the rights of the parties are to be construed without any reference to the policy proper. The claim

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 189 F.—34

for the wages and provisions in litigation is averred in the libel to be an expense "necessarily incurred for the benefit of all parties in interest, and constitutes a general average charge."

The questions presented therefore seem to be these: (1) Are wages and provisions to be regarded as general average in the case of a yacht engaged upon a pleasure voyage and seeking a port of refuge there to undergo repairs rendered necessary by a peril insured against? (2) If such a demand does constitute general average, is it covered by this policy? (3) Is there any other clause in the policy enabling libellant to recover?

[1] It must, I think, be admitted that wages and provisions as well as other port expenses incurred in a port of necessity for the purpose of making repairs constitute a general average charge. *Potter v. Ocean Ins. Co.*, 3 Sumner, 27, Fed. Cas. No. 11,335; *Dollar v. La Fonciere Cie.* (D. C.) 162 Fed. 563; *The Star of Hope*, 9 Wall. 236, 19 L. Ed. 638. And the same authorities hold that the absence of cargo upon the disabled vessel does not militate against the application of the principles of general average to such a case. This doctrine seems too strongly established in American law to be disturbed, and even to have gained some acceptance in the English courts. See remarks of Watkin Williams, J., in *Pirie v. Middle Dock Co.*, 4 Asp. 390; in connection with *Gow on Marine Insurance*, p. 281. I am unable to see any distinction between the case of a vessel without cargo putting into a port of refuge, and there incurring port expenses and making expenditures for wages and provisions which would otherwise have been unnecessary, and the case of a yacht doing the same thing.

[2] As to the second question, the rider contains this language: "In case of claim, repairs to be paid without deduction of new for old whether the average be particular or general"; and, "in the event of loss by fire, claim for general average contribution and salvage charges and/or, expenses excepted the liability hereunder shall be in proportion," etc. These are the only references to general average I discover in the rider, which I take to be the only effective words of the policy. It seems to me that these clauses are quite as strong as the one considered in *Hall v. Janson*, 4 E. & B. 500, and recognize a liability on the part of the insurer to pay all proper general average charges. That is, anything which constitutes a loss or expense resulting from the perils insured against and inseparably annexed to the thing insured is something that the insurer has impliedly undertaken to pay.

If, therefore, I am right in believing the American decisions to have gone so far as to render it necessary to hold that wages and provisions in a port of necessity are even in the case of a yacht a proper general average charge, then they are recoverable under this policy, because the insurer has impliedly undertaken to pay general average.

This conclusion renders any consideration of the third question propounded unnecessary.

Decree for libellant.

In re KYTE.

(District Court, M. D. Pennsylvania. July 15, 1911.)

No. 1,035.

1. BANKRUPTCY (§ 474*)—DISCHARGE—OPPOSITION—COSTS.

Bankr. Act July 1, 1898, c. 541, § 2, subd. 18, 30 Stat. 546 (U. S. Comp. St. 1901, p. 3420), authorizing the court to tax costs whenever they are allowed by law and to render judgment therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy, did not authorize the taxation of costs of a successful opposition to a bankrupt's discharge against a bankrupt's estate.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 474.*]

2. BANKRUPTCY (§ 474*)—DISCHARGE—SUCCESSFUL OPPOSITION—COSTS.

Where a bankrupt was entirely without funds and unable to pay costs of a successful opposition to his discharge, the court would not tax such costs against him.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 474.*]

In Bankruptcy. In the matter of Frank H. Kyte, bankrupt. On exceptions to findings of the referee refusing to tax costs of an opposition to the bankrupt's discharge against bankrupt. Affirmed.

See, also, 182 Fed. 166.

W. H. Goodwin, for trustee.

F. C. Mosier and W. W. Hall, for exceptants.

WITMER, District Judge. The matter in dispute in this case was certified to the court, on petition of certain creditors of the bankrupt, for review of the order of the referee, refusing to allow a bill of costs incurred by the petitioners and others, creditors of the bankrupt, in opposing the bankrupt's discharge, in which they were successful.

[1] Whether the creditors' expenses in opposing the bankrupt's discharge, if successful, should be paid out of the estate of the bankrupt, is the only question to be determined upon this review. The petitioners urge (1) that the referee should have taxed the costs against some one; and (2) that the referee erred in finding that there is no authority for taxing these costs against the estate. As authority for the latter, the court is directed to chapter 2, § 2, subd. 18, of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 546 (U. S. Comp. St. 1901, p. 3420), as follows:

"The court is authorized to tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy."

The costs for which payment is herein authorized are such as are allowed by this act arising from the bankrupt proceedings in the administration of the estate. The costs claimed are not directed to be paid by the act, and they did not grow out of the administration of the bankrupt's estate.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Administration of an estate has been defined to mean a term applied to denote the management of an estate by a person appointed by authority of law to take charge thereof in place of the legal owner. In a bankrupt court the legal owner of the estate is the bankrupt, who is required to turn over his entire estate to some one to be designated by the creditors and approved by the court, for the purpose of administering the same for the benefit of all the bankrupt's creditors. All acts necessary to be done to accomplish the purpose of converting the assets of the estate and distributing the same to and amongst the creditors legally entitled thereto, as well as any act tending to increase the value of the estate, or in some material manner benefit the estate of the bankrupt, whereby the general interests of all the creditors may be advanced, constitute the administration of the estate. The intent of the law is to administer the estate for the general interests of all the creditors with the least possible expense, and to this end when any proposition of interest, as well as detrimental to the creditors, is made, the law provides that all the creditors shall have notice of a time and place to meet and either assent to or disapprove of such proposition. This undoubtedly is a provision of the law which has been created to throw a safeguard around the interests of the creditors so that the opportunity for abuse or mismanagement of their interests may be reduced to a minimum.

The payment of costs and expenses incurred in a collateral proceeding by a creditor or creditors, without the formal approval of the general creditors, especially when it is not intended by such proceeding to increase the proceeds of the estate, should not be looked upon with favor. Such proceeding is administrative only when it tends to increase the income of the estate or prevent the waste of the estate in hand. In the present case it is not pretended that either of these ends were obtained, but, on the contrary, it was a collateral proceeding instituted by certain of the bankrupt's creditors without the formal assent of the other creditors and without any apparent resultant benefit, either present or future, to any one; a personal action upon the initiative of those undertaking it, not administrative in character, and a personal triumph. The discharge of the bankrupt is a personal right, and affects only personal rights and obligations, and the bankrupt is entitled to such discharge provided he has done nothing forbidden nor left undone anything required, whereby he may have forfeited such right to a discharge, but it does not affect the administration of his estate. The estate will be administered in the same manner whether or not the bankrupt is discharged, and the administration will be ended when all the dividends are disbursed and the estate is closed. This may occur before or after the question of the bankrupt's discharge has been finally determined; the administration of the estate will neither be retarded nor hastened on account of the discharge; they both proceed in regular course and in different channels. The costs in question not being costs fairly arising from the proceedings in the administration of the estate, it follows that the court is without warrant or justification to order the same to be paid out of the estate. In this view, we are supported by the opinion in *Re Brundin* (D. C.) 7 Am. Bankr. Rep. 296, 112 Fed. 306, where the court says:

"In my judgment, neither opposing creditors nor bankrupts are entitled to have the costs or expenses of the contest in respect to discharge of the bankrupts paid from the estate administered."

Also in *Bragassa v. St. Louis Cycle*, 5 Am. Bankr. Rep. 703, 107 Fed. 77, 46 C. C. A. 154, where it is said:

"There is no warrant or authority of law for the court to have allowed \$50 for compensation to the referee for services on the hearings before him of the specifications opposing the discharge of the bankrupt. * * * We find that the references were provoked by the bankrupt, and, as the costs were legitimately incurred, we see no other way than to tax the same to the losing party."

There are also other authorities which support the same view.

It also seems that a contrary interpretation of the law would be a dangerous doctrine to establish, as instead of the true intent of the law being carried out, the bankrupt might be submitted to the danger of vexatious opposition, contests multiplied, and estates diminished for no higher reason than to satisfy the whims or prejudices of some individual creditor, or to create fees for ambitious counsel. It would certainly not tend to the economical administration of the estate.

But it is not intended to decide that the courts do not have general power to determine the question of costs in proceedings legally before them. To say that this court would not have the power to dispose of costs in a case legally before it would be to say that the court has no jurisdiction of the subject-matter at issue. It is a well-settled principle of law and has always been recognized that the courts have equitable jurisdiction over the question of costs in any proceeding legally before it, whenever no specific method for the disposition of such costs has been provided by statute. Upon this question, the court in *State of Pennsylvania v. Wheeling & Belmont Bridge Co.*, 18 How. 462, 15 L. Ed. 449, says:

"And when the Constitution of the United States conferred equity jurisdiction on this court, it cannot be construed to exclude the power possessed and constantly exercised by every court of equity then known, to use its discretion to award or refuse costs, as its judgment of the right of the case, in that particular, might require. The court entertains no doubt of its power to award costs."

The general rule of law seems to be that costs when allowed are awarded against the unsuccessful party, but the court, in the exercise of its sound discretion in such a matter, may make some other disposition of the costs, whenever the ends of justice would be better served.

[2] The unsuccessful party is the bankrupt, and upon him the costs should ordinarily be visited, but we do not see that any useful purpose would be served by so doing. It does not appear that the bankrupt has any property or means whereby the costs could be realized, if they were taxed against him, and we agree with the contention of exceptants' counsel, as alleged in their brief, that "to tax the costs upon the bankrupt in this instance would, we believe, be a useless undertaking, as the bankrupt would answer that he is unable to pay."

Therefore, for the reasons heretofore given, the order of the referee is affirmed and the exceptions dismissed.

LIM SAM v. UNITED STATES.

(District Court, W. D. Texas, El Paso Division. July 27, 1911.)

No. 270.

1. EVIDENCE (§ 588*)—WEIGHT—CREDIBILITY OF WITNESSES.

The apparently inconsistent statements of two witnesses should be harmonized wherever possible, rather than impute a corrupt motive to a witness in testifying.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2437; Dec. Dig. § 588.*]

2. ALIENS (§ 32*)—DEPORTATION OF CHINESE.

Notwithstanding repeated illegal acts on the part of Chinamen to enter the country, the court should give a fair hearing to each case that is presented, and the testimony should be carefully weighed and considered, and there should be no radical departure from the rules of evidence in determining the proper weight to be given to the testimony.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 32.*]

3. ALIENS (§ 32*)—DEPORTATION OF CHINESE.

Evidence held to demand the discharge of a Chinaman sought to be deported; it failing to impeach his testimony that he was born in this country.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 32.*]

What Chinese persons are excluded from the United States, see note to Wong You v. United States, 104 C. C. A. 538.]

Proceedings by the United States against Lim Sam. From an order of deportation, he appeals. Reversed, and appellant discharged.

This is an appeal from an order passed by the United States commissioner, June 13, 1910, deporting appellant, Lim Sam, to China. Pending the appeal in this court the appellant took the depositions of two witnesses, Lim Chung and Chin Sing, to prove his birth in San Francisco, Cal. The record discloses that these depositions were taken on the 25th day of November, 1910. On June 28, 1911, counsel for the government took the deposition of Hom Ong, for the purpose of impeaching the credibility of the witness Lim Chung. No other testimony was taken.

Turney & Burges and W. D. Howe, for appellant.
S. Engelking, Asst. U. S. Atty.

MAXEY, District Judge (after stating the facts as above). The two witnesses, Lim Chung and Chin Sing, testify clearly and with apparent truth that the appellant Lim Sam was born in San Francisco. In giving the place of birth they are specific in naming the street and number of the house. They claim to have been acquainted with the father and mother of the appellant. The latter, according to their statement, returned to China 12 or 13 years ago, and the father went back about one year prior to the earthquake in San Francisco, or about the year 1905.

Chin Sing is a merchant, residing at 2322½ Lincoln street, Alameda, Cal. Lim Chung is a laborer, and resides in San Francisco. In reference to the location of his residence, Lim Chung was asked the following question on direct examination:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"Please state your name, age, residence, occupation, and how long you have lived at your present place of abode."

He replied:

"Lim Chung; age 54 years; residence, 808 Clay street, where I have resided about three years; occupation, working man."

On cross-examination the witness was asked this question:

"If you are engaged in any business, then please give the street address of your present place of business, and state what the character of your business is, and give the names of your partners."

He responded:

"I am a working man, and work at 808 Dupont street."

In that condition of the record, counsel for the government, in order to impeach the credibility of Lim Chung, propounded interrogatories to Hom Ong, who testified that he was a merchant residing at 808 Dupont street, San Francisco, and had been there residing about 18 years. Hom Ong knew several persons named Lim Chung, but knew no one of that name living at 808 Dupont street. Counsel for the appellant propounded to the witness three cross-interrogatories:

(1) "Have you ever been acquainted with a Chinese laborer by the name of Lim Chung, or Lim Chong, who is now between 50 and 55 years of age, and will you state that there never was, and that there is not now, any such person? Answer: "I could not say whether I know him or not. There never was such a person there."

(2) "Is it not a fact that the building at 808 Clay street, in San Francisco is a building of more than one story, and that the first floor is occupied by stores and business houses, and the upper portion of the building is occupied by rooms and rooming houses?" Answer: "I don't know anything about the building at 808 Clay street. Our firm occupies the first floor at 808 Dupont street, and the upper portion of the building for lodging."

(3) "Can you, or not, state the names of all persons who have been employed, or who have worked at or with the business house doing business at 808 Clay street, or who have lived at 808 Dupont street, during the past two or three years, or who have lived or worked at either of said places during the past two or three years." Answer: "I know all the people who have worked for me in my business, but I don't know the names of all the persons who have lived or worked up stairs."

No attempt was made to impeach the testimony of the witness Chin Sing, notwithstanding he gave the name of the city, and the street address, of his residence. Nor, indeed, can it be said that counsel for the government was successful in impeaching the credibility of Lim Chung. It is manifest that the witness did not intend to convey the meaning that he was residing both at 808 Clay street and at 808 Dupont. Whether the officer taking the testimony misunderstood the witness, or inadvertently used Dupont for Clay on the cross-examination, does not appear. The record fails to explain the discrepancy. Yet counsel for the government, from this unexplained circumstance, would impute a dishonest purpose on the part of the witness, notwithstanding no effort was made, so far as the record discloses, to prove that Lim Chung did not reside at 808 Clay street.

[1] Besides, if the hypothesis be indulged that the witness intended to testify, both on his direct and cross examination, that he resided at 808 Dupont street, there would still seem to be no real inconsistency between the testimony of himself and Hom Ong on that point. While the latter knew no person of that name in the building at 808 Dupont street, he is equally clear in the statement that he did not know the names of "all the persons who have lived or worked upstairs." Would there, then, appear an irreconcilability between the testimony of the two witnesses, if Lim Chung lived in an upper room of the building? And if he did not reside there, the burden would seem to be on the government to show that fact in order to discredit his testimony. It is not difficult in the present case to reconcile and harmonize the apparently inconsistent statements of the two witnesses, and this should always be done, rather than impute a corrupt motive to the witness in testifying.

[2] The court is aware, and the records at El Paso illustrate, that large numbers of Chinamen have crossed the Rio Grande by stealth and unlawful methods for the purpose of coming into the United States. Indeed, the records of the court disclose that not only a great many Chinese persons have been deported for being unlawfully in the country, but that a number of Chinamen and Americans have been punished for conspiracy to evade, in various ways, the exclusion acts. These considerations require vigilance on the part of the immigration officials and of the court to see to the proper enforcement of such laws. But, notwithstanding the repeated illegal acts on the part of Chinamen to enter the country, the court should give, as it has always endeavored to do, a fair hearing to each case that is presented. Upon the hearing the testimony should be carefully weighed and considered, and there should be no radical departure from the rules of evidence in determining the proper weight to be given to the testimony.

[3] Tested by the ordinary rules of evidence, the court is of the opinion that the government has failed to impeach the credibility of the witness Lim Chung; and, having made no effort to impeach the witness Chin Sing, the court is further of the opinion that the appellant, as shown by the proof, was born in San Francisco, and hence that he should be discharged.

Counsel for the appellant refer in their brief to the cases of Moy Suey, 147 Fed. 697, 78 C. C. A. 85, Pang Sho Yin v. United States, 154 Fed. 660, 83 C. C. A. 484, and Gee Cue Beng, 184 Fed. 383, 106 C. C. A. 493. And it is stated that Judge Pardee, in *Gee Cue Beng's* Case, "approves in toto" the Case of *Moy Suey*. The inference to be deduced from the statement of counsel is that the Circuit Court of Appeals for this circuit has decided that where Chinamen, who claim to be citizens of the United States, are arrested for being unlawfully in the country, the burden rests upon the government to show that they are not natives. In other words, it seems to be claimed that the Chinaman arrested may stand upon his mere assertion of citizenship, without proof, and thus compel the government to prove a negative. The court deems it unnecessary, in this case, to enter upon a discussion of that question, and merely refers to the following authorities,

which may be profitably consulted: *Chin Yow v. United States*, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369; *Chin Bak Kan v. United States*, 186 U. S. 193, 22 Sup. Ct. 891, 46 L. Ed. 1121; *United States v. Ju Toy*, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040; *United States v. Hoy Way* (D. C.) 156 Fed. 247; *Yee King v. United States*, 179 Fed. 368, 102 C. C. A. 646; *Kum Sue v. United States*, 179 Fed. 370, 102 C. C. A. 648; *United States v. Too Toy* (D. C.) 185 Fed. 838.

The order of deportation should be reversed, and the appellant discharged; and it is so ordered.

In re CALHOUN SUPPLY CO.

(District Court, N. D. Alabama, E. D. July 28, 1911.)

1. BANKRUPTCY (§ 184*)—TITLE OF TRUSTEE—UNRECORDED CONDITIONAL SALE—STATUTES.

Bankr. Act July 1, 1898, c. 541, § 47a (2), 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), as amended by Act Cong. June 25, 1910, c. 412, § 8, 36 Stat. 840, vesting the trustee as to all property in the custody, or coming into the custody of the bankruptcy court, with the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon, extends the rights and remedies of the trustee to those of a judgment creditor under the registration act of Alabama, so as to avoid in his favor an unrecorded conditional sale; the law of Alabama requiring the recording of conditional sale agreements without giving a conditional seller any priority over judgment creditors without notice.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 184.*]

2. BANKRUPTCY (§ 4*)—STATUTES—CONSTRUCTION.

Bankr. Act July 1, 1898, c. 541, § 47a (2), 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438) as amended by Act Cong. June 25, 1910, c. 412, § 8, 36 Stat. 840, vesting the trustee as to all property in the custody or coming into the custody of the bankruptcy court with the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon, does not conflict with section 64b (5), regulating the order of distribution of a bankrupt's estate, though the trustee may avoid unrecorded conditional sales, where under the state law requiring the recording of conditional sales the conditional seller has no priority over judgment creditors without notice, and hence the order of payment provided for by section 64 is not interfered with by not allowing a conditional seller priority of payment.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 4.*]

In the matter of the bankruptcy of the Calhoun Supply Company. Petition to review order of referee denying the petition of the Barbour Buggy Company to reclaim property. Dismissed.

Knox, Acker, Dixon & Sterne, for petitioner.
Blackwell & Agee, for trustee.

GRUBB, District Judge. [1] The record presents but one question, viz.: Does the amendment to the bankruptcy act of June 25, 1910, extend the rights and remedies of the trustee to those of a judgment

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

creditor under the registration act of Alabama, so as to avoid in favor of the trustee an unrecorded conditional sale.

Before the amendment to the bankruptcy act, the trustee's title as against a claim under an unrecorded conditional sale, though the state law required record, did not prevail. *Crucible Steel Co. v. Holt*, 174 Fed. 127, 98 C. C. A. 101. It was to obviate this, among other things, that section 47, cl. 2, subd. a, of the act, was amended by inserting the words:

"And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon."

Statement of Representative Shirley to the House of Representatives, Congressional Record, 61st Congress, 2d Session, pp. 2552-2554 (36 Stat. 840). And to vest in the trustee the same right to attack secret unrecorded liens, where record was required by the state law, as was given to the judgment creditors and others under that law. It seems to me that the language of the amendment should be construed to effectuate this result if it fairly admits of such construction. If the operation of the amendment is restricted to cases in which a creditor has in fact acquired a lien by legal or equitable proceedings, then it adds nothing to the law as it was under the original act. By virtue of section 67 (c) of the original act the trustee was subrogated to such a lien, if created within four months, and could enforce it for the benefit of the estate. If created beyond four months, from the filing of the petition, it was, of course, valid as against the trustee, under both the original and amended acts. The class of cases, unprovided for by the original act and intended to be reached by the amendment, were those in which no creditors had acquired liens by legal or equitable proceedings and to vest in the trustee for the interest of all creditors the potential rights of creditors with such liens. The language admits of this construction. It recites that such trustee "shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon." This language aptly refers to such rights, remedies, and powers as a creditor holding such a lien is entitled to under the law, rather than to the rights, remedies, and powers of a creditor who had actually fastened a lien on the property of the bankrupt estate. It is true that the case of *In re Lausman* (D. C.) 183 Fed. 647, conflicts with this view. The construction, necessary to effectuate the intention of Congress, does not seem to me to make the amended section conflict with section 64b, cl. 5, as there stated.

[2] Under the state law, the conditional vendor has no priority over judgment creditors without notice and the amendment to the bankruptcy act places the trustee in that category. As against his right as conferred by the amended section of the act, the conditional vendor has no priority, and the order of payment provided for by section 64 is not, therefore, interfered with by not allowing the conditional vendor priority of payment.

The contention is made by petitioner that the language of the amendment is not broad enough to include a judgment creditor. The language of the amendment applicable to property in the possession of the bankrupt and coming into the possession of his trustee (as in this case) is "creditor holding a lien by legal or equitable proceeding." Unless this includes the "judgment creditor" of our registration statute, it is clear that the trustee has no better right to complain of an unrecorded conditional sale than has the bankrupt. The contention of petitioner is expressed in his brief thus:

"Unless the term 'creditor holding a lien by legal or equitable proceedings' must necessarily include the term 'judgment creditor' so that every creditor holding a lien by legal or equitable proceedings is bound to be a judgment creditor, then the 1910 amendment does not endue the trustee with the rights of a judgment creditor."

It is true that the words quoted from the amendment must necessarily include within their proper meaning a judgment creditor, but that is a very different thing from saying that they must be construed so as to include no other class of lienholders than judgment creditors. It is sufficient, if one of the classes of creditors, coming within the fair meaning of the words, is that of judgment creditors, even though other classes of lienholders, not judgment creditors, may also come within the fair meaning of the words. The purpose of Congress was to embrace within these words every class of creditors with liens by legal or equitable proceedings favored by the varying registration laws of each of the states. The registration laws of some states include but one of many classes of such creditors. In that case the purpose of Congress is not to be frustrated as to the included class because other classes included in the amendment were not included also in the registration act of that particular state. The breadth of language was used for the purpose of gathering in all classes protected by all local registration acts, and this purpose would be defeated by the construction contended for by the petitioner.

A judgment creditor may be a lienholder by legal proceedings in the event he has levied an execution. The words "creditor holding a lien by legal or equitable proceedings" include a judgment creditor, holding an execution lien. The words "judgment creditor" of the Alabama registration act (Code 1907, § 3394) also include a judgment creditor holding a lien by execution. There is therefore a class included in the terms of the amendment that is also protected by the Alabama registration act against the unrecorded conditional sales. The trustee is invested by the amendment with the right of that class to avoid such unrecorded conditional sales.

It is not a valid objection to this conclusion that there may be judgment creditors within the meaning of one registration act, who have no lien by legal proceedings, and hence are not within the class of "creditors holding a lien by legal or equitable proceedings," whose rights by virtue of the amendment vest in the trustee, any more than it is a valid objection that there may be creditors holding a lien "by legal or equitable proceedings" who are not judgment creditors and do not come within the class protected by the registration act.

The test is whether there exists a class properly included within the language of the amendment and that of the Alabama registration act. It is conceded that a judgment creditor holding a lien by execution is such a class. The trustee, therefore, is vested with the right by the amendment and the registration act of that class to avoid unrecorded conditional sales.

For the reasons above stated, the petition for review will be dismissed, with costs upon petitioner.

THE PEARL.

(District Court, E. D. North Carolina. April 15, 1911.)

No. 42.

1. MARITIME LIENS (§ 57*)—STATUTORY LIENS—JURISDICTION TO ENFORCE.

A lien given by a state statute for materials or supplies furnished to a vessel in her home port in the state is enforceable by suit in rem in a court of admiralty.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 96; Dec. Dig. § 57.*]

Maritime liens created by state laws, see note to *The Electron*, 21 C. C. A. 21.]

2. MARITIME LIENS (§ 25*)—STATUTORY LIEN FOR MATERIALS FURNISHED—GAS ENGINE—"MATERIAL."

Under Revisal N. C. 1905, § 2016, which gives a lien on a vessel for all debts contracted "for work done on the same or material furnished," one who furnished an engine to be installed in a gas boat, relying on the credit of the vessel, is entitled to a lien therefor as "material," on compliance with the statute as to recording; and it is immaterial that by the contract it reserved title to the engine until paid for.

[Ed. Note.—For other cases, see Maritime Liens, Dec. Dig. § 25.*]

For other definitions, see Words and Phrases, vol. 5, p. 4404.]

In Admiralty. Suit by the Page Engineering Company against the gas boat Pearl; the Oriental Manufacturing Company, claimant. Decree for libellant.

R. A. Nunn, for libellant.

Guion & Guion, for claimant.

CONNOR, District Judge. The report of the commissioner discloses the following case: The Page Engineering Company, libellant, is a corporation, created under and conducting business in the state of Maryland. Claimant, the Oriental Manufacturing Company, is a corporation conducting business at Oriental, Pamlico county, in the Eastern district of the state of North Carolina, and is the owner of the gas boat Pearl. Claimant purchased the said boat during the month of February, 1910, and subsequent thereto, to wit, on the 26th day of said month, purchased from the libellant, Page Engineering Company, one 25 horse power Oriole engine, with complete engine equipment, for which it agreed to pay the sum of \$750—one-fifth thereof cash, and the balance, in equal installments of \$300 each, in three and six months

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

from date, for which deferred payments claimant executed its promissory notes. The title to said engine and equipment was retained by libelant until said notes were paid. The said engine and equipment were furnished and delivered to claimant to be used in the said gas boat Pearl, which was being repaired and remodeled by claimant at Oriental, N. C. The said engine and equipment were furnished as material and supplies upon the credit of said boat, and same were installed in said boat by claimant. That thereafter, on the several dates set out in the statement of account filed with the commissioner, libelant, at the request of claimant, sold, furnished, and delivered to claimant, upon the credit of said boat and to be used therein, supplies of the value of \$61.85. Said supplies were used in the remodeling and repairing said boat. Claimant has not paid the said notes, nor the amount due for said supplies. The engine, equipment, and other supplies and materials sold by libelant to claimant for the aforesaid purpose, were of the quality and character represented by it, and complied with the conditions upon which such sales were made. Libelant, Page Engineering Company, on the 13th day of October, 1910, filed its notice of lien for material furnished as above set forth in the office of the clerk of the superior court of Pamlico county, and the same has been duly docketed on the lien book in said county, as required by the statute in that respect, etc. Said gas boat Pearl is now, and has been at the several dates herein set forth, at her home port, Oriental, Pamlico county, N. C., and is duly registered in the custom house at New Bern, N. C.

[1] Claimant filed exceptions to the findings of fact by the commissioner. After hearing oral arguments and giving to the testimony careful consideration, I am of the opinion that the exceptions cannot be sustained. The conclusions of fact, as above set forth, are approved and adopted. Libelant bases its right to maintain its suit in admiralty upon the North Carolina statute, which provides that:

"Every building, built, rebuilt, repaired or improved, * * * and every farm or vessel, or any kind of property, real or personal, not herein enumerated, shall be subject to a lien for the payment of all debts contracted for work done on the same, or material furnished." Rev. 1905, § 2016.

Provision is further made by the statute for filing notice of the lien, which it is conceded has been complied with by libelant. It is settled that, when the state statute of the home port of a vessel gives a lien for material furnished, such lien, when perfected under the state statute, may be enforced against the boat by a proceeding in admiralty in the District Court of the United States. Admiralty Rule 12. Judge Gray, in the *Vigilant*, 151 Fed. 747, 81 C. C. A. 371, discusses the question at length and with abundant learning. He says:

"The general maritime law of the United States creates no lien for supplies to a domestic vessel, and there can, therefore, be no proceeding in rem for the debt so incurred. The lien created, however, by the local statute, being maritime in its nature, furnishes the foundation for such proceedings in rem in the admiralty court, the jurisdiction of which found itself upon the existence of a maritime lien, though created by a state statute in the fashioning, creation, and limitation of which the general maritime law has no part." *The Glide*, 167 U. S. 606, 17 Sup. Ct. 930, 42 L. Ed. 296.

[2] I am of the opinion that the engine and equipment, together with the other articles furnished by libelant, under the circumstances set forth in the testimony, come within the term "materials." The statute is remedial, and has been uniformly construed to advance the remedy. They were "of a nature suited to the vessel and as a means of preparing her for her maritime enterprise." 20 Cyc. 760. Whatever the presumption may be as to whether the material was furnished on the credit of the boat, or the personal credit of the owner of it, is not necessary to be considered, because the commissioner has found, as a fact, that they were furnished on the credit of the boat. It is true that claimant insists that there is no evidence to sustain this finding. This contention is met, however, by the testimony of R. A. Dudley, who made the sale as the agent of libelant. In response to the question as to the inducement which caused him to make the sale, he said:

"Well, the first was due to the \$150 cash, and the balance was two notes; and, of course, knowing that the boat was responsible for any repairs, machinery, and accessories, we should install and put there after the engine was sold."

The last sentence of this answer, it is insisted by claimant, sustains its position. While ambiguous, I think the entire answer should be considered, and evidently means that witness looked to the boat. This is certainly some evidence that the libelant sold and delivered the machinery, etc., upon the credit of the boat. There is no evidence as to claimant's understanding, and it is suggested that, in order to create the lien, both parties must have understood that the material was bought and sold upon the credit of the boat. This question was discussed by Circuit Judge Putnam in *The Iris*, 100 Fed. 104, 40 C. C. A. 301, in which case he was construing the Massachusetts statute, giving a lien for material furnished. He says:

"There is no necessity, under the local statute, of either alleging or proving that credit was given the vessel by mutual agreement." *The J. E. Rumbell*, 148 U. S. 1, 13 Sup. Ct. 498, 37 L. Ed. 345.

It is settled that the retention of title to the engine until the debt was paid does not prevent the statutory lien from attaching. In *C. & A. Railroad Co. v. Union Rolling Mills*, 109 U. S. 702, 721, 3 Sup. Ct. 594, 27 L. Ed. 1081, this contention was made. The court quotes with approval this language from the Supreme Court of Illinois in *Clark v. Moore*, 64 Ill. 279:

"The lien [statutory lien] attaches to and incumbers the property to improve which the material is furnished, and the effort to acquire a more specific and exclusive lien thereon in no wise manifests an intention to release the property from all liens and look to other security for payment; but it shows the very opposite intention, an intention to hold, if possible, the property liable for the payment of their claim." 20 A. & E. Enc. 500; 27 Cyc. 276; *The Thomas Morgan* (D. C.) 123 Fed. 781.

I concur with the commissioner that claimant has not sustained its counterclaim. Claimant is insolvent and its property in the hands of a Receiver. While the case is not free from difficulty, upon a consideration of the entire record, I am of the opinion that the report of the commissioner should be confirmed.

Let judgment be drawn accordingly.

EGAN v. SOUTHERN TOWING CO.

(District Court, D. Maryland. March 15, 1909.)

1. TOWAGE (§ 11*)—CARE REQUIRED.

A master of a tug in charge of a tow, and unable because of its small size to do more than save itself in time of storm, must be very observant of the weather, and must not run risks that may be avoided, and must make for one of the numerous harbors available as soon as it becomes evident that stormy weather is to be expected.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 11-23; Dec. Dig. § 11.*]

2. TOWAGE (§ 15*)—CARE REQUIRED.

Evidence held to show actionable negligence of a captain of a tug in failing to take timely precautions to avoid a storm by entering a harbor with the tow.

[Ed. Note.—For other cases, see Towage, Dec. Dig. § 15.*]

3. DEATH (§ 95*)—ACTION FOR NEGLIGENT DEATH—DAMAGES.

In libel by an administratrix for the death of her husband, 61 years old, engaged as master of a barge, a decree of \$3,500 will be awarded as damages for his negligent death.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 108-120; Dec. Dig. § 95.*]

4. DEATH (§ 95*)—ACTION FOR NEGLIGENT DEATH—DAMAGES.

Where a mother, suing for the negligent death of a son, had only the hope and expectation that he would contribute to her support, the court will award her \$500 damages for his negligent death.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 108-120; Dec. Dig. § 95.*]

In Admiralty. Suit by Sarah H. Egan, administratrix, against the Southern Towing Company. Decree for plaintiff.

J. Walter Lord and Howard M. Long, for libellant.

Arthur D. Foster, for respondent.

MORRIS, District Judge (orally). This is a difficult case, as all cases are in which the court has to pass upon the correctness of the judgment of the navigator of a vessel in dealing with difficulties encountered in navigation. At the threshold of the case there are two facts which have come out very clearly.

[1] One is that it is quite in accordance with established custom for Chesapeake Bay tugs of the same class as the Dixie to undertake to tow from Baltimore to Norfolk a tow of ordinary loaded barges five in number, and often as many as eight. The other fact which is established is that such tugs—that is to say, ordinary Chesapeake Bay tugs—except in favorable weather without much adverse wind or sea are not able to manage such a tow, and against a strong wind, a heavy tide, or rough sea they are not able to move such a tow with any speed, and that in anything like a storm or anything approaching a gale such a tug has as much as it can do to save itself, so that they are not able to take a tow of five loaded barges out of danger into a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

place of safety after the storm has come. One naturally asks, then, how it is that this business is carried on in the Chesapeake, as it is, very largely. It is profitable to the tug owners. It must be or it would not be conducted. It is profitable to the owners of the barges and their cargoes, and insurance is obtainable. How is that to be accounted for? Here is a business of great difficulty and danger in which tugs are undertaking to take tows which they cannot do anything with in rough water, and yet the business is continued and is a profitable business. It seems to me that can only be explained by the fact that there are, particularly along the western side of the Chesapeake, numerous harbors, most of them not distant from each other more than 10 or 15 miles, so that if the master of a tug exercises a high degree of prudence and skill—that is a degree of prudence and skill which under the circumstances is necessary for the business and without which the business could not be conducted, if he exercises that degree of care—he can always, if he is observant of the weather, get to a harbor before it is too late. If it was not for that, I do not believe the business could be conducted in the way in which it is conducted. There would have to be more powerful tugs and more seaworthy barges employed. But it is conducted, and it must be, it seems to me, only because the masters of tugs do exercise this high degree of caution which under the special circumstances is only a reasonable prudence and caution. That reasonable prudence requires of them that they shall be very observant of the weather and shall not run risks that they can avoid, and shall make for a harbor as soon as it becomes evident that stormy weather is to be expected.

[2] This brings me to the point in this case on which the decision of it turns, and that is, Was the captain of the *Dixie* justified in continuing on after the weather conditions became such that a storm was to be expected? The testimony is quite convincing, to my mind, that the barometer was falling and the weather indications were threatening at the time when the *Dixie* was passing the Piankatank River, which is a harbor, and very decidedly so when the *Dixie* was passing the Wolf Trap, which, while not a harbor exactly, is a place where a tug can take her tow and reach a safe anchorage, near the Wolf Trap light. She passed the Wolf Trap about 1:20 in the morning. At that time the indications certainly were alarming. The barometer at midnight had begun to go down rapidly, the wind was flawy, there were indications of a severe storm, and it seems to me on the whole testimony it was reckless not to have gone into the Wolf Trap anchorage, if not into the Piankatank Harbor. I think a reasonably prudent man would have gone into the harbor of the Piankatank.

Some criticism and animadversion is made upon those witnesses whose testimony tends to establish the early hour at which it was observable that the barometer was falling and that a storm was threatening, and that the wind was getting stronger. But Capt. Jones of the tug *Dauntless* acted on the opinion he formed, and sought a harbor, although he had only three barges in tow, with a more

powerful tug than the Dixie; and, whatever may be said about his testimony, there can be no doubt that he acted upon what he now says were the indications which were then present and went into harbor, and the event proved that he was right. What he says he expected to happen, did happen, a very severe storm which overwhelmed the Dixie with her tow. When the gale from the west became severe, the captain of the Dixie undertook to take his tow under the land at New Point; but his tug had not sufficient power, and he had to cut loose from the tow and save his tug. He had postponed it until too late. He had not exercised good judgment and prudence under the circumstances of the situation. Of course it is difficult after the event to place oneself in the position of the person who had to decide what to do in the face of the danger, but under the circumstances of this case, when it was so essential for a tug of that class, with very moderate power and a heavy tow, to avoid all danger, with indications showing that a storm was impending, with harbors accessible all the way along on the western shore of the bay, it seems to me that it was a fault, and more than error of judgment, in the master of the tug not to avail himself of the opportunities for reaching safety. Under the conditions under which towing can be maintained on the Chesapeake Bay it seems to me that it is more than an error of judgment, it is a fault, to neglect to avail of the opportunities which are afforded for safety.

Something has been brought out in testimony with regard to the management of the Cumminsky. That testimony is to be received with hesitation because the two men who were on board of her unfortunately were drowned, and we cannot have their statement of what occurred.

It is a close case, but the attention I have given to the testimony, and a careful consideration of it, has led me to the conclusion that the loss of the Cumminsky resulted from the neglect of the captain of the tug Dixie to take timely precautions to avoid a storm, which he ought to have known was coming from the condition of the barometer and from the appearance of the weather, all those conditions which to an experienced man would indicate that a storm was imminent.

[3, 4] Then I come to the question of the amount for which the decree ought to be entered. Capt. Egan was a man of 61 years of age. A man who earns his living in such an occupation as that of master of a barge, is not at 61 years of age in the prime of life, and the number of years in which he might be expected to earn a support for his family was limited. I think, therefore, a decree for \$3,500 in respect to Capt. Egan would be right, and a decree of \$500 in respect to the son is proper.

Mr. Lord: I did not catch what your honor said in regard to the son.

The Court: \$500. It is not necessary for me to comment upon the peculiar circumstances in regard to him. His mother had no legal right to his earnings. She had only the hope and expectation that her son would contribute to her support.

There are other circumstances in the case that I might comment upon, but that is the result to which I have come after consideration of the case. I desire to add that the defense of the respondent has been most ably conducted by the proctor representing the respondent.

In re HARTDAGEN.

(District Court, M. D. Pennsylvania. July 29, 1911.)

No. 1,724.

1. CONTRACTS (§ 176*)—CONSTRUCTION—QUESTION FOR COURT.

The interpretation of a written contract is for the court which must ascertain the intention of the parties from the writing.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 176.*]

2. CONTRACTS (§§ 2, 144*)—CONSTRUCTION—VALIDITY.

In bankruptcy the construction and validity of a contract with the bankrupt must be determined by the local laws of the state.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 2, 41, 145, 724-727; Dec. Dig. §§ 2, 144.*]

3. BANKRUPTCY (§ 184*)—CONTRACTS OF SALE—VALIDITY.

A contract between a manufacturer of agricultural implements and a retail dealer therein, which binds the manufacturer to supply the dealer with certain machinery at specified prices and terms, and binds the dealer to buy the machinery, and which provides that the goods on hand and the proceeds of sales of goods received under the contract shall be held in trust for the benefit and subject to the order of the manufacturer until the purchase price has been paid, and which declares that the contract contains all the "conditions of the sale," is a contract of sale whereby the title to the property passes to the dealer, subject to the agreement to hold in trust for the benefit of the manufacturer to secure the payment of the price, and is void under the law of Pennsylvania as against creditors of the dealer, and under Bankr. Act July 1, 1898, c. 541, § 47a, cl. 2, 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), as amended by Act Cong. June 25, 1910, c. 412, § 8, 36 Stat. 840, vesting the trustee with the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings, the contract is void as to the trustee who may take possession of the property received by the dealer under his contract as against the manufacturer.

Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 184.*]

In the matter of the bankruptcy of James M. Hartdagen. Petition in proceeding to reclaim personal property in the possession of the bankrupt's trustee. Dismissed.

G. J. Benner and John D. Keith, for petitioner.

Donald P. McPherson, for trustee.

WITMER, District Judge. The petitioner, the Walter A. Wood Mowing & Reaping Machine Company, here seeks to reclaim certain personal property, or the proceeds thereof, from the trustee of the bankrupt, James M. Hartdagen. The claimant is a corporation engaged in manufacturing agricultural implements, having its principal office at Hoosick Falls, N. Y. The bankrupt was a retail dealer in such implements with residence and place of business at Tillie.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Adams county, this district. Between September, 1900, and January, 1910, the claimant entered into four several agreements with the bankrupt, and in pursuance of the same delivered to him certain implements consisting of mowers, side delivery rakes, tooth Perry harrows, hay loaders, N. C. Harvesters, and binders, etc. When Hartdagen was adjudged a bankrupt, September 13, 1910, some of these implements, being in his possession, were turned over to his trustee who on demand declined to deliver them to the petitioner, and thereafter these proceedings were instituted. Since, the trustee, by his agreement with the claimant, converted the property in dispute into cash with the understanding that the cash be turned over to the claimant if the court is of the opinion that the claimant can maintain title to this property as against the trustee.

This depends upon the nature of the agreements between the claimant and the bankrupt. These are similar in their terms and conditions, and provide as follows:

"That the said party of the first part agrees to supply the said party of the second part, as herein provided and agreed, the following number and class of Walter A. Wood (harrows and cultivators), delivered on cars at Harrisburg at the prices and terms herein stated, to wit (for example):

| Quantity. | Article. | Specifications. | Price. |
|---|---------------|-----------------|----------|
| 3 | Disc Harrows. | 12 x 16 | \$19.25. |
| Terms: Fall 1909, Net cash Jan. 1st, 1910. 5% cash October 1st, 1909. | | | |

"(3) And the said party of the second part agrees to buy of the party of the first part the harrows and cultivators specified, at the above prices, and to pay and settle for same as herein provided and agreed.

"(4) And, in case harrows and cultivators additional to those herein contracted for are supplied, the party of the second part agrees to pay for same at the same prices and upon the same terms as herein agreed upon.

"(5) All goods on hand and the proceeds of all sales of all goods received under this contract, whether such proceeds of sales consist of notes, cash, or book accounts, the party of the second part agrees to hold as collateral security in trust and for the benefit of and subject to the order of the party of the first part, until all obligations hereunder due the party of the first part from the second party are paid in full in cash. The party of the second part agrees to surrender to the party of the first part on demand at any time all goods on hand received from said party of the first part hereunder, and likewise agrees upon demand to surrender, assign, and turn over to said first party all notes, cash, checks, and book accounts received by the party of the second part from, on account of, or arising out of the sale of, goods or harrows or cultivators so received from the party of the first part, or such portion or amount of said cash, checks, and book accounts as shall be sufficient to pay for said goods and harrows and cultivators and settle the account therefor in full to the satisfaction of the party of the first part. When such notes, accounts, or unsold goods are so demanded and surrendered, assigned, and turned over, they shall be credited to the party of the second part and considered as payment on account. All notes and accounts so surrendered, assigned, and turned over to the party of the first part shall, before assign-

ment and surrender thereof, be respectively indorsed and guaranteed by party of the second part.

"(6) Said party of the first part reserves the right to annul this agreement at any time, by giving notice in writing to said party of the second part, in case it becomes satisfied that the party of the second part is not entitled to the credit hereby extended. In case of death of the party of the second part, or if a firm, death of one member, or should the said second party sell, dispose of, or remove to another place, or default in any payments coming due under this contract, or in any case of preferences given other creditors, any account, notes or other obligation growing out of this contract or arising therefrom, shall become due and payable at once in cash to the party of the first part. * * *

"(11) This contract between the said parties contains all the conditions of the sale, in writing. No verbal agreements will be recognized."

The contracts entered into between the Walter A. Wood Mowing & Reaping Machine Company and James M. Hartdagen, the bankrupt, are agreements of sale, whereby the title to the property in question passed to James M. Hartdagen, subject to an agreement stated in the contracts to hold the property in question for the benefit of the company, to secure to it the payment of the purchase price of the property so sold.

[1] The interpretation of the contract is for the court, and the intention of the parties must be ascertained from the writing.

[2] In bankruptcy its construction and validity must be determined by the local laws of the state. *Thompson v. Fairbanks*, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577, 13 Am. Bankr. Rep. 437; *Humphrey v. Tatman's*, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956, 14 Am. Bankr. Rep. 74; *York Mfg. Co. v. Cassel*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, 15 Am. Bankr. Rep. 633.

[3] It is clear that the agreement entered into by the parties is neither a lease nor bailment. It throughout speaks of a sale, and contains no terms of rental or other clause by which it is sought to disguise the arrangement as a lease or bailment. The entire contract looks to the payment of the purchase price and contains no stipulation for the return of the property, but in the event of failure to pay for it. It is stipulated that title is to be retained by the vendor until fully paid for by the vendee, and that the written agreement contained all the "conditions of this sale." This arrangement between the parties to the contract may be binding upon them as it was no doubt originally intended, but the policy of the law of Pennsylvania abhorring secret liens makes it absolutely void as against creditors. *Rose v. Story*, 1 Pa. 190, 44 Am. Dec. 121; *Wiley's Appeal*, 90 Pa. 210; *Thompson v. Parch*, 94 Pa. 275; *Haak v. Linderman*, 64 Pa. 501, 3 Am. Rep. 612; *Stadtfelt v. Huntsman*, 92 Pa. 53, 37 Am. Rep. 661; *Dearborn v. Raysor*, 132 Pa. 231, 20 Atl. 690; *Ott v. Sweatman*, 166 Pa. 217, 31 Atl. 102; *In re Rinker* (D. C.) 23 Am. Bankr. Rep. 62, 174 Fed. 490, in so far as affirmed in *Liquid Carbonic Co. v. Quick*, 25 Am. Bankr. Rep. 394, 182 Fed. 603, 104 C. C. A. 668; *In re G. K. Trunk Co.* (D. C.) 23 Am. Bankr. Rep. 914, 176 Fed. 1007. The contracts are also void as to the trustee of the bankrupt by force and virtue of the modification of the federal bankruptcy act by amendment June 25, 1910, section 47, cl. 2, subd. A, which reads in part:

"And such trustee, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon."

This provision of the bankruptcy act puts the trustee, in so far as the assets of the estate are concerned, in the position of a lien creditor, and to this extent this case is distinguished from the case of the York Mfg. Co. v. Cassel, and others of its character, which no doubt inspired Congress to enact the amendment recited.

The petition is dismissed.

THE TRANSFER NO. 12.

(District Court, D. New Jersey. May 5, 1911.)

COLLISION (§ 96*)—STEAMER PASSING OUT FROM SLIP—NAVIGATING TOO NEAR ENDS OF PIERS.

A transfer tug, passing downstream at a high speed at night within 30 feet or so of the end of a coal pier at Jersey City having a shed its full length, held solely in fault for a collision with a steamer coming out from the slip on the south side of the pier, and which gave the usual slip whistle.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 203-205; Dec. Dig. § 96.*]

In Admiralty. Suit by the Jersey City Stockyards Company, as owner of the steamer Burlington, against the steamtug Transfer No. 12. Decree for libellant.

Bedle & Kellogg, for libellant.

Vredenburg, Wall & Carey, for respondent.

CROSS, District Judge. The libellant filed its libel herein to recover damages for injuries which the steamboat Burlington, owned by it, sustained in a collision with Transfer No. 12, which happened, as claimed, through the negligent management of that boat. The collision occurred about half past 8 o'clock in the evening of March 31, 1909, when the Burlington was just off the end of a pier known as the "Communipaw coal pier," at Jersey City, within this district. Between that pier and the Port Liberty pier, just south of it, there is open water constituting a slip of about 250 feet in width. The Burlington had just finished coaling at the south side of the Communipaw pier, and passed out of the slip when the collision occurred. The respondent was proceeding southerly for the purpose of coaling at the Port Liberty pier, which is, as above stated, on the southerly side of the same slip. The evening, although not stormy, was dark at the time of the collision.

There was but little wind blowing, and the tide was at the ebb. The Burlington was in charge of a crew of five, a captain, engineer, fireman, and two deckhands. She was a double-ended side-wheeled ferryboat, 165 feet long, of 53 feet beam, drew about 6 feet of water,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and was capable of making about 7 miles an hour. Transfer No. 12 had a similar crew. She was a propeller tugboat, 110 feet long, of 22 feet beam, drew 13 feet of water, and was capable of making about 14 miles an hour. The Communipaw coal dock has coal sheds built overhead throughout its entire length, and which are so high as to cut off from the view of a boat coming from the north the Burlington or any similar boat lying at or passing along the south side of the pier. The Burlington, while being coaled, lay from one to two of her lengths from the end of the pier on its southerly side; that is, the side opposite that from which Transfer No. 12 was approaching. The testimony of her captain and crew is that when she was fully coaled a short whistle was blown as a signal to cast off her lines. This operation took only a minute or so. Immediately thereafter a long slip whistle was blown, which continued while she moved out towards, and until she had reached, the end of the pier. The crew of Transfer No. 12 all say, however, that they heard no whistle, and they are, to a slight extent, corroborated by a witness who at the time was on the Port Liberty pier, and who said that he heard no whistle blown by the Burlington; but he immediately afterwards admitted that she did blow a short whistle as a signal to cast off the lines.

Under the circumstances, it is obvious that his testimony is not very satisfactory or reliable. The positive evidence that a long slip whistle was blown cannot be overcome by negative evidence that it was not heard. Moreover, the probabilities are altogether in favor of the view that it was blown. It would be so monumental and dangerous an exhibition of negligence for a captain to come out from behind a high overshadowing pier directly into navigable waters, without giving any signal, as of itself to be almost unbelievable. The captain of the Burlington says he was abreast of the end of the pier when Transfer No. 12 was coming toward him at a high rate of speed, about 30 feet off the end of the pier and but 300 or 400 feet north of it. In this he is corroborated. Further, the stern of the Burlington was, as he testified, only 30 feet from the end of the pier when she was struck on her port bow while advancing at a rate of but 2 or 3 miles an hour. The force of the blow made a gash in her 10 or 12 feet deep and forced her back into the slip.

The testimony on the part of the respondent is that Transfer No. 12 was merely drifting at the time of the collision, and that the Burlington ran into her; but I cannot accept this view of the case. It is manifest, from the circumstances outside of the direct testimony, that she, having just come out of the slip, could not have attained any considerable speed, and the result of the collision would seem to show conclusively which boat gave the blow. The tug was uninjured. Moreover, it appears by the respondent's own testimony that Transfer No. 12 occupied but five minutes in coming from the Lehigh Valley docks, which are located 2,000 feet above the Communipaw dock. In my judgment the collision was caused by the fact that Transfer No. 12, in proceeding to her coaling place at the Port Liberty dock, cut across close to the end of the Communipaw pier.

This in itself showed negligence. She had 400 or 500 feet of clear water, and should have kept farther out in the channel until opposite the slip, and then have rounded into it. Had this been done, there would have been no collision, nor any opportunity for one. Her captain knew of the existence of the Communipaw pier, and that boats were accustomed to coal on both sides of it. He also must have known that her lookout, coming as she was from the north, could not see, even in the daytime, a boat lying on the south side of the pier. That the danger was recognized appears from a clause in the respondent's answer as follows:

"A careful lookout was kept in order to avoid a collision between the said tug Transfer No. 12 and such boat or boats as might be about to leave from the Communipaw coal piers, or any of them."

Again, the captain of Transfer No. 12 testified as follows:

"Q. Would you have shaped your course in the same way as you were going if you had heard the long whistle of the Burlington? A. I would have kept farther out from the docks, and also I might have backed sooner."

This admission of itself shows that he acted imprudently. He had no right to assume, from the fact that he heard no whistle, or that the lookout had failed to see and warn him of what it was impossible to see, that there was no boat lying behind, or moving out from behind, the pier. He manifestly took an unwarranted risk. He also admits that he was but 200 to 300 feet from the down stream (south) side of the Communipaw dock when he blew his first whistle for the Burlington.

The libellant's case may well be rested upon what has already been stated; but, aside from that, according to the evidence, Transfer No. 12 was at the time showing only her green starboard light, while the Burlington had all her lights up, as required by law. It is unnecessary to consider the question of signals. Those given by Transfer No. 12 were promptly answered by the Burlington, and the maneuvers indicated attempted. All of the signals, however, were given within a few seconds of the collision. This must have been the case, apart from the direct evidence, in view of the fact that the respondent was, as already indicated, but a short distance away when the Burlington was sighted. That the respondent was solely in fault clearly appears.

A reference will be made to a commissioner to ascertain and report libellant's damages.

BUNTING v. PENNSYLVANIA R. CO.

(Circuit Court, E. D. Pennsylvania. June 13, 1911.)

No. 1,320.

1. RAILROADS (§ 222*)—OPERATION—EMISSION OF SMOKE—NEGLIGENCE.

In a suit by an adjoining property owner for injuries to his property by the alleged negligent operation of a railroad through the emission of smoke, a city ordinance regulating the emission of smoke by railroads within the city limits, though not conclusive on the issue of negligence, was admissible as bearing on such issue.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 222.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. RAILROADS (§ 222*)—OPERATION—EMISSION OF SMOKE.

Though a railroad's franchise authorizes it to emit whatever smoke may be necessary in carrying freight and passengers, it is not authorized to exceed the necessities of its business, and is liable for the negligent emission of smoke to the injury of adjoining property owners.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 721; Dec. Dig. § 222.*]

At. Law. Action by Annie E. Bunting against the Pennsylvania Railroad Company. On motion for new trial. Denied.

E. Spencer Miller, for plaintiff.

John Hampton Barnes, for defendant.

J. B. McPHERSON, District Judge. [1] After reviewing this case in the light of the careful arguments of counsel upon the pending motion, I am still of opinion that the rulings at the trial were correct. The question of negligence in operating the defendant's locomotives was submitted to the jury, and they were instructed that, while they might consider the ordinance of the city concerning the emission of smoke, the ordinance was not conclusive; meaning, of course, that it was not conclusive as a defense. It was offered on behalf of the defense for the purpose of showing what rules the city had laid down upon this subject, and was admitted without objection. I was asked to declare, however, that it had "no bearing" on the question of negligence; and, if it had *some* bearing, as I think it had, the request was properly refused. But the jury were distinctly instructed that in spite of the ordinance the emission of the volume of smoke permitted by the city might nevertheless be negligence—for this is the plain meaning of the instruction now complained of—and I still believe this instruction to be correct.

In regard to the evidence concerning the limited use of other kinds of fuel by two other railroads, I shall add nothing now to what I said in the charge on that subject. A recent Pennsylvania case is *Rocap v. Telephone Co.*, 230 Pa. at page 604, 79 Atl. 769.

[2] On the principal facts, the dispute presents a situation of conflicting rights. The plaintiff has a right to the unimpaired enjoyment and use of her property; the defendant has a franchise from the state that gives the right to emit whatever smoke may be necessary in carrying freight and passengers. The railroad is not authorized to exceed the necessities of its business. If it negligently emit smoke, it is undoubtedly liable to persons injured thereby. But it is not liable merely on the ground that injury has been done by the smoke from its engines; the smoke must also have been emitted negligently. It sometimes happens that a citizen may suffer injury that is not capable of redress; this is one of the consequences that occasionally results from living in a crowded community under modern conditions. Whenever two rights conflict, one of them must give way; and, in the absence of negligence, the defendant's right that is now in question is confessedly superior to the plaintiff's.

A new trial is refused.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

THE NERO.

THE HERCULES.

(District Court, E. D. Pennsylvania. March 23, 1911.)

No. 26.

COLLISION (§ 71*)—DERRICK AND MOORED LAUNCH—FAILURE OF LAUNCH TO MOVE OUT OF WAY.

A collision between a large and unwieldy derrick having no motive power of her own and a small launch tied up to a pier *held* due solely to the fault of the launch for the failure of the man in charge to move her out of the way, as he might readily have done, upon being warned from the derrick as soon as her presence was discovered.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 101; Dec. Dig. § 71.*]

In Admiralty. Suit by the owner of the launch Nero against the derrick Hercules for collision. On final hearing. Decree for respondent.

Francis S. Laws, for libellant.

George P. Rich, for respondent.

J. B. McPHERSON, District Judge. There is no important dispute in this case except upon one point. The young man who was left in charge of the launch declares that the derrick enjoined him not to move his boat, and that he obeyed the injunction, although a slight change of place, which he could have made without trouble, would have avoided the collision. In my opinion the weight of the evidence is with the respondent in this matter; and certainly, if the warning testified to by her witnesses was actually given—and I find the fact to be as they have testified—the negligence of the launch is clear. This leaves to be considered the question whether the derrick was also negligent in failing to take proper precautions under all the circumstances. In my opinion, she did all that could properly be required. She had no reason to suspect the presence of the launch, and only became aware of it when it is probable that the collision could not have been avoided. She is a large and unwieldy vessel, without power of her own, while the launch is a small boat, and could easily have been moved by hand with slight exertion by the young man in charge. The derrick might reasonably suppose that the launch would be moved the few feet that would have put her into complete safety, and I see no negligence in the failure of the Hercules to put out a breast line to the short pier immediately to the north. I think it is true that soon after the launch was discovered it was possible to throw a line from the derrick to the short pier, but it would have been necessary to send a man around the dock to catch it, and it is very doubtful whether he could have reached the spot in time to check the movement of the derrick so as to avoid the collision.

I do not agree with the respondent's contention that the launch was where she had no right to be. Pier 13 was open by permission of the owner to all boats having business there, and the launch was prosecuting her lawful business when she made fast to the pier upon the occa-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sion in question. But, as I have already said, she was bound to take reasonable precautions to avoid collision, and in my opinion she failed to discharge the duty that was imposed upon her. She was a much lighter vessel and was much more capable of easy and speedy movement. In several respects the case resembles *The Etruria* (D. C.) 88 Fed. 555.

But I think the circumstances of this litigation should have some effect upon the disposition of the costs; and therefore, while the libel must be dismissed, I direct that the docket costs shall be equally divided, and that each party shall pay his own witnesses and the cost of taking and transcribing their testimony.

A decree to this effect may be entered.

THE MIDDLESEX.

(District Court, D. Maryland. April 14, 1911.)

COLLISION (§ 102*)—VESSELS IN SLIP—MUTUAL FAULT.

A scow, which had been lying alongside a vessel in a slip, cast off and was being moved up the slip by her bow line past a steamer, whose wheel was turning, when she was drawn by the suction within reach of the wheel, and was struck and sunk. *Held*, that the steamer was in fault for having no lookout to give warning and stop the engine in case of danger to other vessels, and that the scow was also in fault for attempting to pass the side of the steamer when her wheel was turning and the danger was obvious.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 102.*]

In Admiralty. Suit for collision by the Chesapeake Lighterage & Towing Company against the steamship *Middlesex*. Decree for half damages.

H. N. Abercrombie, for libellant.

Ralph Robinson, for respondent.

ROSE, District Judge (orally). The owners of Scow 132 libeled the steamship *Middlesex*. The scow had been alongside the *Anthony Groves*, a steamer lying in the same slip as the *Middlesex*. Having completed the purpose for which it had been made fast to the *Groves*, those in charge of it cast off its stern line from the *Groves* and started to move it by means of its bow line up the slip past the bow of the *Groves*. Before this manœuver was completed the barge sank. The resulting damage amounted to \$519.58.

The libellant says the sinking of the barge was due to its being drawn into contact with the *Middlesex* by the suction produced by the turning of the wheel of the latter. The *Middlesex* in its answer said that the barge sank because of its own unseaworthiness, and not as a consequence of any injury received by contact with the *Middlesex*.

The *Middlesex* at the time was fast to her pier, but her assistant engineer had started her engines for the purpose of blowing out her cylinders and making certain that her machinery was in good order before starting on her regular trip down the bay. The engines were

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

in motion, and the paddle wheel of the Middlesex was turning, when Scow 132 cast off from the Anthony Groves. There was at the time no one on lookout on the Middlesex. There was nobody on the Middlesex who could have been hailed by those on the scow. The injury resulted from the barge being brought by the suction of the water, resulting from the turning of the wheel of the Middlesex, into contact with the wheel, and being struck by one of the iron buckets or paddles of the wheel.

The libelant claims that the Middlesex was negligent in so turning her wheel without having some one on watch who could have had the engine stopped in case of necessity for so doing. I sustain this contention. Had there been such a lookout on the Middlesex, I believe the accident would not have occurred. That there was not a lookout conclusively appears.

The theory of the original answer and the testimony of the witnesses produced by the Middlesex show that there was nobody on board of her who saw the barge drifting down towards her. There was a lighter alongside of the Middlesex. The men on the lighter did see it. Neither side, it is true, has produced any of these men as witnesses; but the men on Scow 132 say that the men on the lighter saw what was happening and tried to prevent it. The testimony of the first officer of the Middlesex is quite in harmony in this respect with the statements of those on the scow. He says his attention was first attracted to the barge by some noise or shouting or excited talk on board the lighter. He, however, himself did not see the scow when it drifted under the guard of the Middlesex and was hit by her paddle. The first he saw of it was after all these things had happened, and when it had drifted or been pulled over to the other side of the slip and was about to turn over.

The Middlesex was negligent, in my judgment, in not having some one who could have watched the motions of the raft in the neighborhood, and who could have given immediate directions for the stopping of her wheel in case of necessity.

It is contended on behalf of the Middlesex that, whether this be true or not, she is not responsible, because no one on the scow hailed the steamer and asked her to stop her engine. Such hailing, in my judgment, would have done no good. As the witness from the scow testified, it would have been unnecessary and idle; for there was nobody to have heard or understood such hailing. Those on the scow were much better employed in trying, as they did, first with the hook and then with their hands, to keep the barge from hitting the steamer in a dangerous place. This effort might have succeeded if it had not been for the chance that the corner of the barge struck the Middlesex and managed in that way to get between the rims of her wheel, and thus came into immediate contact with the heavy paddle buckets.

On the other hand, it seems to me that the scow was also guilty of negligence. The assumption upon which it is entitled to recover, if at all, is that there is danger in turning the wheel of a steamer under the circumstances in evidence. If that be true, the danger must be quite as apparent to persons on such a scow as it would be to those on board

a steamer. Very probably it is even more keenly appreciated by the former than by the latter. When the barge cast off while the paddle wheel of the Middlesex was in motion, those on board of it were negligent. The accident would not have happened if the scow had not cast off while the Middlesex wheel was turning. It would not even then have happened, had anybody been on watch on the Middlesex.

I must divide the damage, and give a decree to the libellant for one-half the amount thereof, \$259.79.

CORNELL v. NICHOLS & LANGWORTHY MACH. CO.

(Circuit Court, S. D. New York. May 31, 1911.)

1. RECEIVERS (§§ 154, 162*)—CLAIMS—QUESTION—PROCEEDS—MORTGAGES—ADMINISTRATION EXPENSES.

Where a receiver of a corporation, with the consent of the court, in order to get money with which to collect claims against insurance companies, agreed to turn over the claims to such creditors as would come in, and share the expense of collection, on condition that they should be first paid in full and that the balance should go to the general estate, neither the receiver nor a mortgagee of the insured property was entitled to claim payment of a mortgage or of expenses of the general administration of the estate out of the fund obtained as against the claims of contributing creditors.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 277, 279-282; Dec. Dig. §§ 154, 162.*]

2. RECEIVERS (§ 200*)—COMPENSATION.

Where a receiver of an insolvent corporation, in order to collect claims against certain insurance companies, obtained funds for that purpose from contributing creditors under an agreement to turn the claims over to such creditors on condition that they should be first paid in full from the proceeds and the balance should go to the general estate, the contributing creditors having thereafter employed the receiver to collect the claims, he was entitled to compensation for his services from the proceeds.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 397-401; Dec. Dig. § 200.*]

In Equity. Suit by Charles G. Cornell, Jr., against the Nichols & Langworthy Machine Company. Proceedings for distribution of assets in the hands of a receiver of an insolvent corporation. Claims of receiver and mortgagee overruled.

Charles P. Howland, for New York Safety Steam Power Co.
Briesen & Knauth, for Knauth, Nachod & Kuhne.

HAND, District Judge. [1] When the receiver was appointed, the assets of the corporation consisted of an equity in the half burned property and claims against many insurance companies, domestic and foreign. Soon it became apparent that the claims against foreign insurance companies were to be disputed, and that nothing could be realized without new money to prosecute the actions which should arise. That money the receiver did not have, and could not get except by fresh advances, and there was no one to advance such new

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

money but the creditors. The claims as they stood were therefore without any value at all to the estate. The receiver might have sold them for what he could realize, and the consideration he received would have been assets in his hands subject to the expenses of administration. If the purchaser had thought fit to employ him to collect the claims, he would never have thought of claiming the right of fixing such purchaser with more than the expense of collection. Nor would the relations have been in the least different, had the purchaser agreed to turn over to the receiver only a surplus from what he might collect above a fixed sum. Instead of doing this, the receiver, with the court's consent, offered to turn over the claims to such creditors as came in to share the expenses of collection upon condition that they should be first paid in full and the balance should go to the general estate. Suppose he had agreed, as he might well have done, that the claims should be prosecuted by the contributing creditors themselves, they to turn over the net surplus for administration. Had that been the contract, the contributing creditors would be surprised to hear that, before they began to pay themselves, the expenses of general administration must be met. They would quite rightly have said:

"This claim was given us to collect upon certain agreed terms, in which nothing was said about the payment of the general administration expenses. Had we not advanced our money, those expenses would have had no possible chance of being paid. It is true that the chance has proved valueless; but, even so, the general expenses are in no worse case than before. They have lost nothing, yet the receiver asks that he be allowed by implication to interpolate a term in our contract by which, although the surplus only was to belong to the estate, his expenses obtain a preference upon the money which we by our efforts only have won."

[2] In all this I think the contributing creditors would be quite right had they been collecting the claims themselves. As it is, the receiver has done so, and no one disputes that he must be properly paid for such a service. I cannot, however, see how it makes any difference as to his getting his general expenses out of this fund that he has been its collector, instead of a committee of creditors. Those expenses come from the general assets, and there are no general assets until the terms of the contract have been complied with under which this special fund has been created. The receiver can impose no part of such general expenses upon this special fund, except by interpolating an implied term in the contract, which is not reasonable in my judgment. In respect of these expenses, he stands just as he would have stood had no fresh advances of money ever been made. The same reasoning applies to the claim of the mortgagee, but with even greater force. Even were it entitled to get the whole surplus above the amount necessary to fulfill the contract with the creditors (which I do not decide), yet since the court had power to create liens prior to either mortgagee or receiver for the preservation of the property, neither mortgagee nor receiver can come ahead of the court's bargain, and compel the court to violate its word to those with whom it dealt. Thus the mortgagee is clearly out of the case, and so equally is the receiver, except by virtue of his services in respect of these particular assets. It is difficult to fix a just allowance for that work. Had

success resulted, the allowance asked would not have been too great, but success did not result. Such services are essentially speculative, by whatever name we may choose to disguise it, and are properly and necessarily speculative, provided no absolute percentage be fixed from the outset. Every one would be shocked that the lawyers should take the whole, but every lawyer knows that Mr. Winslow's services will be meanly paid by what I feel obliged to allow him. At best such allowances are a compromise between what would pay the lawyer and what would be a reasonable deduction from the client. In the case at bar, considering the fact that he has actually consumed 80 days in two trips abroad, to say nothing of other time here, an allowance of \$4,500 is the least that I can in justice make him, and his allowance will be fixed at that sum. The rest of the fund will be distributed among the contributing creditors in due proportions.

THE LAURETTA SPEDDEN.

(District Court, D. Maryland. April 7, 1909.)

COLLISION (§ 95*)—RIVERS—NEGLIGENCE.

A collision in the daytime between a sailing vessel and a scow in tow of a tug in a river *held*, on the evidence, due solely to the fault of the tug, and that the vessel as required kept her course and speed until the collision was imminent, when she made a change of course which nearly avoided the collision.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200-202; Dec. Dig. § 95.*

Collision with or between towing vessels and vessels in tow, see note to The John Englis, 100 C. C. A. 581.]

In Admiralty. Suit by Robert L. Rogers, owner of the bugeye Nettie Allison against the steam tug Lauretta Spedden. Decree for libellant.

Milton Roberts, for libellant.

Dallam & Marbury, for respondent.

MORRIS, District Judge (orally). This was a collision between a small sailing vessel and an empty scow in tow of the steam tug Lauretta Spedden. It took place about 9 o'clock on the morning of July 31, 1908, in the Patapsco river about half way between the entrance of the Baltimore Harbor and Ft. Carroll. The bugeye was proceeding on a southeast course down the river having up her mainsail, foresail, and jib, with a fresh 14-mile breeze from the northeast. Her master was at the wheel and two colored sailors forward. The case for the sailing vessel is that when she had cleared the harbor she saw the tug and tow to the leeward about a mile and a half to two miles off; that the sailing vessel kept her course, but the tug in approaching crossed the course of the sailing vessel from the sailing vessel's starboard to port, and the scow, being about 300 feet behind the tug and more to the leeward, collided with the sailing vessel; that the master of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sailing vessel when he saw that a collision with the scow was imminent put his wheel to port and let her main sheet run off, bringing the sailing vessel's head to the starboard and before the wind, and nearly clearing the scow, but they came together, the sailing vessel striking head on near the corner of the scow with such violence that the bug-eye sank and her master was injured.

The case for the tug made by the answer is that while the tug was coming up the river with the empty scow on a 50-fathom hawser they saw the bug-eye approaching under full sail coming rapidly down the river on a course parallel to the course of the tug and about 250 feet to the westward. That when the bug-eye was nearly abreast of the tug and about 250 feet to the port side of the tug, the master of the bug-eye put his wheel to starboard and began to haul down her mainsail, and the bug-eye began to luff to her port; that the tug blew warning whistles, and the master of the bug-eye seeming to see the scow put his wheel to port, and threw the head of the bug-eye to starboard and collided with the scow, bow on.

The story of the answer, on behalf of the tug, is so improbable that, upon consideration of all the testimony, I am constrained to accept the account given by those on the bug-eye. That the bug-eye, having a fair wind, for the course she desired to make should, when abreast of the tug, and for no reason one can imagine, have hauled down her mainsail and luffed up into the wind, is not credible. If that had been done, the bug-eye would have lost her speed. That she did not lose her speed is testified to by the witnesses, and is shown by the force with which she struck the scow. It is much more probable that the strong 14-mile breeze from the north and east, acting upon the empty scow at the end of a 50-fathom hawser, caused the scow to sag over to the westward and across the course of the bug-eye, and that its sagging was not observed by those on the tug. All the law required of the bug-eye was that she should keep her course and speed, and that, I think, she did until the collision was imminent, when she made a change of course which nearly avoided the collision.

The answer and the witnesses for the respondent assert that the master of the bug-eye was befuddled with drink, but I am not convinced that it was so. He brought the bug-eye safely out of the harbor in a high wind, and was on his proper course down the river with a fair wind. He had nothing to do but keep his course so far as the steam tug was concerned, and that at least he appears to have had sense enough to do and to save himself from a sinking vessel.

I find the tug solely to blame for the collision, and will sign a decree in favor of the libellant.

THE LITUANIA.

(District Court, D. Maryland. April 20, 1911.)

COLLISION (§ 79*)—STEAMER AND SCHOONER—FAILURE TO CARRY LIGHTS.

A steamer held not in fault for a collision with a schooner at night, on the ground that the schooner was not carrying lights, and could not have been seen from the steamer in time to have prevented the collision.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 123, 139, 151; Dec. Dig. § 79.*]

In Admiralty. Suit by Thomas E. Dawson, as master of the bugeye Edgar M. Schall, against the steamer Lituania. Decree for respondent.

Milton Roberts, for libellant.

George Forbes and Convers & Kirlin, for respondent.

ROSE, District Judge (orally). There is no question as to rules of law applicable. I am not deciding the question on the relative number of witnesses for the steamer or for the schooner. I am not even deciding the case, I may say, on any superior reliability that I attribute to the witnesses on the part of the steamer. I have seen but one witness from the steamer; but I have seen witnesses for the schooner, and I have heard their testimony, and after I heard them testify the conclusion is very strongly borne into my mind that the schooner's lights were not burning. Therefore it is not a question of the burden of proof. It is not a question of negative against positive testimony. It does not seem to me that the testimony given by the members of the crew of the schooner was true.

The only question in the case is whether the steamer is at fault, even then, for not seeing the schooner. I can hardly think so. I know of such nights as those that have been described by the witnesses, where it is clear overhead and where it is exceedingly hard, unless there is a light, to see near the water. In this case this steamer was moving, as it had a right to move, perhaps at 10 miles an hour or more; that is to say, it was moving over a mile in six minutes. I doubt very much, under those circumstances, whether a most diligent lookout would have discovered or could have discovered a schooner, if it had no lights out, in time to avoid the accident. The steamer was moving that night at such a rate that in a minute it would pass over approximately 300 yards. I doubt if with the greatest possible vigilance anybody on that steamer could have seen the schooner more than 100 yards away. That would have been only 20 seconds before they came together, a time absolutely insufficient to have made the slightest practical change in either the speed or the course. Those on the steamer saw the schooner as soon as the most vigilant man could have seen it, but they saw it too late to take any precautions.

Under the circumstances, I shall have to dismiss the libel.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

GEORGE N. PIERCE CO. v. WELLS FARGO & CO.

(Circuit Court of Appeals, Second Circuit. May 18, 1911.)

1. CARRIERS (§ 150*)—LIMITATION OF LIABILITY—VALIDITY OF LIMITATION.

A provision of a bill of lading exempting the carrier from all liability for loss or damage to the property shipped, unless proved to have been caused by its fraud or the "gross negligence" of itself or its servants, is not contrary to public policy; there being no distinction between gross negligence and ordinary negligence under the decisions of the federal courts.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 654-659; Dec. Dig. § 150.*]

2. CARRIERS (§§ 155, 158*)—LIMITATION OF AMOUNT OF LIABILITY.

A common carrier may by a contract fairly entered into with a shipper limit the amount of its liability for negligence, and the validity of such a contract is not affected by the fact that the carrier uses printed bills of lading, which fix an arbitrary value for all packages, having no relation to their real value, beyond which it is not to be liable unless a greater value is stated by the shipper and more freight paid, where the facts are fully understood by the shipper who declines to place a valuation on the property, and assents to the limitation in consideration of a reduced rate.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 663-718; Dec. Dig. §§ 155, 158.*]

3. CARRIERS (§ 27*)—INTERSTATE COMMERCE ACT—FALSE BILLING.

The fixing of the value of property in a bill of lading at less than its actual value for the purpose of limiting the amount of the carrier's liability in case of loss is not a false billing in violation of Interstate Commerce Act Feb. 4, 1887, c. 104, § 10, 24 Stat. 382, as amended by Act March 2, 1889, c. 382, § 2, 2b Stat. 857 (U. S. Comp. St. 1901, p. 3160).

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 27.*]

4. NEGLIGENCE (§ 1*)—DEFINITION.

Negligence is the failure to exercise the care appropriate to the circumstances of the particular case.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4743-4763; vol. 8, pp. 7729-7731.]

Noyes, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Western District of New York.

Action at law by the George N. Pierce Company against Wells Fargo & Co. Judgment for plaintiff, from which it brings error. Affirmed.

William B. Hoyt (A. L. Becker and Hoyt & Spratt, of counsel), for plaintiff in error.

Alexander & Green (W. C. Prime and W. W. Lancaster, of counsel), for defendant in error.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. The plaintiff, a manufacturer, brought this action at law to recover of the defendant, an express company, the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 189 F.—36

value of a car load of automobiles and appurtenances which it had delivered to the defendant to be carried from Buffalo to San Francisco. The defendant admitted its liability, and the trial judge directed the jury to find a verdict in favor of the plaintiff for \$50, the agreed value of the shipment, with interest and costs. The plaintiff took out this writ of error to the judgment entered on the verdict on the ground that the jury should have been directed to find a verdict for the actual value of the shipment, which was over the sum of \$15,000.

The bill of lading under which the goods were carried provided:

" * * * Nor shall said company be liable for any loss of or damage to said property in any event or for any cause whatever unless said loss or damage shall be proved to have been caused by or to have resulted from the fraud or gross negligence of said company or its servants; nor in any event shall said company be held liable beyond the sum of fifty dollars, at not exceeding which sum the said property is hereby valued, unless a different value is hereinabove stated. * * * "

The goods were fully described in writing with the additional statement, "Value asked and not declared." The plaintiff had large experience in shipping its product both by railroad companies and by express companies. It was entirely familiar with shipping receipts and bills of lading and had books containing the forms of various companies, including the defendant. It had been in the habit of putting valuations upon its express shipments, but changed its practice before the shipment in question was made. Its shipping clerk read the bill of lading for this shipment, was asked by the defendant's agent whether he wished to put a valuation on the goods, and declined to do so. He knew that, if he did so, the amount of freight payable would be increased. The plaintiff's representative on the Pacific coast had got the rate for this particular shipment, and had advised the plaintiff what it would be.

Thus the agreement was deliberately made with full knowledge of all the facts. The parties dealt with each other on perfectly fair, open, and even terms. Although the valuation was obviously much below the real value, the plaintiff thereby got the benefit of paying less freight and the defendant the benefit of limiting, not its liability, but the amount of its liability for negligence.

[1, 4] There is nothing against public policy in the first clause above quoted. The federal courts recognize no difference between gross and ordinary negligence. *Railway Co. v. Arms*, 91 U. S. 489, 23 L. Ed. 374. In all cases negligence is failure to exercise the care appropriate to the circumstances of the particular case. Greater care is called for in transporting eggs than in transporting pig iron. Therefore the clause, though it exempts the defendant from its liability as insurer, which is lawful, does not exempt it from the consequences of its own fraud or negligence, which would be unlawful as against public policy. It remained liable for its negligence to the full amount agreed upon. Such a contract is valid in the federal courts.

[2] The Supreme Court has definitely so decided in *Hart v. Pennsylvania Railroad Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717. In that case 12 race horses were valued at \$200 each, one of which was worth \$15,000 and the others from \$3,000 to \$3,500 each. Mr. Justice Blatchford said:

"Although the horses, being race horses, may, aside from the bill of lading, have been of greater real value than that specified in it, whatever passed between the parties before the bill of lading was signed was merged in the valuation it fixed; and it is not asserted that the plaintiff named any value, greater or less, otherwise than as he assented to the values named in the bill of lading by signing it. The presumption is conclusive that, if the liability had been assumed on a valuation as great as that now alleged, a higher rate of freight would have been charged. The rate of freight is indissolubly bound up with the valuation. If the rate of freight named was the only one offered by the defendant, it was because it was a rate measured by the valuation expressed. If the valuation was fixed at that expressed, when the real value was larger, it was because the rate of freight named was measured by the low valuation. The plaintiff cannot claim a higher valuation on the agreed rate of freight.

"It is further contended by the plaintiff that the defendant was forbidden by public policy to fix a limit for its liability for a loss by negligence at an amount less than the actual loss by such negligence. As a minor proposition, a distinction is sought to be drawn between a case where a shipper, on requirement, states the value of the property, and a rate of freight is fixed accordingly, and the present case. It is said that, while in the former case the shipper may be confined to the value he so fixed, in the event of a loss by negligence, the same rule does not apply to a case where the valuation inserted in the contract is not a valuation previously named by the shipper. But we see no sound reason for this distinction. The valuation named was the 'agreed valuation,' the one on which minds of the parties met, however it came to be fixed, and the rate of freight was based on that valuation, and was fixed on condition that such was the valuation, and that the liability should go to that extent and no further. * * *

"The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practised on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with the public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss. * * *

"The plaintiff did not, in the course of the trial, or by any request to instruct the jury, or by any exception to the charge, raise the point that he did not fully understand the terms of the bill of lading, or that he was induced to sign it by any fraud or under any misapprehension. On the contrary, he offered and read in evidence the bill of lading, as evidence of the contract on which he sued.

"The distinct ground of our decision in the case at bar is that where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations. *Squire v. New York Central R. R. Co.*, 98 Mass. 239, 245 [93 Am. Dec. 162], and cases there cited."

There can be no objection to a carrier's using printed bills of lading which fix a value for all packages unless a greater value is stated by the shipper and more freight paid. If it could not do this, a negotia-

tion and a chaffering would be necessary as to the value of each article tendered for shipment whose freight depended at all upon value, before the document could be delivered. A satisfactory or profitable transaction of business would be impossible. In the present case, however, as in the Hart Case, the shipper gave his positive assent.

The plaintiff in error relies upon *Calderon v. Atlas Co.*, 170 U. S. 272, 18 Sup. Ct. 588, 42 L. Ed. 1033, and *The Kensington*, 183 U. S. 263, 22 Sup. Ct. 102, 46 L. Ed. 190. They are not applicable. In the *Calderon* Case the bill of lading, as construed by the Supreme Court, exempted the carrier from any liability whatever for packages over the value of \$100 each. Mr. Justice Brown recognized the right of the carrier to limit his liability:

"Acting upon this view, it was held that the liability of the respondent was limited to \$100 per package, following in this particular the rulings of this court in *Railroad Company v. Fraloff*, 100 U. S. 24, 27 [25 L. Ed. 531], and *Hart v. Pennsylvania Railroad*, 112 U. S. 331 [5 Sup. Ct. 151, 28 L. Ed. 717], and the principle announced in *Magnin v. Dinsmore*, 56 N. Y. 168; s. c., 62 N. Y. 35 [20 Am. Rep. 442]; s. c., 70 N. Y. 410 [26 Am. Rep. 608], *Wescott v. Fargo*, 61 N. Y. 542 [19 Am. Rep. 300], and *Graves v. Lake Shore & Mich. Southern Railroad*, 137 Mass. 33 [50 Am. Rep. 282]. In this last case the rule obtaining in this court is adopted to its full extent by the Supreme Judicial Court of Massachusetts. In these cases it was held to be competent for carriers of passengers or goods, by specific regulations brought distinctly to the notice of the passenger or shipper, to agree upon the valuation of the property carried, with a rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, and that such contracts will be upheld as a lawful method of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations. See, also, *Bailou v. Earle*, 17 R. I. 441 [22 Atl. 1113, 14 L. R. A. 433, 33 Am. St. Rep. 881]; *Richmond & Danville Railroad v. Payne*, 86 Va. 481 [10 S. E. 749, 6 L. R. A. 849]; *J. J. Douglas Company v. Minnesota Transportation Co.*, 62 Minn. 288 [64 N. W. 899, 30 L. R. A. 860]."

But he went on to say that the contract properly construed relieved the carrier of any liability whatever, which was, of course, void:

"In this case the contract is one prepared by the respondent itself for the general purposes of its business. With every opportunity for a choice of language, it used a form of expression which clearly indicated a desire to exempt itself altogether from liability for goods exceeding \$100 in value per package, and it has no right to complain if the courts hold it to have intended what it so plainly expressed. If the language had been ambiguous, we might have given it the construction contended for, which probably conforms more nearly to the clause ordinarily inserted in such cases, but such language is too clear to admit of a doubt of the real meaning."

In the *Kensington* Case the limitation was held invalid because the alternative offered to the passenger of a higher valuation for a higher freight was that she should ship her baggage under a bill of lading. This would have brought it within the Harter act (Act Feb. 3, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]), which relieves the carrier from any liability for errors of navigation or management by its servants and so was unfair. The words with which Mr. Justice White concluded his opinion show that the court did not intend to depart from its ruling in the *Hart* Case, *supra*:

"In view of the nature and duration of the voyage, of the circumstances which may be reasonably deemed to environ transatlantic cabin passengers, and the objects and purposes which it may also be justly assumed the persons who undertake such a voyage have in view, we think the arbitrary limitation of 250 francs to each passenger, unaccompanied by any right to increase the amount by an adequate and reasonable proportional payment, was void. It is therefore unnecessary to decide whether the ticket delivered and received, under circumstances disclosed by the record, gave rise to a contract embracing the exception to the carrier's liability, which were stated on the ticket. We intimate no opinion on the subject."

[3] It is also suggested that the fixing of a value lower than the real value is in violation of section 10 of the interstate commerce act of February 4, 1887 (chapter 104, 24 Stat. 382), as amended (Act March 2, 1889, c. 382, § 2, 25 Stat. 857 [U. S. Comp. St. 1901, p. 3160]), but, being the same for all shippers, there can hardly be said to be any discrimination.

This court is definitely committed to the proposition that a common carrier may by contract limit the amount of his liability for his negligence. *Bachman v. Clyde Steamship Co.*, 152 Fed. 403, 81 C. C. A. 529; *Hohl v. Norddeutscher Lloyd*, 175 Fed. 544, 99 C. C. A. 166. And we think it would be in the highest degree violative of public policy to permit a shipper who has pecuniarily benefited by the valuation he has deliberately agreed upon to repudiate his agreement and recover against the carrier on a higher valuation. The judgment is affirmed.

NOYES, Circuit Judge (dissenting). In upholding the right to contract many courts have gone so far as to rule that a common carrier may even stipulate for exemption from responsibility for its own negligence. But the Supreme Court of the United States has never accepted this view. In a series of decisions beginning with the great case of *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627, it has consistently held that any contract which excuses a common carrier from negligence in the performance of its duty is contrary to public policy and void.

The principles of public policy involved are broad. The law as administered by the federal courts will not permit a common carrier to abandon its obligations to the public. Still it has been contended that, while these considerations would forbid a carrier from altogether relieving itself from liability, they should not prevent it from exempting itself if it offer the shipper the alternative of paying a greater rate and obtaining full liability. But the Supreme Court of the United States in *Calderon v. Atlas Steamship Co.*, 170 U. S. 272, 282, 18 Sup. Ct. 588, 592, 42 L. Ed. 1033, after saying that contracts for exemption from all responsibility have been repeatedly held by it invalid as attempts to put off the essential duties resting upon carriers, said:

"The difficulty is not removed by the fact that the carrier may render himself liable for these goods, if 'bills of lading are signed therefor with the value therein expressed, and a special agreement is made.'"

See, also, *The New England* (D. C.) 110 Fed. 415, 419.

So it has been contended that, while a carrier may not stipulate for its absolute release from liability for negligence, it may limit its liability

to a certain sum in case of loss. But the weight of authority in this country is undoubtedly to the effect that the same principles of public policy which condemn total exemptions condemn such partial exemptions, and that such limitations, as distinguished from agreed valuations, are invalid. See *Hutchinson on Carriers*, § 250.

It is upon the theory of an agreed valuation that the majority of the court decide this case. It is said that the parties agreed that the valuation of property obviously worth about \$15,000 was \$50, and consequently that no more was recoverable, although the property was destroyed by the defendant's negligence.

Unquestionably the law makes a distinction between agreed valuations and mere limitations, and sustains the former. When shipper and carrier make a fair valuation of property offered for transportation with a rate of freight based thereon, a contract releasing the carrier from liability beyond the agreed amount will be sustained. Such agreements permit an adjustment of rate to liability and protect the carrier from fanciful and extravagant valuations. In the case of articles of doubtful or uncertain value, every presumption should be in favor of the valuation agreed upon. But the principle should not, in my opinion, be extended further. It is only because such agreements present a meeting of the minds of the parties as to the fair value of the property, as distinguished from an arbitrary limitation of liability, that they escape condemnation by those considerations of public policy which we have noticed. I cannot concur in holding that a fictitious valuation, known by both parties to have no relation whatever to the real value of the property, is within the governing principle. In my opinion a valuation of \$50 upon \$15,000 worth of property—of known value to both carrier and shipper—is not a valuation at all, but is an arbitrary and unreasonable limitation in the guise of a valuation. If \$50 can be sustained as a valuation of this property, any sum may be named as the value of any property. While public policy declares that agreements which relieve a carrier from the effects of its negligence "are contrary to the fundamental principles upon which the law of carriers was established," nevertheless such exemption may be obtained by going through a form of words—by "valuing" the most valuable article at a penny!

Moreover, the opinion of the majority not only says that the "valuation" in this case escapes the condemnation of principles of public policy, but goes further, and states that it would be in the highest degree violative of those principles to permit a shipper to recover the full value of his property in the face of such a "valuation." But precisely the same thing could be said in the case of a shipper who enters into an agreement with a carrier, in consideration of a reduced rate of freight, to release the carrier from all liability for negligence. It has never been held inimical to public policy to permit a shipper to repudiate such an agreement although deliberately entered into for value. On the contrary, as we have seen, public policy requires such repudiation. The controlling consideration is not one of private right, but of public interest.

The decision of the majority is based upon the opinion of the Supreme Court in *Hart v. Pennsylvania Railroad Co.*, 112 U. S. 331, 5

Sup. Ct. 151, 28 L. Ed. 717, the gist of which, as I view it, is contained in the following paragraph:

"The distinct ground of our decision in the case at bar is that where a contract of the kind signed by the shipper is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by negligence of the carrier, the contract will be upheld as a proper and lawful method of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations."

As I construe this language, it states the rule already noted: That a fair valuation—a valuation "fairly made"—between shipper and carrier will be sustained. While the language of some parts of the opinion is broad, I find nothing to indicate an intention upon the part of the Supreme Court to depart from those principles governing carriers which it had previously consistently maintained. There was not in the Hart Case a fictitious "valuation"—an arbitrary sum having no relation whatever to the real value of the property. The valuation in the receipt of \$200 was undoubtedly a fair average valuation of a horse, and race horses which, probably more than any other class of property, are susceptible of "extravagant and fanciful valuations," were shipped under it. The Supreme Court apparently held the valuation bona fide and sustained it for that reason. If the amount stated in the present receipt had been a fair average valuation of an automobile—say \$1,000—and these machines, although of greater value, had been shipped under it, there would be far more ground for contending that the decision in the Hart Case is applicable here. In view of the facts, the decision in that case seems not inconsistent with the views already expressed.¹

For these reasons I am constrained to dissent in this case. I do so with diffidence and reluctance. The majority opinion is able, and I appreciate that it is in accordance with the trend of the decisions in this court. But, if the principles of public policy which condemn agreements whereby carriers seek to put off their obligations to the public and exempt themselves from the consequences of their negligence means anything of substance, I strongly feel that they should be given an application broad enough to accomplish something. It would be better, as it seems to me, to hold that carrier and shipper may enter into such agreements as they see fit than to deny the right to make a direct contract and permit the same result to be accomplished by indirection. It would be better to deny the existence of considerations of public policy than to insist that they are sound and while still insisting expressly approve an obvious and deliberate evasion of them.

In my opinion there was error in the judgment of the Circuit Court.

¹ The decision of this court in *Hohl v. Norddeutscher Lloyd*, 175 Fed. 544, 99 C. C. A. 166, is in my opinion distinguishable from the present case, in that there the value of the property was concealed. The shipment was a closed package containing hosiery. In the present case the value of the automobiles was well known.

RADIN et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. April 10, 1911.)

No. 195.

1. CONSPIRACY (§ 47*)—PROSECUTION FOR—EVIDENCE—INFERENCES.

If the proof in a prosecution for conspiracy shows a previous meeting and a concert of action thereafter, each of the parties doing some act contributing to accomplish an unlawful purpose, a jury is justified in finding that they were conspiring together to accomplish that purpose.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 105-107; Dec. Dig. § 47.*]

2. BANKRUPTCY (§ 485*)—CONCEALMENT OF PROPERTY BY BANKRUPT—INDICTMENT.

Under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), making it a crime to conspire to commit an offense against the United States, an indictment will lie for a conspiracy that a bankrupt shall knowingly and fraudulently conceal from his trustee property belonging to his estate, which is made a criminal offense by Bankr. Act July 1, 1898, c. 541, § 29b (1), 30 Stat. 554 (U. S. Comp. St. 1901, p. 3433), and such conspiracy may be entered into prior to the bankruptcy, in contemplation of bankruptcy; and defendants may be convicted, although it is not alleged nor proved that a trustee was actually appointed, where the evidence warrants a finding that the conspiracy was so successfully carried out that, when the bankruptcy proceedings were instituted, the bankrupt's property had all been removed beyond the jurisdiction of the court, so that the appointment of a trustee would have been a useless formality.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 485.*]

3. WITNESSES (§ 270*)—TRIAL—DISMISSAL OF WITNESS.

Where none of the testimony of a witness had been material to any issue, and he was being cross-examined on wholly irrelevant matters, it was within the right of the judge to dismiss him from the stand.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 926, 955-957; Dec. Dig. § 270.*]

4. CRIMINAL LAW (§ 554*)—EVIDENCE—TESTIMONY OF CODEFENDANTS.

Where defendants, charged with conspiracy, are being tried together, and they take the stand in their own behalf, their testimony is to be treated like that of any other witness, and may be considered for all purposes.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1255, 1256; Dec. Dig. § 554.*]

In Error to the Circuit Court of the United States for the Southern District of New York.

Criminal prosecution by the United States against Matthias Radin, Abraham Minsky, and others. From a judgment of conviction, defendants Radin and Minsky bring error. Affirmed.

Judgment was entered upon the verdict of a jury finding defendants above named guilty under section 5440 of the U. S. Revised Statutes (U. S. Comp. St. 1901, p. 3676) of conspiracy to conceal the property of H. Feinberg & Son, bankrupts, from their trustee under section 29b of the bankruptcy act. The defendants Herman Feinberg and Samuel Medlin were convicted and fined respectively \$100 and \$500; they have not appealed. Radin was sentenced to pay a fine of \$1,000 and imprisonment for one year and Minsky to pay a fine of \$500 and imprisonment for five months. The indictment against Isabelle Minsky, the wife of Abraham Minsky, was dismissed.

The indictment as found contained two counts, the first relating to a conspiracy alleged to have been formed on the 29th of October, 1908, and the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

second to a conspiracy formed on the 5th of November, 1908. At the close of the government's case it elected to go to the jury on the first count and the second count was dismissed as to all of the defendants. The trial commenced on the 7th of October, 1909, and was concluded on the 27th of the same month, occupying 16 court days. Two counsel appeared for the prosecution and five for the defendants.

Boothby, Baldwin & Hardy (Ernest E. Baldwin, of counsel), for plaintiffs in error.

Henry A. Wise, U. S. Atty., and Felix Frankfurter, Asst. U. S. Atty.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The first count of the indictment upon which Radin and Minsky (hereafter called defendants) were convicted charges, in substance, that on the 29th day of October, 1908, Herman Feinberg and his son Henry were doing business in furs and skins at 48 East Tenth street, New York, and also in London, England, under the firm name of H. Feinberg & Son, the father taking care of the New York branch and the son, Henry Feinberg, the London branch. That on said day Herman Feinberg, having a large quantity of furs and skins on the premises of the firm in New York, received information from London that the firm was in business difficulties and thereafter the defendants above named, together with Herman Feinberg, Samuel Medlin, Isabelle Minsky and others, contemplated, anticipated and planned that Herman Feinberg should commit an act of bankruptcy by removing from the firm's premises and concealing the said furs and skins with intent to defraud the firm's creditors. That the parties above named also contemplated, anticipated and planned that an involuntary petition in bankruptcy should be filed and the said Herman and Henry Feinberg should be adjudicated bankrupts and a trustee should be appointed of their estate in bankruptcy. The indictment further charges that the persons above named, in the circumstances as stated, wilfully and unlawfully conspired to commit an offense against the United States by corruptly and fraudulently agreeing that Herman Feinberg knowingly and fraudulently should conceal, while a bankrupt, from the trustee of his estate in bankruptcy, the said furs and skins and the money which might be received from a sale thereof together with other property and choses in action which belonged to the said firm.

The indictment further charges that to effect the object of the conspiracy the said conspirators, on the 30th of October and the 1st day of November, 1908, took part in the removal of furs and skins belonging to the said firm from 48 East Tenth street and shipped a portion thereof to Canada, well knowing that said goods would in due course belong to the estate in bankruptcy of the said H. Feinberg & Son. That in order to effect the object of the conspiracy certain of the conspirators removed books of account from the firm's place of business, that Herman Feinberg went to Jersey City on November 2nd and remained there for four weeks and that when the receiver in bankruptcy went to No. 48 East Tenth street to take possession of the bankrupts' property he was informed by one of the conspirators that

the furs and skins on the premises did not belong to the estate in bankruptcy.

The evidence tended to establish the truth of these allegations. We do not regard it necessary to review the testimony in detail because it can hardly be questioned that if the jury credited the witnesses called by the prosecution, they were entirely justified in finding that when it became evident that the firm of H. Feinberg & Son was in financial straits Radin and Minsky, with the other defendants, conspired together to prevent the firm's creditors from receiving any of the firm's property.

Bankruptcy was anticipated and means were taken to prevent any stock or accounts from coming into the control of the court in bankruptcy. Feinberg went into hiding in New Jersey where process could not reach him. The books were removed and the bookkeeper secreted herself. A fictitious company was created to which part of the stock was transferred and Minsky went to Canada as the agent of this company and sold goods there which had been shipped from New York. The accounts were assigned and collected by the conspirators, Radin receiving the assignment of several. In short, when the conspiracy had concluded its preliminary activities, the assets of the firm had substantially disappeared, nothing tangible was in sight; if the creditors recovered the property which had been transferred it could only be at the end of protracted litigation.

We do not, of course, intend to say that the testimony tending to show the conspiracy and the overt acts thereunder was not disputed. There were sharp conflicts on many of the essential issues, but the jury were justified in determining them in favor of the government.

The evidence was largely presumptive. The agreement was not reduced to writing and signed by the conspirators. It was not proved by direct oral evidence. From the nature of the case such proof was impossible. Conspiracies are not formed in that way. Conspirators do not go out upon the public highways and proclaim their intention. They accomplish their purpose by dark and sinister methods and must be judged by their acts.

[1] If the proof shows a previous meeting and a concert of action thereafter, each of the parties doing some act contributing to accomplish an unlawful purpose, a jury is justified in finding that they were conspiring together to accomplish that purpose. One who commits an unlawful act knowing that it is unlawful cannot be heard to say that he did it with innocent intent. The law presumes that every sane person intends the necessary consequences of his acts. If the jury believed that the defendants did the acts sworn to by the witnesses for the prosecution they were justified in drawing the conclusion that a conspiracy existed.

The trial judge, during a charge which stated impartially the conflicting evidence and the deductions to be drawn therefrom, asked the jury to answer the following question:

"Was there an agreement to do what was done with intent to conceal Feinberg's goods and property from such trustee in bankruptcy as might be appointed thereafter?"

The jury answered the question in the affirmative and as there is no reason for setting their verdict aside, we must consider the questions of law which will be discussed hereafter in the light of the facts as found, viz., that a conspiracy existed to conceal Feinberg's goods from a trustee who might be appointed in the future and that pursuant to such conspiracy they were so concealed.

[2] The most important question, and the one which has given us the greatest concern, arises under the first proposition argued by the defendants. It is asserted that:

"The indictment is defective in that there is no allegation that the alleged conspiracy was continued and persisted in after the appointment of a trustee."

It is true that there is no such averment and no proof was offered of the appointment of a trustee, indeed, at the argument, it was admitted, *ore tenus*, that no trustee was appointed. What exigency required the finding of this indictment at a time when it could not be alleged that a trustee had been appointed and that the conspiracy was a continuing one as to him, we, of course, do not know. It would seem, however, that the risk of having so perplexing a question in the record might easily have been avoided if the, apparently, simple precaution had been taken of procuring the appointment of a trustee before the finding of the indictment.

In approaching this question it is well to bear constantly in mind that this is an indictment under section 5440 of the Revised Statutes and not under section 29b of the bankruptcy act.

Section 5440 is as follows:

"If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years or to both fine and imprisonment in the discretion of the court."

Section 29b is as follows:

"A person shall be punished by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently (1) concealed while a bankrupt, or after his discharge, from his trustee, any of the property belonging to his estate in bankruptcy."

The words "any offense against the United States" in section 5440 have been construed to include any offense made a crime by the laws of the United States. It, therefore, makes it a crime for two or more persons to conspire that a bankrupt shall knowingly and fraudulently conceal from his trustee property belonging to his estate in bankruptcy.

Of course this conspiracy may be entered into prior to the bankruptcy; to hold otherwise would emasculate the statute and render it abortive in its application to the bankruptcy act. After the bankrupt's property is in the hands of the court it would be well nigh impossible to carry out such a conspiracy as is here shown. This court has held that the statute applies to a conspiracy formed in contemplation of bankruptcy. *Cohen v. United States*, 157 Fed. 651, 85 C. C. A. 113. See, also, *Alkon v. United States*, 163 Fed. 810, 90 C. C. A. 116.

An indictment charging such a conspiracy does not and cannot contain an averment that a trustee was appointed when none has been appointed. It is a familiar rule that the pleadings must conform to the facts and the proof to the pleadings. If the appointment of a trustee be an essential ingredient of the offense it is necessary to allege it, and this is impossible where none has been appointed. If, on the other hand, a trustee be subsequently appointed, proof of the fact might successfully be prevented on the ground that nothing of the kind is alleged. What, then, is to be done with a case where the proof shows that a conspiracy was formed before bankruptcy, but in contemplation thereof, and its members were so successful in doing acts to effect the object of the conspiracy that nothing of the bankrupt's estate is left for his creditors?

No reason exists for a trustee in such circumstances. He might be appointed, it is true, but it would be a vain act; as well might an administrator be appointed for a deceased person who has left nothing but debts. From a practical viewpoint the existence of the trustee in no way affects the guilt or innocence of the conspirators. His appointment is not an ingredient of the crime which relates to a conspiracy to conceal the goods so effectually that no trustee will ever be needed.

If the contention of the defendants be correct we have the strange anomaly of defendants who have entered into a conspiracy to enable the bankrupt to conceal his property and who have succeeded so completely that not a vestige of his property remains, going scot free; and other defendants, who have entered into an identical conspiracy, being imprisoned, for the reason that they failed to conceal the bankrupt's entire property, thus making the appointment of a trustee necessary.

The government is not seeking to punish Feinberg for concealing, while a bankrupt, property belonging to his estate from his trustee, but is seeking to punish the defendants for conspiring that he should conceal his property from his trustee and thereby defraud his creditors. This question was decided in accordance with the contention of the government in *U. S. v. Cohen* (C. C.) 142 Fed. 983, where Judge Holt says:

"The true test is: Could a conviction be had if no bankruptcy proceedings were ever begun? I think it could if in addition to the organization of a conspiracy any of the parties to it did any act to effect the object of the conspiracy."

As the indictment in that case alleged the appointment of a trustee this court did not deem it necessary to pass upon the proposition above stated.

We are, however, of the opinion that it was not essential in the case at bar that the indictment should allege, or the proof show, that a trustee was actually appointed. This proposition is, we think, established by inevitable deductions from decided cases. In the *Alkon Case*, *supra*, the indictment charged a conspiracy entered into between the defendants on May 1, 1906, to conceal the goods purchased by one

of them and stored and hidden by the other. The indictment alleged that after this was done the purchaser was to file a fraudulent petition in bankruptcy and that after the adjudication and appointment of a trustee he was to conceal from the trustee the property so purchased and hidden by the conspirators. The indictment charged further that on November 16, 1906, the purchaser, in pursuance of the conspiracy, filed a fraudulent petition in bankruptcy. There was there, as here, no allegation of existing bankruptcy at the date of the conspiracy, and, of course, there could not be such an allegation as the bankruptcy did not occur until more than six months thereafter. The court said of the conspiracy:

"It included an intent to continue the concealment until after Barush became a bankrupt, and it was like all conspiracies in that it related to something in futuro. The plaintiff in error cites no case in support of his position; and in common with the Circuit Court of Appeals for the Second Circuit, in *Cohen v. United States*, 157 Fed. 651, 654, 83 C. C. A. 113, it does not occur to us that there is anything in principle or on authority which invalidates the indictment on this account."

This decision was followed in *U. S. v. Young-Holland Co.* (C. C.) 170 Fed. 110.

The scope of the conspiracy section is clearly explained in *Williamson v. U. S.*, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278, where the indictment charged a conspiracy to suborn perjury. The court says:

"But the proposition wholly fails to give effect to the provisions of the conspiracy statute (Rev. Stat. § 5440), which clearly renders it criminal for two or more persons to conspire to commit any offense against the United States, provided only that one or more of the parties to the conspiracy do an act towards effecting the object of the conspiracy. In other words, although it be conceded, merely for the sake of argument, that an attempt by one person to suborn another to commit perjury may not be punishable under the criminal laws of the United States, it does not follow that a conspiracy by two or more persons to procure the commission of perjury, which embraces an unsuccessful attempt, is not a crime punishable as above stated. The conspiracy is the offense which the statute defines without reference to whether the crime which the conspirators have conspired to commit is consummated."

The case of *Reg v. Banks*, 12 Cox, C. C. 393, is cited by both parties but seems to us to aid the contention of the government. The court sustained an indictment charging a conspiracy to murder a child not born at the date of the conspiracy. The court told the jury that it was for them to say whether an agreement actually existed between Leah and Elizabeth Banks to destroy the child when born, and if they found that an agreement actually existed either before or at the time of the birth to destroy the child "somehow," it was not necessary that the means of destruction should have been agreed upon. As to the third count which stated in detail the facts regarding the conspiracy the court ruled:

"That it showed an object in the mind of each prisoner sufficiently proximate to the subject of the conspiracy; and that the overt acts charged not being a material part of the count, it was unnecessary to consider their effect."

In the Banks Case the conspiracy was to murder a human being not then in existence. In the case at bar the conspiracy was to defraud a trustee not then in existence. It is argued that:

"The child would, in due course of nature be born within a short time and therefore capable of being killed pursuant to the agreement."

But it might with equal plausibility be argued here that:

"The trustee would in due course of bankruptcy be appointed and therefore capable of being cheated pursuant to the agreement."

When the conspiracy was formed in the Banks Case the child had not been born, might never be born or might be born dead. The object of the conspiracy was not possible of attainment when the conspiracy was entered into, it might never be possible. The carrying out of the crime depended upon a contingent future event. If that event happened the crime might be committed, otherwise not. Nevertheless as the defendants conspired to commit a crime which might be possible in the future though impossible at the time of the conspiracy, the court held that they could be punished not for murder but for the conspiracy to commit murder.

In *Commonwealth v. Rogers*, 181 Mass. 184, 63 N. E. 421, it was held that a conspiracy to procure persons to vote at a caucus who were not entitled to vote there, might be completed before any of the persons had been agreed upon and that the particular nature of the disqualification of said persons was not material and need not be alleged or proved. At page 189 of 181 Mass., and page 424, of 63 N. E., Chief Justice Holmes—now Mr. Justice Holmes—says:

"It is said that the first count is bad because it does not show how the persons whom the defendants conspired to procure to vote were not entitled to vote. The allegation embraces persons unknown so that the requirement is impossible, and this illustrates the fact that such a conspiracy might be completed before any of the persons to be procured had been agreed upon. But it follows from that fact that the particular nature of the disqualification is in no way material to the offense."

It is true that the precise point here in issue has not, so far as we are informed, been passed upon except by Judge Holt in the *Cohen Case* and it may be urged, strictly speaking, that what was there said was obiter. We think, however, that the contention of the government is sustained by the reasoning of the cases cited and the principles which govern the administration of the criminal law. In brief and plain language, the crime charged is conspiracy to defraud the bankrupt's creditors by concealing his property so that his trustee cannot reach it. When that conspiracy was entered into and the bankrupt's property was hidden and sent out of the country so that a trustee could not reach it the crime was consummated. We see no reason for giving to the law a construction so strained and technical as to permit the perpetrators of such an iniquity to escape.

If we understand the second point urged by the defendants it is that the indictment is defective because it originally contained two counts charging two separate conspiracies entered into on different dates and that as the "other persons unknown" with whom the defend-

ants conspired are not alleged to be the same in each count they may have been different persons and, therefore, there was no mutuality of defendants in the two counts.

We do not consider it necessary to discuss this question because it is academic. The second count was dismissed as to all of the defendants and the case is before us solely on the first count. There is no pretense that testimony was introduced under the second count that was not equally competent under the first count. In legal effect it is precisely as if the indictment, as found, contained but one count and it is idle to speculate upon what might be the result if it now contained two counts.

[3] Prejudicial error is asserted based upon the action of the court in dismissing the witness Kaiffe Jaffe who was called by the defendant Radin to establish an alibi. He testified that on Sunday, November 1st, he saw Radin a little after 9 o'clock and was with him "until after 10 o'clock; more than an hour." This was intended to contradict the testimony for the prosecution that Radin was at Feinberg's store on that Sunday morning at about 11:30. Jaffe's testimony did not prove an alibi and he might have been safely dismissed at this point but, apparently, the temptation to cross-examine was too strong to be resisted. He was first cross-examined by the United States Attorney and then by Mr. Levy, who appears on the record as counsel for Feinberg and Isabelle Minsky, who do not appeal. It was during Mr. Levy's examination that the ruling complained of was made. The examination drifted away to inconsequential and immaterial matters and at the time in question counsel was endeavoring to ascertain the exact date when Jaffe was admitted to the bar. The following is what occurred:

"Q. Well, the great event of your life was your admission to the bar, was it not? A. Yes, and it was in December.

"Q. And can't you tell me that date? A. No.

"Q. Why can't you?

"The Court: Mr. Levy, you need not proceed. I do not think this witness needs further examination. Any member of the bar whose professional life is less than a year old who does not know the date when he was admitted to practice in his chosen profession may leave the witness stand.

"Mr. Baldwin: I simply want to note an objection and exception on the part of the defendant Radin.

"(The witness left the stand.)"

While we might wish that the action of the court had been less abrupt we cannot think that any prejudicial error was committed for the following reasons:

First, it was evident that the time of the court and jury was being wasted in an irrelevant and useless inquiry. It is the right and duty of the trial judge to confine the testimony to the issues involved and to limit cross-examination when it is persisted in improperly. The court's remarks were tantamount to saying:

"It seems to me that this witness has been interrogated sufficiently."

Second, the counsel for Radin had established the fact that Radin was in a barber shop an hour and a half before it was alleged he was at Feinberg's store and had turned the witness over for cross-examina-

tion and the United States Attorney had finished his examination. The ruling of the court occurred after every relevant inquiry had been exhausted and the counsel for Radin did not suggest that he had any further questions to ask. Indeed, it would seem that it was for the interest of his client that the examination should be terminated as quickly as possible.

Third, the testimony of Jaffe did not cover the time when Radin was alleged to have been in Feinberg's store and as the action of the court could only affect this testimony we do not see how the defendant Radin is injured. If the court had said directly that Jaffe had not established an alibi he would have been well within his privilege as a federal judge.

[4] We see no error in permitting the counsel for Feinberg and Medlin to cross-examine the defendant Radin or in the court's refusal to instruct the jury that they could not consider the testimony of any of the defendants for or against any other defendant. These conspirators were properly tried together, they had a right to take the stand in their own behalf and having done so they must be treated as other witnesses are treated. *Benson v. United States*, 146 U. S. 325, 13 Sup. Ct. 60, 36 L. Ed. 991.

Other exceptions have been argued but we do not deem it necessary to discuss them: it is sufficient to say that none relates in our judgment to a reversible error. Considering the complicated character of the issues presented, the mass of testimony and the time consumed, the record is unusually free from exceptions presenting debatable questions.

The judgment is affirmed.

CAMPFIELD v. SAUER et al.

(Circuit Court of Appeals, Sixth Circuit. June 6, 1911.)

No. 2,095.

1. DAMAGES (§ 120*)—BREACH—MEASURE OF DAMAGES.

Where plaintiffs had contracted to furnish defendant the lumber required under a building contract, but, lumber having advanced in price, refused to make further deliveries unless defendant would pay the advance, the fact that defendant refused to do so did not preclude him from recovering, as damages for breach of the contract, the loss from delay in obtaining the lumber elsewhere, since he was under no obligation to accept it from plaintiffs under the conditions attached to their offer which would have required him to waive the breach of the contract.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 291-305; Dec. Dig. § 120.*]

2. DAMAGES (§ 163*)—ACTION FOR BREACH—MATTER IN MITIGATION OF DAMAGES—BURDEN OF PROOF.

The party chargeable with breach of a contract has the burden of proving facts in mitigation of damages.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 454-459; Dec. Dig. § 163.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. DAMAGES (§ 175*)—EVIDENCE—BREACH OF CONTRACT.

Upon the question of the damages recoverable for delay by plaintiffs in furnishing the lumber required by defendant in the performance of a building contract, evidence was admissible that plaintiffs knew that, under defendant's contract, he was subject to a penalty if the building was not completed within the time fixed, as tending to show that such penalties were within the contemplation of the parties when the contract for the lumber was made.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 469-471; Dec. Dig. § 175.*]

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

Action at law by Charles A. Sauer, Adam J. Sauer, and John J. Sauer, copartners as C. A. Sauer & Co., against Edwin M. Campfield. Judgment for plaintiffs, and defendant brings error. Reversed.

Henry B. Graves, for plaintiff in error.

Robert E. Bunker, for defendants in error.

Before SEVERENS and KNAPPEN, Circuit Judges, and McCALL, District Judge.

KNAPPEN, Circuit Judge. The plaintiff in error (hereinafter called the defendant) had a contract with the board of education of Ann Arbor, Mich., for the construction of a high school and library building, to be completed by August 15, 1906. The defendants in error (hereinafter called the plaintiffs) were unsuccessful bidders for this contract, and after its award to defendant entered into contract with him, through an offer in writing (accepted by the defendant) in the following language:

"Ann Arbor, Mich., July 8, 1905.

"Mr. E. M. Campfield, General Contractor, High School and Library, Ann Arbor, Michigan—Dear Sir: We will furnish you all the timber as below, sizes and prices hereafter named and specified free on board cars Ann Arbor, Mich., Ann Arbor Ry. delivery, for the High School and Library Building. Quality to be as per specifications for said building, all as per sizes and specifications, which you are to furnish us. And will do all in our power to get a quick delivery, especially the first floor tier of floor joist. (The following prices are net.)"

A schedule of prices and sizes followed. Plaintiff sued for the unpaid price of lumber furnished under this contract. The defendant set up a counterclaim for breach of contract, in failing to deliver lumber as demanded. On the first trial plaintiffs recovered, defendant's counterclaim being rejected, under a construction adopted by the Circuit Court, that the contract was unilateral. This court reversed the judgment of the Circuit Court and awarded a new trial, construing the contract as binding the plaintiffs to furnish and the defendant to buy thereunder all of the timber required for the building. *Campfield v. Sauer*, 164 Fed. 833, 91 C. C. A. 304. Upon a new trial plaintiffs have again recovered. The important facts, so far as they need now be set out, are these:

During July, 1905, defendant sent plaintiffs four orders under the contract, amounting to \$8,768.43. Defendant paid thereon \$7,211.33

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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(possibly 10 cents more), leaving an unpaid balance, as claimed by plaintiffs, of \$1,557.10. The lumber under these orders was delivered at dates ranging from August 22d to December 29, 1905. No further order was made until October 21, 1905. By this time the price of lumber had appreciably advanced. Plaintiffs expressed a willingness to fill this order provided defendant would stand the difference caused by the increased prices, refusing otherwise to fill it or further orders, under the claim (no competent evidence of which is called to our attention) that plaintiffs were induced to enter into the contract by defendant's agreement to immediately furnish the schedule of sizes, and that defendant when requested to furnish such schedules, agreed to take his own chances on an increase in price. Defendant declined to stand the increase, and on October 30th notified plaintiffs that unless advised that the latter would furnish all the lumber contracted for, defendant would purchase in open market at the best prices obtainable, and would charge the extra cost thereof to plaintiffs' account "with any damage or cost in securing the aforesaid lumber." The orders subsequent to those of July were unfilled. Upon the trial defendant admitted the receipt of lumber amounting to \$8,422.46, and claimed payments thereon of \$7,211.43, leaving an admittedly unpaid balance of \$1,211.03. He claimed to have paid by way of increased price of lumber purchased on account of plaintiffs' default, and on account of defects and shortages in the lumber received under the July orders, \$973.31. Recovery was asked for this amount, as well as special damages for the alleged delay of 60 days in the completion of the building through plaintiffs' delay in filling the July orders and the failure and refusal to fill the later orders. These special damages claimed consisted, first, of an item of \$2,500 which defendant claimed to have paid to the board of education under a provision of his contract with the board, by which defendant agreed to pay the actual damages sustained by delay in the completion and delivery of the building; and, second, large amounts claimed to have been lost by way of wages and other expenses while the work of construction was suspended by reason of plaintiffs' delay in furnishing lumber. The jury were instructed (as we construe the charge) that defendant was entitled to credit against the purchase price of the lumber delivered to the extent of shortages in the invoices thereof, as well as on account of defective lumber not actually used by defendant (in case of such use the defendant to be liable for its reasonable value only); and that the defendant was entitled to recover on account of the lumber not delivered only the difference between the contract price and the increased market price, unless unable to purchase at the market price. A later instruction that the value of lumber not furnished could be assessed at no more than the market price at the time plaintiffs refused to proceed with the contract was doubtless inadvertent. Defendant's claims for damages resulting from delay in filling the July orders and from refusal to fill the later orders were not submitted. Verdict was rendered for plaintiffs for the full amount of their claim with interest, and for defendant, by way of set-off, for \$744.05, leaving a net recovery in plaintiffs' favor of \$1,117.97.

[1] 1. The important question presented is whether the trial court rightly excluded from the consideration of the jury the special damages claimed by defendant to have been suffered through plaintiffs' refusal, in October, 1905, to make further deliveries. Plaintiffs contend that the court's action was justified under the doctrine announced by this court in *Lawrence v. Porter*, 63 Fed. 62, 11 C. C. A. 27, 26 L. R. A. 167, and the record seems to indicate that the court's action was based upon the authority of that case. It is clear to our minds that the case presented here is not brought within the doctrine of *Lawrence v. Porter*.

In that case there was a contract for the sale of lumber on credit. The seller refused to deliver on credit, offering, however, to deliver for cash at a reduced price, the reduction more than equalling the interest for the term of credit. The buyer did not allege inability to pay cash, but asserted that he was unable to obtain the lumber from others than the seller at the place of delivery or other available market. It was held that the buyer could not recover damages on the ground that he had bought for resale at another place at an advance over the contract price and cost of transportation, for the reason that plaintiff had received from defendant an unconditional offer to furnish the lumber at a reduced price. No question was made of the ability and readiness of the defendant to so furnish. In that case Judge (now Mr. Justice) Lurton, speaking for this court, said:

"The offer after the breach by defendants to sell the lumber necessary to complete the contract was not coupled with any condition operating as an abandonment of the contract, nor as a waiver of any right of action for damages for the breach."

In the case before us plaintiffs' offer to furnish the lumber was not unconditional. On the contrary, the statement was:

"We are perfectly willing to furnish the lumber, provided only you will stand the difference caused by the increase in price since our original agreement and as per your verbal agreement above mentioned."

It is clear that had defendant accepted this offer he would have abandoned all claim for damages for the difference in price so paid. He was under no obligation to make such waiver for the sake of saving plaintiffs from liability for the damages which might result from delay through purchasing elsewhere. *Coulter v. B. F. Thompson Lumber Co.* (Sixth Circuit) 142 Fed. 706, 74 C. C. A. 38; *Hirsch v. Georgia Iron & Coal Co.* (Sixth Circuit) 169 Fed. 578, 95 C. C. A. 76. In the latter case Judge Lurton, speaking of the rule recognized in *Lawrence v. Porter*, that one who has been damaged by the breach of a contract must do nothing to aggravate his injuries, and all that he reasonably can to mitigate the loss, said:

"The duty imposed by the equitable rule referred to must be held within reasonable bounds. It is a rule which has never been regarded as requiring one to yield to a wrongful demand that he may thereby save the wrongdoer from the legal consequences of his own error."

Nor does it indisputably appear that, after plaintiffs' refusal in October to furnish the lumber, defendant could have obtained lumber of the required dimensions in time to have prevented the alleged delay in

the construction of the building. It is true that Spalding, a wholesale lumber dealer at Detroit, testified that all the lumber in question could have been furnished through him. Plaintiffs in fact furnished through Spalding all the lumber delivered under the contract. Defendant denies that he knew that all the lumber delivered was so procured. Spalding, however, testifies that he did not have in stock lumber of all the dimensions called for, and that had he been called upon, he would have been compelled to have some of it manufactured in the south. Plaintiffs' explanation of the delay in filling the July orders is that it required several months to get out the specially manufactured stock. Defendant testified that he obtained the timber in question from different people, in different parts of the country, at the lowest prices obtainable. He says he had to go out into the open market to buy, and that "we solicited every firm that we knew of that was handling timber of that kind; we sent out over 200 inquiries and sent our specifications in every direction;" and further, that he purchased the special sizes at the best figure he could obtain at the time, so as to get it immediately.

[2] The burden of proving that the damages alleged have been sustained by the defendant could have been prevented or mitigated by his action rested upon the plaintiffs, as the parties charged with responsibility for breach of the contract. *Lillard v. Ky. Dist. & Warehouse Co.* (Sixth Circuit) 134 Fed. 168, 178, 67 C. C. A. 74; *Ky. Dist. & Warehouse Co. v. Lillard* (Sixth Circuit) 160 Fed. 34, 40, 41, 87 C. C. A. 190; *Howard Supply Co. v. Wells* (Sixth Circuit) 176 Fed. 512, 516, 100 C. C. A. 70. Whether plaintiffs had discharged this burden was, under the evidence, a question of fact for the jury.

Plaintiffs earnestly contend that the delay in the completion of the building was occasioned solely by defendant's fault in not sooner furnishing lists of the kinds and sizes of timber needed, and there was testimony tending to support this contention. As said by this court upon the former review, it "devolved upon Campfield to furnish Sauer & Co. from time to time lists of the quality and sizes needed." The trial court instructed the jury that it was the duty of the defendant "from time to time as the building progressed to order from the plaintiffs the timber of the agreed sizes necessary to be used in the construction of the buildings; and it is for the jury to determine whether the defendant Campfield in any manner or form broke the contract in this respect." On July 26, 1905, plaintiffs, in acknowledging the receipt of the order, wrote, "Kindly send the balance of stock required at once," evidently referring to lists of quality and sizes needed. Defendant, however, sent no orders between July 26th and October 18th. Defendant testified that the work was suspended about 60 days "between January and spring time," and that the occasion of the delay was lack of floor joists and roofing timbers. This was heavy stuff. Defendant testified that a portion of this material was obtained by him in Chicago, by having it ripped out of larger stuff, and that other portions he had to have sawed in the south, and that "in the course of business after we placed the order for timber in the south, with the Holton people for instance, it was some 4 or 5 months before we could get it." One of the plaintiffs testified that plaintiffs did not

keep this heavy stuff in stock. Under cross-examination, as to the length of time needed to get out the heavy stuff, he was asked, "It takes, you think, about 60 days to get that stuff, does it?" to which the answer was, "Yes; it takes that." It is argued that the witness did not mean that it took only about 60 days, but that the answer was sarcastic, and meant that it took much more than that time. Defendant contends here that ordinarily it took but about 60 days to furnish the special stock. It is of course true that if defendant's orders could not be filled in the contemplated course of business, and after the receipt of schedules of quality and sizes, in time to prevent the alleged delay in the construction of the building, defendant would have no right to recover damages for such delay.

The record raised, in our opinion, questions of fact under all the testimony, including the time required or taken for the delivery of lumber under the July orders, the testimony as to the time required to get out special sizes, and such knowledge as each party had of the general requirements of the building specifications, whether the defendant unreasonably delayed furnishing the lists of dimensions required, and whether plaintiffs could reasonably have procured the same by due diligence, after orders therefor were furnished by defendant, in time to have prevented the alleged delay in whole or in part. But these questions of fact we cannot pass upon without assuming the province of the jury. In view of the ground upon which the claim for special damages by reason of delay in the completion of the building was denied, the question of the sufficiency of the evidence offered to support such claim is not properly before us.

[3] Without controverting the familiar rule that special damages for delay are recoverable if within the reasonable contemplation of the parties at the time of making the contract (provided such damages are not so remote, uncertain, and speculative that they cannot be ascertained with reasonable certainty), it is insisted that damages occasioned by delay in completing the building were not within the contemplation of the parties to the contract in suit. This argument is based in part upon the fact that the profits which the plaintiffs could have made under the contract were but a very small fraction of the damages claimed by defendant, and that the latter amount to a large fraction of the value of the entire timber involved in the contract. But this argument is not conclusive. Evidence was offered (and rejected) tending to show that the plaintiffs knew of the requirements of the defendant's building contract, including the provision for damages for delay in construction; and such evidence would have tended to show that such damages were within the contemplation of the parties, even although not mentioned in the contract between plaintiffs and defendant. *Iowa Mfg. Co. v. B. F. Sturtevant Co.* (Eighth Circuit) 162 Fed. 460, 89 C. C. A. 346, 18 L. R. A. (N. S.) 575.

To what extent the alleged failure to make prompt deliveries under the July orders contributed to the delay in completing the building is not very clear. And as the case must be tried again on account of the erroneous exclusion of the question of damages for delay occasioned by the October refusal, what we have already said as to liabilities

under that refusal is enough to indicate our views upon the subject of liability for alleged delay in filling the July orders.

2. Defendant claimed there were shortages in amount and defects in quality of the lumber furnished under the July orders amounting to \$345.97. The jury, as we construe the charge, were instructed that defendant was entitled to credit for such shortages and defects so far as shown. They were instructed, however, with respect to the creation of a breach of contract thereby "in the sense that a claim for damages could be based thereon," that (1) it must appear "that proper and reasonable notice of such shortages in quantity and defects in quality was given by the defendant to the plaintiffs and that the plaintiffs refused or failed, within a reasonable time subsequent to such notice, to supply such shortages in amount or to repair such defects in quality;" (2) that such notice of shortages and defects in order to have been "proper and reasonable under the circumstances, must have been given by the defendant to the plaintiffs in a manner conformable to the custom of the lumber trade so far as said custom applies to the contract" in question; and (3) that if notices of shortages and defects were "not given in proper time or with sufficient definiteness to enable plaintiffs to supply those deficiencies under their contract with their vendors and manufacturers" no proper or reasonable notice was given. Later, however, the instruction was given that:

"If the jury shall find from the evidence that the plaintiffs failed to fill completely all the orders for the timber in question which defendant Campfield made in the month of July, 1905, and that there was actually lacking timber of the value of \$345.97 or any less amount, then the plaintiffs broke their contract and defendant Campfield is entitled to recover damages for such breach."

It would seem that the later instruction neutralized the former instructions to which we have referred, and as the judgment is to be reversed, it is perhaps unnecessary to now pass upon the correctness of the earlier instructions. As, however, the question may arise upon a new trial, it is proper to say that we see no error in the general proposition contained in the first instruction; that the second instruction should not have been given, for the reason that the testimony upon which it is based relates merely to "a usage of the lumber trade" which is not shown either to have been general or known to defendant; and that the correctness of the third instruction depends upon the defendant's knowledge of the plaintiffs' contracts with their vendors.

3. Several other alleged errors are discussed by counsel, but as these questions are not controlling and not very likely to arise upon a new trial, we do not deem it our duty to discuss them.

The judgment of the Circuit Court will be reversed and a new trial ordered.

WISE v. MILLS et al. In re MILLS et al. WISE v. HENKEL.

(Circuit Court of Appeals, Second Circuit. July 1, 1911.)

Nos. 203, 204.

ARREST (§ 71*)—EVIDENCE—SEIZURE OF PROPERTY—ORDER FOR RETURN—ENFORCEMENT.

Where books and papers belonging to persons charged with crime were seized on a bench warrant directing the arrest of such persons, and some of the books and papers had no relation to the matters in issue, it was within the nonreviewable discretion of the court to order their return, and to enforce such order as against the district attorney by contempt proceedings.

[Ed. Note.—For other cases, see Arrest, Dec. Dig. § 71.*]

Appeal from and in Error to the Circuit Court of the United States for the Southern District of New York.

Proceeding by Henry A. Wise against Lawrence H. Mills and others. In the matter of Lawrence H. Mills and others for an order on the said Wise to show cause why certain books and papers, seized at the time of petitioners' indictment, should not be surrendered to them. Proceeding by said Wise, individually and as United States Attorney for the Southern District of New York, against William Henkel, United States Marshal in and for the Southern District of New York, to review an order requiring Wise to return certain books and papers to petitioners Mills and others, and punishing him for contempt for refusal to do so. Writs of error in the first two proceedings, and appeal from an order discharging a writ of habeas corpus in the last-named proceeding, dismissed.

See, also, *United States v. Mills*, 185 Fed. 318.

Felix Frankfurter, Asst. U. S. Atty., for appellant.

Everett, Clarke, Benedict & Ward (A. Leo Everett, of counsel), for appellees.

Before COXE and WARD, Circuit Judges.

COXE, Circuit Judge. It is conceded in the brief submitted by the United States attorney that the writ of error to review the original order directing the return of the seized books and papers will not lie.

It is unnecessary for us to attempt to assign the limits within which a seizure of an indicted defendant's books and papers may be justifiable, for the reason that we find no warrant in the law for such a wholesale appropriation of the defendants' property as is disclosed by this record. Books and papers were seized and taken from their possession which did not, in any way, relate to the crime charged in the indictment.

Assuming that papers relating to the particular offense charged may be seized upon a bench warrant directing the arrest of the defendants, the assumption does not aid the position of the government, for these were not such books and papers.

The order was not only interlocutory but it was discretionary as well.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Starting, then, with the undoubted right of the circuit judge to make the order which was not reviewable, it follows that it was not only proper to enforce it, but it was his duty to do so. In other words, the only course for the United States attorney to pursue was to obey the order. If he did not do so, the court had no alternative but to compel him to obey. There can be no error in enforcing a perfectly valid order. In short, having found the original order proper and valid, we cannot hold the proceedings to enforce it improper and invalid.

We need hardly add that no reflection is intended upon the course of the United States attorney, who was acting in accordance with what he deemed to be his duty, in order that the question might be tested in the courts.

The writs of error and appeal are dismissed.

MORSE CHAIN CO. v. LINK-BELT CO.

(Circuit Court of Appeals, Second Circuit. June 20, 1911.)

No. 265.

1. PATENTS (§ 328*)—REISSUES—IDENTITY OF INVENTION—DRIVE-CHAIN.

The Morse reissue patent, No. 12,844 (original No. 757,762), for a drive-chain for power transmission, is void, as not being for the same invention as the original patent, which was clearly limited to a two-part pintle, while in the reissue it was attempted to broaden it to include a pintle of any number of parts more than one, although such a chain had previously been held not to infringe the original patent.

2. PATENTS (§ 165*)—INFRINGEMENT—EFFECT OF UNNECESSARY LIMITATION ON CLAIMS.

A patentee, who limits his claims to the precise construction shown and described, even though not obliged to do so, cannot hold as an infringer one who uses a different construction.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 241; Dec. Dig. § 165.*]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Suit in equity by the Morse Chain Company against the Link-Belt Company. Decree for defendant (182 Fed. 825), and complainant appeals. Affirmed.

See, also, 164 Fed. 331, 90 C. C. A. 650.

J. Edgar Bull and Paul Synnestvedt, for appellant.

Howson & Howson (Charles Howson, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. [1] The reissued patent relates to an improvement in drive-chains for general power transmission "wherein the pintle consists of two parts bearing upon one another throughout their length along the line of bearing of the link upon the other in the joint." One object of the patentee was to increase the bearing surface at the joint in chains wherein the links are made up of plates of which those in one link are interspersed upon the pintle with those

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the adjacent links and wherein each of the plates of one link engages its respective part of the pintle and turns therewith freely on the other part of the pintle.

Another object is the construction of the chain in such manner that alternate links only engage with the sprocket whereby the parts of the pintles having plain bearing surfaces may be mounted facing each other in those links which do not touch the sprocket and which bearing surfaces are substantially at right angles to the length of the links, any slipping tendency of the rockers upon the seat pins being thereby avoided. A third object is the formation of the seat pin with flattened or otherwise irregular sides throughout, whereby it will hold a fixed position in each of the plates with which it engages, the holes in the links sustaining the seat pin being made to conform substantially to said irregularities. The patentee says:

"One of the chief advantages of the two-part pintle in a plate-chain resides in the fact that a continuous bearing is provided throughout the width of the links, as clearly illustrated in Figure 11. Were the pintle a solid one, the links *D* would have a bearing in the joint for but one-half the length of the pintle and likewise with the links *C*, whereas with a two-part pintle each of said links has a bearing extending from one outside plate *D'* to the other along the line *H*, Figures 8 and 11. Thus for each link the bearing surface is doubled by the use of the two-part pintle, and the wearing away at the pintle is thereby very materially decreased."

Again the patentee says:

"While the explanation of the invention above given has reference specifically to a structure in which the pintle is described as composed of 'two' parts, it is obvious that the generic idea involved is applicable to a structure having a pintle made in 'separate' parts, whether there be two or any other number of parts more than one. A three-part pintle chain of analogous structure is shown in one of the modifications of the applicant's patent No. 736,999 which was copending with the original letters patent No. 757,762. I do not in this patent cover per se a pintle made in two parts, or in separate parts (whether two or more) irrespective of the form of links with which the pintle is associated. On the contrary, all the claims of this patent in which the pintles are elements are limited to the employment of such pintles in what are commonly known as multi-plate chains or links, whereby the effective bearing surface is increased."

The original patent contained no statement similar to the paragraph last quoted and the description and claims were confined to a two-part pintle.

The claims of the reissue which are involved are as follows, No. 12 being a new claim:

"6. A drive-chain having each link composed of a plurality of plates, the plates of each link being interspersed upon the pintles with the plates of the adjacent links, and two-part pintles of which the seat-pins have flattened sides throughout their length whereby they hold a fixed position in each of the plates with which they engage."

"9. A drive-chain having adjacent links composed of a plurality of plates adapted to arch over the sprocket-teeth, the plates of each link being interspersed upon the pintles with the plates of the adjacent links, and pintles formed in two parts, of which one part engages with the plates of one link only and passes freely through openings in the plates of the adjacent link, and the other part engages with the plates of said adjacent link and passes freely through openings in the plates of the first-mentioned link."

"10. A drive-chain having adjacent links composed of a plurality of

plates adapted to arch over the sprocket-teeth, the plates of each link being interspersed upon the pintles with the plates of the adjacent links, and pintles formed in separate parts which bear upon each other throughout substantially the full width of the chain, one part of the pintle engaging with the plates of one link only and passing freely through openings in the plates of the adjacent link."

"12. A drive-chain having adjacent links composed of a plurality of plates adapted to arch over the sprocket-teeth, the plates of each link being provided with apertures at their ends and interspersed upon the pintles with the plates of the adjacent links, and pintles, formed in a plurality of separate parts adapted to engage one with another to form a longitudinally extended bearing throughout substantially the full width of the chain one of the parts of the pintle being so engaged in the apertures of the plates of one link only as to turn therewith and passing freely through the apertures in the plates of the adjacent link, and another of the parts of the pintle being so engaged in the apertures of the plates of such adjacent link as to turn therewith, and passing freely through the apertures in the plates of the other link."

The original was in litigation in the Seventh circuit where a decree dismissing the bill was affirmed by the Circuit Court of Appeals in *Morse Chain Co. v. Link-Belt Co.* 164 Fed. 331.

In the Circuit Court the action was based upon two patents to Morse, No. 736,999 granted August 25, 1903, and No. 757,762 which was subsequently reissued. Judge Kohlsaat, in the Circuit Court, speaking of the complainant's contention that No. 757,762 was the broad patent and No. 736,999 the specific patent, says:

"But upon what ground complainant at this late day seeks to set up the two-part pintle patent as generic I am unable to discover from the record. It seems to have no other foundation than its desire to show infringement. That patent is, in all its terms, limited to a two-part pintle. Its other features are multi-plate links, and also some details in the adjustment of the parts. The multi-plate links were old. The two-part pintle was also old."

The bill was dismissed because the defendant's three-part pintle did not infringe the two-part pintles of the claims. The Court of Appeals in affirming the decree said (164 Fed. 331, 333, 90 C. C. A. 650, 652):

"It is earnestly insisted, however, that whereas in all the other claims of patent No. 757,762, the description is as of a two-part pintle; in claim ten there is no such limitation, the description being 'and pintles formed in separate parts;' the argument being that such description covers a three-part pintle, as well as a two-part pintle. But the fact remains, that the specific thing described in the patent is not a three-part pintle, but is a two-part pintle, and there is nothing in the descriptive portion of the patent indicating that anything else than a two-part pintle, either actually or potentially, was in the mind of the inventor."

Although the court was clearly of the opinion that the invention of No. 757,762 was not generic and, if held to be generic, that the patent was void for double patenting, concludes its opinion as follows:

"On the whole case, we are content to find that the appellee's device is not an infringement of the patents sued upon, and that, therefore, the decree appealed from should be affirmed."

The parties to this action are the same as in the seventh circuit. The mere fact that there was a change of name of the defendant cor-

poration from Link-Belt Machinery Company to Link-Belt Company does not alter the fact that it is the same corporation which defended the Illinois action. The following propositions have, therefore, been decided between the parties or their privies.

First.—That the defendant's chain does not infringe the claims of the original patent.

Second.—That the original patent was for a two-part pintle in combination with a plurality of plates in each link.

Third.—That patent No. 736,999 describes a pintle differing from 757,762 in that it has three instead of two parts.

Fourth.—That the action of Morse in the patent office, taken in connection with the reading of the patent, excludes any idea other than that the action of the pintle parts is limited to an arrangement thereof which secures a rocking or rolling co-action thereof as distinguished from a sliding or hinge action.

Fifth.—That multiple links and two-parts pintles were old.

Sixth.—That a three-part pintle discloses patentable novelty over a two-part pintle.

In this situation, with these propositions decided against him, the patentee applied for a reissue four years and two months after the date of the original patent. Five judges have decided that the invention of the original is not the same as that of the reissue. The judges of the Seventh circuit held this by implication, having decided that the defendant's three-part pintle did not infringe the claims which were limited to a two-part pintle, and Judge Hand held it directly.

In these circumstances we should be very sure of our position before running counter to such a weight of authority. After giving careful consideration to all the arguments presented we are convinced that the decision below is right and cannot be overthrown without giving to the claims an unwarranted construction.

Morse was not a pioneer, he did not make a broad generic invention and he was not the first to use two-part pintles in drive-chains. In 1876 Neumann procured a patent for such a chain. It was a clumsy unsatisfactory structure but the pintle is there, nevertheless; the parts "having oval surfaces of the sides bearing together." Gautier, Dodge, Holt and others show similar constructions. Indeed, Morse himself, as early as 1893, shows a two-part pintle in his patent No. 507,153; and again, in 1900, in his patent No. 663,352. When, in 1904, he took out his original patent there was room for improvements, but the broad conception was not new. Other inventors, if they made patentable improvements, were entitled to use them, provided they did not use the specific devices of the Morse patent. There is nothing in the original patent to indicate that Morse intended to cover a three-part pintle. As to this proposition there can be no controversy; it has been so decided and the complainant has acquiesced in the decisions by surrendering the patent and asking for a reissue.

[2] Of the claims in controversy the sixth and ninth are expressly limited to a two-part pintle. The tenth is so limited by implication as it provides for "pintles formed in separate parts which bear upon each other," which, in view of the context, can mean a two-part pintle

only. Even if the reissue were valid these claims would not be infringed. A patentee who limits his claims to the precise construction shown and described, even though not obliged to do so, cannot hold as an infringer one who uses a different construction. The new claim, the twelfth, if valid, is probably infringed, as it provides for "pintles formed in a plurality of separate parts." If, however, it be construed to cover a three-part pintle, it is void, as no such structure is described or claimed in the original. The defendant is operating under a patent to Dodge dated May 24, 1904; four years prior to the date of the reissued patent. The defendant's chain did not infringe the original patent and in order to hold it under claim twelve we must conclude that it and the structure covered by that claim embody the same invention described in the original patent. Obviously they do not.

The seventh claim of the Dodge patent is for:

"The combination of two links, a segmental bushing attached to each link, and a pivot-pin free to move upon the segmental bearing-surfaces of both bushings substantially as described."

Assuming that this language describes, and that the defendant uses a three-part pintle, it is plain that it is not the same construction covered by the claims of the original Morse patent. It cannot be maintained that a two-part pintle is the same as a three-part pintle or that the one includes the other. It may well be that in similar structures the entire invention consists in reducing the number of parts. It may be that a two-part pintle has advantages over a three-part pintle. At all events, it is manifest that Morse thought this to be the case, because throughout the proceedings in the patent office, he took pains to limit his claims to a two-part pintle and never intimated that his invention could be embodied in any other structure. The inference seems plain that it was only when he found that chains with pintles composed of more than two parts would operate successfully that he sought by a reissue to compel them to pay tribute. The reissue statute was not intended to produce a result so inequitable.

The argument against the validity of the reissue is clearly and ably presented in the opinion below and nothing further need be added.

The decree is affirmed.

DILG et al. v. GEORGE BORGFELDT & CO.

(Circuit Court of Appeals, Second Circuit. June 29, 1911.)

No. 280.

PATENTS (§ 328*)—INVENTION—CUTLERY-POLISHING MACHINE.

The Dilg & Dilg patent, No. 662,919, for a cutlery-polishing machine, is void for lack of invention, in view of the prior art, which, for the purpose of testing the question of invention, must be regarded as including cutlery-grinding machines.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Suit in equity by Christian F. Dilg and Charles H. J. Dilg, partners, against George Borgfeldt & Co. Decree for defendants, and complainants appeal. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

V. D. Borst and H. D. Williams, for appellants.

Hans v. Briesen (Arthur v. Briesen, of counsel), for appellees.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge. The patentees at the commencement of their specification thus describe the subject-matter of their claimed invention:

"Our invention relates to a cleaning and polishing machine adapted for use primarily for renovating articles of small size, as knives, forks, etc., or other cutlery-ware, and has for its object the provision of a machine of the class described simple in construction, inexpensive in manufacture, and efficient in practical use."

The claim in question reads as follows:

"1. In a cutlery-polishing machine, the following elements: Shafts of two rotatable cleaning devices, means to move one shaft forward and backward (parallel to the other) and rigidly hold the same in any desired position; a main operating-shaft located below the plane of the two said shafts; and stationary and shifting means to similarly rotate the stationary and movable shafts in opposite directions whether the same are moving forward or back or lying adjacent or apart; and detachable rotatory cleaning devices."

The machine of the claim is thus a structure in which there are two detachable rotary cleaning or polishing devices between which the article to be cleaned is placed, one of which is movable to and from the other and yet is always held rigid and parallel thereto; in which there is a main driving shaft situated below the axis of the cleaning devices so as to be out of the way of the article being cleaned, and in which there are driving means for the rotation of the cleaning devices adaptable to their different positions.

The defenses are:

- (1) Invalidity;
- (2) Noninfringement.

In considering the question of validity we shall not, primarily, look for strict anticipation but shall endeavor to ascertain whether, in view of the prior art, invention is to be found in the claim in suit.¹

¹ As bearing upon the defense of invalidity, much stress is laid in the defendant's brief and in the opinion of the court below upon the proceedings in the Patent Office. It seems that the patentees erased a claim containing all the elements of the present claim with the exception of "a main operating shaft located below the plane of the two said shafts," and the Circuit Court held that they became thereby estopped from asserting that there is any patentable novelty in that part of the present claim which was embraced within the cancelled claim.

It is, of course, well settled that when an inventor seeks a broad claim which is rejected, and, acquiescing in the rejection, substitutes a narrower claim, he cannot be heard to insist that the claim as allowed should be construed to cover that which was rejected. The complainants insist that this is the extent of the rule and that the mere cancellation of a claim, although upon its rejection by the Patent Office, does not amount to an admission with respect to the patentable character of its subject-matter which binds him in the consideration of other claims which may embrace the same subject-matter as a part thereof.

As, however, we reach the same conclusion as the Circuit Court without referring to the proceedings in the Patent Office, it is unnecessary to determine the question of estoppel presented, and we think that dicta upon the subject would be inexpedient.

We shall also assume, in accordance with the complainants' contentions, that they are entitled to carry back the date at which the prior art must be considered, from the date of the application in 1895 to 1888.

Examining the prior art, we find that the field was quite crowded when the patentees came into it. Earlier patents disclose cutlery polishing and grinding devices having mechanism for moving one polishing or grinding wheel toward the other; and, although all the elements of the claim may not be found in any one patent, it is clear that they are all to be found in different patents. No single patent may anticipate, but they all have a bearing upon the question whether invention or mechanical skill was involved or required.

Cutlery-polishing machines and cutlery-grinding machines are so similar in their nature that both must be regarded in the prior art for the purpose of testing the inventive character of the claim. The polishing-machine, of course, removes the surface of the knife far less than the grinding or sharpening machine and the position of the knife may be somewhat different when being ground than when being polished; but still the nature of the machines and their operation are so similar that we think it clear that that which is old in grinding machines cannot be regarded as new in polishing machines. If the arts are not the same they are closely analogous.

In the prior art in 1888 was the patent to Heitze for a cutlery-grinding machine. This patent shows all the elements, except one, of the claim in suit in similar combination. The exception is that the operating shaft is not described as being located below the plane of the two wheel shafts and the question is thus at once presented whether invention was involved in taking the structure of the Reitze patent and lowering the operating shaft. And this question is not complicated by proof that the machine if altered would work in any different way or accomplish any novel result—except that the shaft would be out of the way of the article being polished.

Now the location of the operating shaft below the wheel shafts in cutlery-grinding machines was old in 1888. Such construction is shown in the Capewell patent of 1877. Indeed this patent shows all the elements of the patent in suit operating similarly except that the grinding rollers are not "similarly" rotated and it may well be doubted whether the exercise of the inventive faculties would have been necessary to modify the gear ratio to meet the terms of the claim. The Guex patent of 1878 shows a cutlery-cleaning machine in which also the main shaft is located below the plane of the wheel shafts, although the machine differs from that of the patent in that there is no provision for adjusting the relative position of the rolls.

As already indicated, then, the problem presented to a man skilled in the art was to modify the Reitze cutlery-grinding machine to fit it for cleaning and polishing cutlery. In that structure the knife to be sharpened rested with its edge upon the grinding stones and was not pressed down between them and there was not the same necessity for locating the operating shafts below the wheel shafts. But in using the machine for polishing the knife would necessarily be lowered between the buffing rolls and the drive shaft might be in the way. In our opin-

ion, especially in view of the prior patents, it required no more than mechanical skill to obviate the difficulty by locating the drive shaft below the plane of the wheel shafts and thus putting it out of the way.

While we have no doubt that the complainants' machine has been commercially successful, we are by no means satisfied that there was a period of groping and that the complainants succeeded where others failed. Even if such were the case it would not be sufficient to show invention here.

We also recognize the complainants' contention that although every element of a combination may be old, yet the combination itself may be patentable. But a combination is not patentable unless it shows invention, and in view of the cutlery grinding and polishing machines of the prior art, we find no invention in the present case.

The decree of the Circuit Court is affirmed, with costs.

HURD et al. v. SEIM et al.

(Circuit Court, N. D. New York, July 26, 1911.)

1. PATENTS (§ 290*)—SUIT FOR INFRINGEMENT—INTERVENTION.

In an infringement suit against users or dealers in the alleged infringing article, there is no ground for permitting intervention by the company from which defendants bought such articles where the defense which it seeks to set up is equally open to the defendants; such company having the right to assume or assist the defendants in making such defense without becoming a party.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 290.*]

2. PATENTS (§ 327*)—SUIT FOR INFRINGEMENT—CONSTRUCTION OF DECREE.

In a decree entered by the Circuit Court of Appeals of the Second Circuit adjudging a patent valid and infringed, a provision excepting from the injunction restraining the defendant from selling infringing articles such articles as were made by a company in Indiana, where in a suit against such company the patent had been held invalid, was not an adjudication of defendant's right to sell such articles in the Second Circuit, but merely reserved that question until it should arise in a proper case.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 620-625; Dec. Dig. § 327.*]

3. PATENTS (§ 327*)—INFRINGEMENT—EFFECT OF PRIOR ADJUDICATION.

A patent was held valid and infringed by a Circuit Court in New York, and its decree was affirmed by the Circuit Court of Appeals of the Second Circuit and also by the Supreme Court. In a suit in Indiana against a manufacturer the patent had been held invalid, and the decree was not appealed from. *Held*, that such decree did not authorize the sale or use in New York or elsewhere in the Second circuit of articles thereafter made by the defendant in that suit, which were clear infringements of the patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 620-625; Dec. Dig. § 327.*]

4. PATENTS (§ 327*)—SUIT FOR INFRINGEMENT—PARTIES AND PRIVIES—"PRIVITY."

The term "privity" denotes mutual or successive relationship to the same rights of property, and purchasers of articles made by the defend-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ant in a suit for infringement of a patent after the decree therein are not privies to such decree, nor protected thereby as such.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 620-625; Dec. Dig. § 327.*

For other definitions, see Words and Phrases, vol. 6, pp. 5606-5611; vol. 8, p. 7764.]

In Equity. Suit by James D. Hurd, the Consolidated Rubber Tire Company, and the Rubber Tire Wheel Company against William Seim and Gustave Reissig. On application by complainants for preliminary injunction, and also on petition of the Diamond Rubber Company of New York for leave to intervene as party defendant. Leave to intervene denied, and injunction granted.

Walter E. Ward, for complainants.

Amasa J. Parker, for defendants.

Charles K. Offield, for Diamond Rubber Company.

RAY, District Judge. This is a suit in equity brought by the complainants to restrain the defendants Seim and Reissig from infringing what is known as the Grant patent, dated February 18, 1896, No. 554,675, and issued to Arthur W. Grant for "rubber-tired wheel." The validity of this patent has been adjudicated in certain circuits, and its invalidity has been adjudicated in other circuits. It was held valid in the Second circuit by the Circuit Court and also by the Circuit Court of Appeals in Consolidated Rubber Tire Co. & Rubber Tire Wheel Co. v. Diamond Rubber Co. of New York, 162 Fed. 892. In this case on the petition of the Diamond Rubber Company a writ of certiorari was granted, and the case taken to the Supreme Court of the United States, where the patent was held valid and infringed. See Diamond Rubber Co. of New York, Petitioner, v. Consolidated Rubber Tire Co. & Rubber Tire Wheel Co., decided April 10, 1911, 220 U. S. 428, 31 Sup. Ct. 444, 55 L. Ed. 527.

So far as this suit between the parties is concerned, the patent must be considered valid. It has the presumption of validity to start with and the decision of the Supreme Court of the United States sustaining it. However, in Goodyear Tire & Rubber Co. et al. v. Rubber Tire Wheel Co. (Sixth Circuit) 116 Fed. 363, 53 C. C. A. 583, the patent was held invalid, and in Rubber Tire Wheel Co. v. Victor Rubber Tire Co. (Sixth Circuit) 123 Fed. 85, 59 C. C. A. 215, it was also held invalid. In a case in the Seventh circuit, district of Indiana, where in the Kokomo Rubber Company was defendant, the patent was held invalid. This last case did not go to the Circuit Court of Appeals.

The defendants here, Seim and Reissig, reside and do business in the city of Albany, state of New York, Second circuit. It seems to be their contention that they purchase the alleged infringing articles in which they deal and which they sell from or through the Diamond Rubber Company of New York, which, in turn, obtains them from the maker, the Kokomo Rubber Company. In the case above referred to in the Circuit Court of Appeals, Second Circuit, and which went

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to the Supreme Court of the United States as stated, the Circuit Court of Appeals inserted the following in the decree:

"Ordered, adjudged, and decreed that the decree of said Circuit Court be and it hereby is amended by inserting the following clause: 'Nothing in this injunction shall prevent or is intended to prevent or enjoin this defendant from handling, using and selling rubber tires and rims covered by the Grant patent, manufactured by the Goodyear Tire & Rubber Company, having a right to manufacture, use and sell such tires, under a judicial decree in the federal courts of the Sixth Circuit, or manufactured by the Kokomo Rubber Company, having a right to manufacture, use and sell such tires under a judicial decree in the District of Indiana, Seventh Circuit; or manufactured by the Victor Rubber Tire Company, under a judicial decree in a litigation in the federal courts in the Sixth Circuit, wherein in such litigations it has been judicially determined that the said Grant patent is invalid and void.' And as so amended is affirmed, with costs taxed at the sum of \$31.95."

The defendants here, as well as the Diamond Rubber Company of New York, contend that, inasmuch as the decree was affirmed with this clause therein, there has been an adjudication that the Diamond Rubber Company has the right to use and sell rubber-tired wheels and the various parts which go to make up the rubber-tired wheel of the patent manufactured by the Goodyear Tire & Rubber Company, or by the Kokomo Rubber Company, or by the Victor Rubber Tire Company, the patent having been held invalid as to them. The contention is also that this right extends to all dealers and users of rubber tires and rims covered by the Grant patent manufactured by either of the said companies, and that they will be able to show that the rubber tires and rims dealt in and sold by these defendants were manufactured by the Kokomo Rubber Company, and that, therefore, Seim and Reissig had a perfect right to use or sell them as they are protected by the decree in the Indiana circuit above referred to, not appealed from or reversed.

That the wheels and parts complained of and dealt in and sold by the defendants are covered by the Grant patent and infringe same cannot be questioned. The first question is, Were these tires and rims made by the Kokomo Company? I have read the affidavits of William Seim, Gustave Reissig, and Dorothy Seim presented and read in opposition to the granting of this motion for a preliminary injunction, and I fail to find evidence therein that either the rims or tires or wheels dealt in by the defendants here were made by the Kokomo Rubber Company or by the Goodyear Tire & Rubber Company or by the Victor Rubber Tire Company, and hence fail to find evidence that these defendants are protected in using, dealing in, or selling these parts or any of them, or the vehicle wheel complained of, even if the decrees referred to protect those companies, and all who purchase from them or either of them against the charge of infringement. I do not need to decide that such decrees do or do not protect those companies and those who deal with them or purchase from them directly or from those who purchase of dealers to whom such companies sell in passing on the question of a preliminary injunction.

The petition for intervention filed by the Diamond Rubber Company of New York alleges, in substance, that it is engaged in purchasing, handling, using, and selling rubber tires and rims decreed to be cov-

ered by the Grant patent in suit, and that such articles so covered by the Grant patent are manufactured and sold to the petitioner Diamond Rubber Company by the said Kokomo Rubber Company. The petition also alleges that the Kokomo Company has the right to manufacture, use, and sell such tires under a judicial decree of the United States Circuit Court for the District of Indiana, Seventh Circuit, and that the right of the Diamond Rubber Company to handle, use, and sell such tires and rims has been judicially found and assured to the petitioner by the decree of the Circuit Court and Circuit Court of Appeals, Second Circuit, affirmed by the Supreme Court of the United States. To sustain this contention, the petitioner presents a certified copy of the mandate of the Circuit Court of Appeals, Second Circuit, above referred to, as well as the decision of the Supreme Court of the United States in the same case. The petitioner further alleges that the defendants here, Seim and Reissig, are copartners, doing business in the city of Albany, and that they purchase the infringing articles dealt in by them from the petitioner, Diamond Rubber Company of New York, and that same are made by the Kokomo Rubber Company of Indiana. The contention is that the defendants here, Seim and Reissig, having purchased these articles of the Diamond Rubber Company and the Diamond Rubber Company having purchased them of the Kokomo Rubber Company and a decree of the Circuit Court in Indiana having been entered adjudging the patent invalid, the defendants are protected by said Indiana decree, and have the right to deal in and sell these infringing articles. In short, it is contended that infringing articles covered by this patent made by the Kokomo Company may be sold anywhere and everywhere in the United States by parties or persons who obtain them directly or indirectly from the Kokomo Company.

James D. Hurd, the complainant here, holds an exclusive license under the patent in suit for making and selling these rims and tires and wheels in the state of New York. His license antedates the Indiana decree, to which suit he was not a party. The Diamond Rubber Company desires to be made a party defendant so it may come in in this suit, and raise these question and make this alleged defense in person.

[1] I see no reason for allowing the intervention if, notwithstanding the decision of the Supreme Court of the United States above referred to, the Kokomo Company has the right to make and sell the alleged infringing articles anywhere in the United States or anywhere in the Seventh circuit, and is protected in so doing by the decree of the Circuit Court before referred to, and purchasers of such articles from the Kokomo Company in the Seventh circuit have the right to use and sell same anywhere in the United States and are protected by said decree in so doing, and purchasers of such articles in the Second circuit are protected in using and selling them because made by and obtained from the Kokomo Company. The defendants here, Seim and Reissig, can set up that defense, show the facts, and prove that the alleged infringing articles made and sold by them were made by the Kokomo Company, sold to the Diamond Rubber Company and

by it sold to these defendants, and the defense will be complete. The presence of the Diamond Rubber Company an intermediary purchaser and seller in this suit is entirely unnecessary. If it desires to defend this suit in behalf of these defendants, it can furnish and pay counsel and furnish and pay witnesses; in short, bear all the expenses and take upon itself the burden of the defense. The Kokomo Company does not come to this court asking to intervene or seek to defend dealers in these infringing articles alleged to have been made by it.

The broad allegations of the petition for intervention must be deemed qualified by the certified copy of the decree filed therewith and which shows that the only right of the Diamond Rubber Company, if any, to make, use, and sell these articles which infringe the Grant patent is derived from the decree of the United States Circuit Court in Indiana. If that decree of the Circuit Court in the action referred to does protect the Kokomo Company against the charge of infringement in making and selling rubber tires, rims, and other parts which in fact infringe the Grant patent, I am of the opinion, and hold, that such decree does not protect users and sellers of those articles made by the Kokomo Company in Indiana in the Second circuit. If it shall be held that the decree of the Circuit Court in the District of Indiana not appealed from or reversed establishes in that circuit that the Grant patent is invalid notwithstanding the decision of the Supreme Court of the United States, still that decree does not establish that as the law in the Second circuit. The decision of the Supreme Court of the United States holding this patent valid must prevail in the Second circuit. It must be the law here that the patent is valid. There is no judgment or decree anywhere that the Kokomo Company has a right as licensee to make and sell these articles under the Grant patent. The decision of the Circuit Court of Indiana is that the Grant patent is invalid—that is, it has no existence. The decision of the Circuit Court of Appeals in the Second Circuit sustained by the Supreme Court of the United States is that the patent is valid.

[2] The Circuit Court of Appeals in the Second Circuit did not adjudicate or determine that the Kokomo Company has the right to make and sell articles which would infringe the Grant patent but for the decision of the Circuit Court in Indiana. The Supreme Court of the United States has not so adjudicated. The Circuit Court of Appeals in the Second Circuit has not adjudicated or determined that purchasers and users of the articles referred to who obtain same from the Kokomo Company are protected in the use and sale of same in the Second circuit. All the Circuit Court of Appeals in the Second Circuit adjudged or determined was that the injunction in Consolidated Rubber Tire Co. & Rubber Tire Wheel Co. v. Diamond Rubber Co. of New York should except the defendant from its operation in handling, using, and selling rubber tires and rims covered by the Grant patent, manufactured by the Kokomo Rubber Company.

The effect of the reservation made by the decree of the Circuit Court of Appeals in the Second Circuit is thus stated by the Supreme Court:

"The final contention of the Rubber Company is that the Grant patent having been declared invalid by the Circuit Court of Appeals of the Sixth Circuit and by the Circuit Court for the District of Indiana in the Seventh Circuit, the Rubber Company should not have been enjoined from the handling or sale of tires manufactured in the Sixth and Seventh Circuits, and cites *Kessler v. Eldred*, 206 U. S. 285 [27 Sup. Ct. 611, 51 L. Ed. 1063]. The Court of Appeals practically reserved the question. It modified the decree of the Circuit Court so far as it prevented the handling, using or selling tires and rims authorized by any judicial decree, recognizing, as it said, the applicability of *Kessler v. Eldred*. But it further said: 'Whether it should be given a broader interpretation is a question upon which we express no opinion, deeming it more prudent to wait until the facts are fully developed. There is no occasion for attempting at this time to anticipate the future for a contingency which may not arise. * * * To provide in a decree that a defendant is not enjoined from making, using and selling devices which do not infringe or which have been licensed, seems unnecessary. The doctrine of *Eldred* and *Kessler*, if carried to the extent contended for by the defendant, will introduce radical and far-reaching limitations upon the rights of patentees. These questions may not arise in the case at bar, but if they should, the court should have the facts, and all the facts, before attempting to decide them.' We concur in these remarks."

This is far from an adjudication that these defendants have the right to use, deal in or sell rubber tires and rims or vehicle wheels, which in fact infringe the Grant patent, in the Second circuit, because made by the Kokomo Company in the Seventh circuit.

[3] If it is finally held where a patent is litigated between the owner thereof and an infringer, and the same is held invalid by the Circuit Court of a given circuit and the case is not appealed, and the same question is litigated in another circuit between the same complainant and a different defendant, alleged infringer, and the case goes to the Supreme Court of the United States and the patent is held valid, that the defendant in the first suit has the right to manufacture and sell articles plainly and indisputably covered by the patent all over the United States, and that purchasers from such defendant everywhere in the United States are also protected in so using and selling such articles, the patent will afford little, if any, protection to the owner. The monopoly of the patent will be shared by the defendant in the suit referred to, and he will have the same right to make and sell possessed by the owner of the patent, and all purchasers and users under him will be protected. I am not prepared to assent to any such result. Articles which in fact infringe this patent, if sold or used outside the circuits where the patent has been held invalid, must be held to infringe, and those who sell or use outside the circuits referred to must be held to be infringers, even if the articles so sold or used were made and put on the market by a person or corporation as to whom the patent was so held invalid. The decision of the Circuit Court in the District of Indiana may be the law there as to the Kokomo Company and those who deal with it there, but it is not the law of the Second circuit or in any way binding on the courts in the Second circuit. While articles made by the Kokomo Company and sold in the Second circuit were excepted from the operation of the injunction in the case referred to it was not decided that the users and sellers here had any right to use and sell. As said by the Supreme Court, the Circuit Court of Appeals of the Second Circuit reserved

the question. The question is now before me in this motion to intervene, and is a practical one. There is no rule of comity which requires the Circuit Court of the United States in one circuit and state to recognize the decrees of a Circuit Court of the United States in another state and circuit in such a case as this, especially when the Supreme Court of the United States has decreed differently as to the same subject-matter, viz., the validity of a patent. Neither the Kokomo Company nor the Diamond Rubber Company of New York is a licensee. The adjudication in Indiana has no force in New York. Suppose the decree of the Circuit Court in Indiana is to be given the effect of holding that the Kokomo Company had a right to make and sell the wheels or the parts complained of, its effect may be confined to Indiana, and, if the Circuit Court of New York holds differently between other parties as it must in view of the decision of the Supreme Court, then all persons residing and acting in New York other than the Kokomo Company are subject to the decree made by the Circuit Court in New York. Sued in Indiana circuit, the Kokomo Company and possibly those purchasing from it would be protected, but sued in New York, Second circuit, purchasers from the Kokomo Company would not be. The territorial jurisdiction of the two courts is separate and distinct. In *Kessler v. Eldred*, 206 U. S. 285, 27 Sup. Ct. 611, 51 L. Ed. 1065, Kessler was the maker and seller of electric cigar lighters, and had customers therefor throughout the United States. Eldred was a competitor of Kessler in the business of making and selling cigar lighters. Eldred owned a patent for an electric lamp lighter, known as the Chambers patent. Eldred brought suit against Kessler in the district of Indiana for infringement of the Chambers patent in making and selling his cigar lighters. The Circuit Court found that there was no infringement of the Chambers patent, and its decision was affirmed by the Circuit Court of Appeals. There was no holding that the Chambers patent was invalid. Later Eldred brought suit in the Western district of New York against one Breitwieser, who was a user of the cigar lighters made by Kessler. Kessler assumed the defense of that suit. After the commencement of this last suit, many of Kessler's customers refused to send in further orders, and refused to pay for lighters already purchased, being intimidated by the suit against Breitwieser. Thereupon Kessler brought suit in equity, Northern district of Illinois, to enjoin Eldred from commencing further suits for infringement of the Chambers patent against Kessler's customers who used the precise structure made and sold by Kessler and which had been held as between Eldred and Kessler not to infringe the Chambers patent on the ground such suits injured Kessler's business, and would result in a multiplicity of actions. The Circuit Court dismissed the bill, but on appeal to the Circuit Court of Appeals, Seventh Circuit, that court certified to the Supreme Court the questions: (1) Did the decree of noninfringement in the suit of Eldred v. Kessler, district of Indiana, have the effect to entitle Kessler to continue to manufacture and sell the lighter complained of in that suit throughout the United States; and (2) did the decree mentioned have the effect of making suits by Eldred against

Kessler's customers for alleged infringement by them of the Chambers patent in using and selling the lighter made by Kessler a wrongful interference by Eldred with Kessler's business? The Supreme Court answered both of these questions in the affirmative. Mr. Justice Moody in giving the opinion of the court said:

"We need not stop to consider whether the judgment in the case of *Eldred v. Kessler* had any other effect than to fix unalterably the rights and duties of the immediate parties to it, for the reason that only the rights and duties of those parties are necessarily in question here. It may be that the judgment in *Kessler v. Eldred* will not afford *Breitwieser*, a customer of Kessler, a defense to Eldred's suit against him. Upon that question we express no opinion. Neither it nor the case in which it is raised are before us. But the question here is whether by bringing a suit against one of Kessler's customers Eldred has violated the right of Kessler. * * * Leaving entirely out of view any rights which Kessler's customers have or may have, it is Kessler's right that those customers should, in respect of the articles before the court in the previous judgment, be let alone by Eldred, and it is Eldred's duty to let them alone. The judgment in the previous case fails of the full effect which the law attaches to it if this is not so."

In the statement of the case the court says:

"Eldred was a competitor of Kessler's and manufactured a similar form of lighter (entirely dissimilar from that described in the Chambers patent)."

It was evident to the court that Eldred's line of conduct was intended and calculated to injure and impair the trade of Kessler by driving away his customers. The validity of the Chambers patent owned by Eldred and which he claimed Kessler infringed was not (so far as appears) in question. In any event, the decree did not go against Eldred and in favor of Kessler upon any theory that the Chambers patent was invalid, but simply on the proposition that Kessler's lighter, "like Eldred's," but "entirely dissimilar from that described in the Chambers patent," did not infringe the structure covered by the Chambers patent. It well may be that in such a suit really to enjoin an unlawful interference with a man's business by means of vexatious suits against his customers as between the parties to the prior suit the court has power to intervene and restrain the alleged wrongdoer, one of the parties to that action, at the suit of the other from bringing and prosecuting other actions involving the same precise facts and questions, even though brought against other defendants, and apply the rule or doctrine of comity, thus giving full force and effect to the judgment of the Circuit Court rendered in one district in other or even all districts in the United States.

There is a wide distinction between a holding that a patent is invalid and a holding that a certain manufactured article does not infringe such patent. In *Kessler v. Eldred* the question was not submitted, and the Supreme Court did not decide that a judgment in the Circuit Court of one district and circuit holding a patent invalid is binding and conclusive of that fact in all other circuits even as between the parties to the suit. Nor did it decide, as we have seen, that such a decree protects purchasers from the defendant in such a suit, who has successfully denied the validity of the patent, who are using and selling the alleged infringing article (made by the defendant in such suit) in other circuits against the charge of infringement made

in the circuit where the alleged infringing acts are done. If that is held, it must follow that the decree of a Circuit Court of the United States in one circuit, as between the parties to the suit and their privies and all persons who take property from the one or the other of the parties, adjudicated upon or in relation to in such suit, is final, binding, and conclusive in all other circuits as to like property thereafter made. There was no direct judgment that Kessler had the right to make the lighters in question. It was not adjudicated between Kessler and Eldred that Eldred had no valid patent. It was adjudicated that a certain structure made by Kessler did not infringe, was not covered by Eldred's (the Chambers patent). That adjudication was affirmed by the Circuit Court of Appeals in the Seventh Circuit. *Eldred v. Kessler*, 105 Fed. 509, 45 C. C. A. 454. That became the law of the case in that circuit as to that particular subject-matter between these parties and their privies. The equity action was brought in the Circuit Court of the Northern District of Illinois, also in the Seventh circuit. It well may be and is probable that the opinion of the court in *Kessler v. Eldred*, *supra*, was given with this fact in mind. Eldred was a citizen of the Northern district of Illinois and Kessler of the district of Indiana.

In the case at bar the rubber tires and rims in question here were not in existence when the case in Indiana was decided and the decree rendered which is alleged to protect the defendants here. They could not have been a subject of controversy in that suit. The validity of the Grant patent was in issue. It was adjudicated that it had no legal existence. Having no existence as to the Seventh circuit, district of Indiana, the making and sale of rubber tires and rims by the Kokomo Company was not unlawful so far as the holder of that patent was concerned. I am of the opinion that this decree conferred and confers no right on the Kokomo Company to perpetually and forever infringe the Grant patent now that it has been held valid by the Supreme Court of the United States whose decision must be the supreme law of the land. Clearly, to my mind, it confers no right on the Diamond Rubber Company of New York, the petitioner for intervention here, to purchase and sell rubber tires or rims or rubber tired wheels made by the Kokomo Company which in fact infringe the Grant patent, for as to it the Supreme Court of the United States has decided, in a case where it was sued for infringing that patent and where its validity was directly in issue, that the patent is valid, and that the Diamond Rubber Company has no right to make or sell articles covered by it. The exception in the decree of the Circuit Court of Appeals, Second Circuit, went to the terms and extent of the injunction to issue under it, and the effect of its decree as a whole was to reserve the question here in issue. This is held by the Supreme Court as before stated. In short, unless the decree in the Circuit Court of Indiana, referred to, is a protection to the Kokomo Company and all who purchase and sell tires and rims of its make wherever located and dealing in them, the Diamond Rubber Company of New York and these defendants, Seim and Reissig, are infringers when they purchase and sell and use the articles mentioned in the state of New York, especially those made or purchased and sold here since the de-

cree of the Circuit Court of Appeals, Second Circuit, and its affirmance by the Supreme Court. To hold otherwise is to fail to give full force and effect to the decision of the Supreme Court of the United States. To hold that the Diamond Rubber Company of New York, as to which company the Grant patent has been held valid in a suit wherein that company was defendant by the Supreme Court of the United States, is at liberty to purchase and sell these tires and rims throughout the United States, is to say that the patent is invalid as to that company by reason of the decree of the Circuit Court in the district of Indiana, a subordinate court, as to all articles made and sold by the Kokomo Company in whose hands soever they go and to my mind is extending the doctrine of *Kessler v. Eldred*, supra, far beyond its legitimate scope, and the intent of the court which pronounced the judgment in that case. I do not think that either the Diamond Rubber Company of New York or these defendants is in privity with the Kokomo Company. True, they purchase rubber tires and rims from the company directly or indirectly, but such tires and rims were not the subject of that action or involved in it as they were not then in existence.

[4] They were not parties to that suit in Indiana or represented by any one who was a party. They had no interest in it. The term "privity" denotes mutual or successive relationship to the same rights of property. *Litchfield v. Goodnow* (and cases cited), 123 U. S. 549, 551, 8 Sup. Ct. 210, 31 L. Ed. 199. It does not satisfactorily appear here that the alleged infringing wheels, or parts thereof, handled and sold by these defendants, were made or sold by the Kokomo Company at any time, or prior to the decision by the Supreme Court. In fact, there is stamped on the tire itself as maker thereof the name of another company. I do not think the intervention should be permitted for this additional reason, viz., it is not made to appear that the tires and rims and wheels used and sold by these defendants were made by the Kokomo Company, and there is substantial evidence that they were not made by that company. There is no suggestion that they were made by either of the other companies as to which this patent has been held invalid.

For these reasons, the petition for leave to intervene is denied, and the motion for a preliminary injunction is granted.

AMERICAN STEEL FOUNDRIES et al. v. WOLFF TRUCK
FRAME CO.

(Circuit Court, N. D. Illinois, N. D. April 25, 1911.)

No. 29,185.

1. PATENTS (§ 109*)—AMENDMENT OF APPLICATION—VERIFICATION.

An amendment to an application for a patent merely adding new claims which do not involve a departure from the original invention as described and shown in the specification and drawings is within the applicant's right and need not be verified.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 152; Dec. Dig. § 109.*]

Amendment of application for patent, see note to Cleveland Foundry Co. v. Detroit Vapor S. Co., 68 C. C. A. 239.]

2. PATENTS (§ 167*)—SPECIFICATION—EFFECT OF REFERENCE TO DRAWINGS.

Where an opening in a mechanical device, as shown in the drawings filed as part of an application for a patent, was of peculiar form, and such opening was described in the specification by reference to the drawings and the letter by which it was designated thereon, the peculiar form was thereby incorporated in the specification although not otherwise mentioned therein.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 243; Dec. Dig. § 167.*]

3. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—CAR TRUCK.

The Hardie patent, No. 569,044, for a metallic car truck, construed and held to disclose patentable novelty and invention. Also held infringed by a modified form of the device of the Harrington patent, No. 857,937.

In Equity. Suit by the American Steel Foundries and J. S. Andrews Company against the Wolff Truck Frame Company. Decree for complainants.

Linthicum, Belt & Fuller (Charles C. Linthicum, of counsel), for complainants.

Sheridan, Wilkinson, Scott & Richmond, for defendant.

KOHLSAAT, Circuit Judge. This cause is now before the court on final hearing. The bill charges infringement of claims 2, 3, and 6 of patent No. 569,044, granted to J. S. Hardie on October 6, 1896, for a metallic car truck. The claims in suit read as follows, viz.:

"2. A car-truck, comprising two truck-arches rigidly connected with each other, each truck-arch having a transverse opening, the upper portion of which is contracted, a truck-bolster fitted in the upper portion of said openings, and springs seated in the openings and below the truck-bolster and respectively bearing against the truck-bolster, substantially as described.

"3. A truck having two truck-arches, each formed with an opening, the upper portion of which is contracted, a truck-bolster having its ends respectively fitted within the upper portions of said openings, and means within the openings and below the truck-bolster by which the truck-bolster is held in place, substantially as described."

"6. A truck having a truck-arch formed with an opening, the central portion of which is enlarged over the terminals, a spring-seat fitted within the contracted lower portion of the opening, springs rested on the spring-seat, and a truck-bolster fitted within the upper contracted portion of the opening and engaged by the springs, substantially as described."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The invention here involved consists in a combination truck having, as an essential element, a transverse opening in each truck-arch or side frame of such a form as enables its use with all kinds of bolsters. This is the only structural novelty here relied on. The new feature of this opening is found in the contracted upper portion, or, as stated in claim 6 in the enlarged central portion thereof, whereby a bolster constructed with column guides, integral or otherwise, upon its opposite sides may be passed through the enlarged portion of the opening in the side frame of a one-piece side frame, and then be raised into and maintained in contact with the sides of the contracted upper portion of the opening in the arch or side frame, so as to resist any substantial backward and forward movement of the bolster, and make a comparatively rigid connection between the two side frames. The advantage claimed for the device is that it provides a simple and durable construction which is not liable to get out of order; one which is readily set up without the aid of skilled labor, and one which may be conveniently inspected and repaired, and which is adapted to use with any bolster. The enlarged opening, however, would seem to be of value only in connection with bolsters equipped with column guides or lips. The defenses are lack of patentable novelty, noncompliance with the statute as to what the invention consists in, and want of infringement.

The application upon which the patent in suit was granted was filed January 25, 1896. Of the four original claims asked for, none claimed the contracted upper part or the enlarged central portion. Original claims 1, 2, and 4 were rejected. Original claim 3, which covered principally the means for placing and holding the bolster in the contracted upper part, was allowed. Thereupon Hardie canceled original claims 1, 2, and 4, and added claims 2 to 9, inclusive, among which appear the claims in suit. Now for the first time appears a claim for the contracted upper end and the enlarged central portion of the opening. No new specification or drawings were filed, nor was the change in the claims sworn to. The drawings disclosed the contracted upper portion, and the enlarged central portion of the opening, but no reference is made thereto in the specification.

[1] Upon this state of facts defendant moves to have the claims in suit declared invalid for want of verification of the amendment. In *Hoe v. Kohler* (C. C.) 25 Fed. 271, decided in 1885, Justice Blatchford, sitting in the Circuit Court for the Southern district of New York, held that the mere failure of the file wrapper and contents to disclose whether the application was properly verified or not was not sufficient to rebut the presumption that the commissioner required and received a proper preliminary oath. To the same effect is *Earl v. Rochester S. & E. R. Co.* (C. C.) 157 Fed. 241. Defendant cites *Steward v. American Lava Company*, 215 U. S. 161, 30 Sup. Ct. 46, 54 L. Ed. 139, affirming *Lava Company v. Steward*, 155 Fed. 731, 84 C. C. A. 157, in support of its contention. In that case the fact of failure to make the required oath was conceded, as appears from the opinion. Here, it is not conceded, nor is there any attempt to prove it. Mr. Justice Holmes, speaking of the oath on page 168 of 215 U. S., on page 50 of 30 Sup. Ct. (54 L. Ed. 139) says:

"* * * The amendment required an oath that Dolan might have found it difficult to take, and for want of it the patent is void."

It is evident there could be no presumption as to the oath under such circumstances. It will be borne in mind that the statute does not in terms require the oath to be in writing or recorded. Walker on Patents (4th Ed.) § 122.

[2] But it is not deemed necessary to dispose of this contention upon this ground. Hardie made no amendment to either the specification or drawings. The latter, as above stated, disclosed the opening with a contracted upper part and an enlarged central part. The specification makes no mention of it. In *Western Electric Company v. Sperry Electric Company et al.*, 58 Fed. 187-196, 7 C. C. A. 164, 173, Judge Woods, speaking for the Court of Appeals for this circuit, and with reference to an amendment to the application says:

"At first Scribner, it is clear, believed the up-and-down compensating movement of the armature in the main circuit, irrespective of the action of the regulating magnet, to be an important feature of his lamp; but before the patent issued, without changing the drawing or modifying the structure of his device in the least, he presented an amended specification, in which he repudiated that idea, and described the armature in operation as assuming and holding a definite relation to the magnet. So long as he did not change the structure of his device or invention, he had the right to change the specification. * * *"

This latter expression is quoted approvingly in *Michigan Central R. R. Co. v. Consolidated Car Heating Company*, 67 Fed. 128, 14 C. C. A. 232, decided by the Court of Appeals for the Sixth circuit. In the same case sections 561 and 635 of *Robinson on Patents* are cited to the effect that "new matter is that which is not found in the specification, drawings, or model as first filed, and which involves a departure from the original invention" and proceeds to give weight to the drawings. In *Hogg et al. v. Emerson*, 6 How. 484, 12 L. Ed. 505, the court says the models and drawings are proper to be resorted to for clearer information. To the same effect is *Brooks et al. v. Fisk et al.*, 15 How. 212, 14 L. Ed. 665. In *Tinker v. Wilber Eureka M. & R. Mfg. Co.* (C. C.) 1 Fed. 139, Judge Wheeler, in the Circuit Court for the Southern district of New York, states that the drawings "could and should be looked at, if necessary, in order to explain an ambiguous or doubtful specification, and to make the invention capable of being understood and used. But it cannot supply an entire want of any part of a specification or claim in a suit upon a patent, although it might afford ground for a reissue covering the part shown by it." Judge Blodgett in *Frazer v. Gates & Scoville Iron Works* (C. C.) 22 Fed. 442, adheres to the rule that models and drawings are not to be resorted to for the purpose of construing the patent except in cases where the specification is ambiguous or uncertain. It is said by Judge Shipman in *Gunn, Tr., et al. v. Savage et al.*, 30 Fed. 369:

"A description which is said to be vague and uncertain may be made clear by the drawings. An imperfect written description will be aided by correct drawings, but when the written description is not only silent in regard to a feature of the invention, but places the novelty upon a different and described feature, the drawings will not help an entire omission, because the necessity of a written description is made absolute by the statute.

Doubtful or ambiguous specifications can be aided and made plain by drawings, but they cannot supply an entire absence of description in the specification. Again, the drawings will not aid the nondescription, because, although they may show to an expert the new feature, they do not show that the patentee claimed to be the inventor of that part of the die, when in his specification he had distinctly placed his invention upon another part."

Sections 4884 and 4889 of the statutes (U. S. Comp. St. 1901, pp. 3381, 3383) provide that the drawings shall be a part of the specification and of the patent. The specification refers to the transverse openings A' of the drawings and the transverse flanges thereof A2 and speaks of the reduced bolster ends b' being guided in the upper portions of the openings A'. There can be no doubt but that the specification, including the references to the drawing, amply describes the openings with contracted upper portions and enlarged central portions for the purposes of amending the claims. Under such a state of facts Hardie was at liberty to amend his claims to cover the peculiar form of transverse openings shown in the drawings, even though no reference is made in the specification to their peculiar form and its advantages. It is a well-established rule of law that a patentee is entitled to all the benefits of his invention. The amendment was fully justified by the description including the drawings, and was therefore not such a departure from the original application as would require a new verification. The claims in suit are very explicit as to the openings. Taking the whole patent—claims, specification, and drawings—into consideration, under the authorities, some of which are cited supra, the objections raised by defendant as to the amendment are not well taken.

[3] As above stated, the claims and the specification taken in connection with the drawings show the side arches or frames held together by a bolster which makes no use of the enlarged central portion of the opening. It has no column guides, bolster end lips, or other features which required an opening wide enough to permit the bolster end side guides and all to be inserted therethrough, and an upper part so narrowed as to engage the sides or any other part thereof. The patent is very inartificially drawn. The defendant insists that the use of the openings, with bolsters having column guides, is nowhere suggested. The Patent Office seems to have been of the opinion that no such use was contemplated, since a patent specifically covering the column guide and contracted upper part of the opening was granted to W. P. Betten-dorf on October 6, 1903, numbered 740,617. It is complainant's contention that the patent disclosed an opening which could be used with any bolster, else why the contracted upper portion or enlarged central portion? On the other hand, defendant insists that the contracted upper part means vertical contraction so as to engage the shoulder shown at the ends of the bolster in the drawings. This latter position has not the merit of being reasonable, especially so since the drawings disclose the laterally contracted upper part. Defendant explains the enlarged central portion of the opening as desirable for insertion of the spring seat—a use to which it is doubtless put. But this minor advantage would hardly account for the large modification of the open-

ing shown in the drawings, although an enlarged opening is made an element for that purpose in the Barber patent, No. 620,092. Complainant disclaims any intention to have an opening so large as to permit the withdrawal of the whole bolster therethrough. On the other hand it is not clear that there is any advantage in producing an opening which would accommodate every kind of bolster. The only feature of the patent in suit which suggests the use of a bolster having column or side guides are those recited in the claims, and the representation in the drawings of a contracted upper part and an enlarged central part. The specification as well as certain claims not in suit call for compression wedges under the spring seats. Their application to the bolster is not disclosed though presumably they were intended to tighten or raise and hold something in position. The patentee in his testimony says they were designed to force the side or column guides into contact with the contracted upper portion.

In its commercial device, complainant does not seem to use the compression wedge. Hardie testifies that his original drawings showed a bolster having column guides as in the Schaffer bolster and that the change to the bolster shown in the patent in suit must have been made by his solicitors and that it was his intention to provide for column guides. Two photographs taken before the patent was granted show Hardie's truck assembled with a Schaffer bolster. The record makes plausible Hardie's contention that he had the Schaffer bolster in mind in providing the form of his side frame opening. The question therefore is whether his device shown in the drawings to be assembled with a bolster having no column guides, is so misleading or meaningless as to fail to disclose his alleged invention to those skilled in the art in accordance with the statutory requirement. It is a well-known canon of patent construction that patents shall be liberally construed in order to give effect to the invention, if invention may be fairly deduced from what is disclosed. At the time of the filing of the application by Hardie bolsters with column guides or lips were well known. Hardie shows a method whereby such bolsters may be used in connection with cast one-piece side-frames or arches, and as well in connection with bolsters not provided with column guides. This appears from the evidence and from an inspection of the drawings, but is not claimed.

It must be remembered that the claims call for a truck, and not merely for the seating of a bolster end. Given the Hardie opening in the side arch, would not the substitution of the Schaffer bolster for that of the drawing, amount to the use of an equivalent; and is not the substitution plainly suggested by the form of Hardie's opening? It seems fair to hold that it was made to catch and appropriate the whole bolster family. It is therefore held that complainant is not limited by the drawings of the patent in suit, to a combination employing a bolster having no column guides, and that the use of the Schaffer bolster in the assembling of the Hardie truck comes within the terms of the patent. This being so, are the claims in suit valid?

Hardie was not a pioneer in the construction of one-piece side-frames made of metal and having transverse openings available for

the reception of springs, spring seats and bolster-end bearings. Goltra patent No. 552,493, granted December 31, 1895, Hughes patent No. 408,022, granted July 30, 1889, and the Fox patent No. 521,709 disclose it. The opening in the side-frame having a large and a narrow portion, so that the axle may pass through the larger opening and then be crowded by means of a tongue and groove arrangement into locked contact with the sides of the contracted part of the opening, is shown in Sanford patent for an adjustable car-truck, No. 105,984, granted August 2, 1870. Wyatt and Smedley patent, No. 223,207, shows the enlarged central portion and contracted upper portion of a transverse opening between side columns in truss or diamond variety of arch-bar side-frames. The openings are substantially like those of the patent in suit, except that they are obstructed by supporting bolts, and are evidently not intended for the insertion of any kind of a bolster. They would be suitable for the reception and locking of bolster ends having integral column guides should the bolts be moved out of the way. As with the patent in suit, so in the latter device, the patent does not show a bolster requiring the peculiar form of the openings nor any use to which it might be put. Its swinging bolster would doubtless not be one of the bolsters to which complainant alludes when it says the Hardie opening is adapted to be used with all bolsters, although it would not interfere. Could not the Wyatt & Smedley opening be so adjusted as to be used with any bolster without patentable modification?

The Geisendorff patent, No. 20,871, granted July 13, 1858, for a car axle shows a journal box device acting essentially upon the principle of Hardie's device. The journal-box operates upon the same principle as does the opening in the Hardie side-arch, except that the bearing of the box is upward. The journal-box has ears or lips which serve as jaw-guides, corresponding to the column guides of the claims in suit, which pass into locking relation with the jaw-slots. The box can be removed by forcing the guides to register with the corresponding openings or recesses in the inner faces of the pedestal jaws. This also is found in patent No. 20,535, granted to W. O. Arnett June 15, 1858. This patent covers an improvement for disconnecting car axle-box cases without removing the stay-bar or elevating the car. The front flanges of the pedestal jaws are cut away at their lower part to make an opening large enough for the insertion of the lugs upon the box case. They are then lifted to lip and groove contact with the inner face of the pedestal jaws. Similar openings were employed by the Illinois Central Railroad prior to the date of the patent in suit, used, however, for the insertion of the spring seat or board and not for the insertion of bolster ends. The enlarged opening in the side frame is clearly shown in the lower portion of the opening. No reason is apparent why a bolster end with side guides could not be inserted and then raised, as in the claims in suit. Defendants demonstrate that it can be done by assembling it in conjunction with what is known as the Lehigh Valley bolster. It could hardly be deemed invention to make it larger vertically in order to accommodate a larger bolster end.

In view of the prior art as above stated, it appears that, in and by

itself, complainants' side arch with its transverse opening presented no novelty of a patentable nature. The invention, if there be one, must be found in the combination, with reference particularly to that part thereof pertaining to the manner of inserting and removing the bolster ends from the opening. Complainants' counsel assert that the only structural novelty of the patent consists in the enlarged opening in the side frame, and that the invention resided in the conception that making the opening in that form enabled its use with all kinds of bolsters. As construed by counsel for complainant, the patent does not disclose a means for removing the bolster bodily from the truck. In order to do that, the side-frames or arches of the truck must be spread apart. Were it otherwise, it is apparent that defendants' arch opening would not respond to that requirement. So far as the patent discloses, however, the removal of the whole bolster might have been the thought in the inventor's mind. The Hardie patent is the first in the car-truck art to employ a one-piece side-arch capable of use with a bolster having ends provided with columns, side guides, or lips and integral therewith. To insert a bolster end so provided in the old built up side-arch, it was usual to remove the top bar of the arch or truss or temporarily take off the side guides or lips. When the one-piece side-frame came into use manifestly there was no top bar to be removed, and consequently no means for inserting bolster ends with integral side column lips in such a manner as to cause them to be locked in the opening, without removing the lips or guides, or using an opening resembling the button-hole method, as defendant's expert terms it; i. e., that form used by Hardie.

The removal of the side guides involved considerable trouble, so complainant claims, and was, to a considerable degree, superseded by the device seen in the patent in suit. There is disclosed, however, in Schoen patent No. 542,427, granted July 9, 1895, a means whereby bolsters with top guides can be inserted in any transverse opening in side-frames whether built up or made of one piece. The Schoen side-frame is of the latter type. The bolster top guides in Schoen are released from contact with the top bar of the opening by removing the springs as in Hardie's device, and the opening is made large enough to permit of the removal of the whole bolster—a feature disclaimed by Hardie, thus limiting Hardie to bolster ends provided with side column guides. Schoen makes room in his opening for the insertion and removal of his bolster-end, vertically, while Hardie does it laterally. In both the clearance of the lugs or guides is effected by the removal of the springs, thus providing a means for alignment of the guides with openings through which they could be withdrawn. It is complainants' contention that Schoen's device never went into general use.

As to the so-called button-hole method, defendant insists that there was no invention in transferring it into the bolster art since its use was so well known in all manner of devices requiring a locking of the parts in an opening with fixed sides, as in the assembling of the parts of a bedstead, corset fastenings, and innumerable other constructions. Some attempts were made by patentees to adjust the

the bolster-end having integral side guides to an opening in the one-piece metal side-frame. Goltra tried in 1879 in his patent No. 223,207, but testifies as a witness herein that he does not remember how he proposed to get the bolster in and out of the opening. His patent does not show.

Nothing short of the opening in the side-arch with the contracted upper portion or the enlarged lower or central part would avail to release his hapless lip-incumbered bolster-end.

Defendant manufactures under a modification of patent No. 857,937, granted to C. G. Harrington for a car-truck on June 25, 1907, known as the Wolff truck side-frame. This was placed on the market in its present form early in 1908. Another form seems to have been used several years earlier. Bettendorf shows the defendant's opening in substance in his patent No. 740,617, granted October 6, 1903. Barber's patent, No. 620,092, granted February 28, 1899, discloses a diamond side-frame having a transverse opening with an enlarged lower portion, but not in connection with bolster ends. Hardie's side-frame opening was placed on the market in 1897. His application was filed January 25, 1896. The Goltra & Schaffer patent for the bolster with side-column guides had been granted more than two years previously. At the time of the issuance of the patent in suit no way was shown whereby the Goltra & Schaffer patented bolster could be used with a solid metal side-frame, except as might be deduced from the prior art above set out, although more than two years had elapsed since this bolster came upon the market. That its use in metallic car trucks was desirable is demonstrated by the commercial success following its use by Hardie. It would seem that those engaged in that art would have appropriated it as soon as known had it required mere mechanical skill to adjust the side-frame opening to its use. The question is not entirely free from doubt, but, all things considered, I am of the opinion that it possesses some patentable novelty and a small degree of invention. Therefore, though reluctantly, the patent in suit is held to be valid.

I have little trouble in holding that defendant's device infringes. It has the enlarged portion in its opening whereby the bolster-head may be inserted and lifted into locked contact with the contracted upper part. The difference in method is not appreciable. The complainant may prepare its decree accordingly.

ASBESTOS SHINGLE, SLATE & SHEATHING CO. et al. v. H. W. JOHNS-MANVILLE CO.

(Circuit Court, S. D. New York. January 30, 1911.)

1. PATENTS (§ 328*)—VALIDITY—PROCESS OF MAKING ARTIFICIAL STONE PLATES.

The Hatschek reissue patent, No. 12,594 (original No. 769,078) for a process of making artificial stone plates and the product of such process, claim 6, which is for a product not stated to be produced by such process, and which must be presumed not to be since such product is expressly

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

covered by claim 7, is void because it does not show the method of making the product, and also because a claim for the same thing in the original application was rejected with the patentee's assent. Claim 1, which is for a process of making hydraulic cement colloidal, is also void for lack of novelty.

2. WORDS AND PHRASES—"GROUT."

"Grout" is a thin watery concrete in which the proportion or bulk of water is large.

In Equity. Suit by the Asbestos Shingle, Slate & Sheathing Company and Ludwig Hatschek against the H. W. Johns-Manville Company. Decree for complainants in part.

See, also, 184 Fed. 620; 189 Fed. 611.

Clifton V. Edwards, for complainants.

A. Parker-Smith, for defendant.

HAND, District Judge. The complainant insists upon a decision upon claims 1 and 6 after having an opportunity to discontinue as to them, and therefore it becomes my duty to decide upon them.

Claim 6 is as follows:

"An artificial-stone product consisting of a major proportion of hydraulic cement and a minor proportion of fibrous material, the product being in layers and elastic, non-brittle and penetrable to nails—that is, capable of being nailed similar to paper building-board or wood—incombustible and water and frost resistant, of hardness, strength, and durability, and having a certain quality of toughness which enables it to resist strains and shocks which would shatter ordinary brittle material, such as slate, and the product being, finally, easily cut and sawed into shape and capable of being presented thin enough to serve as a substitute for wooden shingle and slate tile, and substantially as described."

Unless this product is the product of the Hatschek patent, the specifications do not show how to make it, which of course is necessary. It must be made in layers, and it is not apparent how such a watery product can be made in layers, except upon a cardboard machine. On the other hand, if it is construed merely as the product of the process described it is precisely the same as claim 7, and under well-established rules two claims must be read differently when they occur in the same patent, else one is redundant. Therefore, it must be construed as meaning a product of some other process than that shown, and as such it is bad.

Again, if claim 6 be for some other product than that of the process, as indeed it must be, and if it is thought to be specified, still it is invalid, because precisely the same claim was rejected in the original file wrapper without complaint. That claim was as follows:

"As a new article of manufacture, an artificial stone plate, consisting of asbestos fibres and hydraulic cement, the cement greatly in excess of the fibres, said plate being composed of a stratified homogeneous mass of the aforesaid materials, substantially as described."

Having assented to that rejection the complainant may not now assert it. *Corbin Cabinet Lock Co. v. Eagle Lock Co.*, 150 U. S. 38, 14 Sup. Ct. 28, 37 L. Ed. 989.

Claim 1 is as follows:

"The process of rendering hydraulic cement colloidal, which consists in working the same with a large bulk of water—that is to say, with sufficient water to allow the particles of cement to be kept in motion and thus segregated—whereby the setting or hardening power of the cement is not destroyed, and, in the presence of other material, as well-divided asbestos it is intimately associated with the latter, so that even if the weight of the cement be greater than that of the material with which it is mixed, no separation takes place, substantially as set forth."

The claim here is for the process of working cement with a large bulk of water so that its setting power is not affected, and it may be mixed intimately with other materials. The so-called "colloidal" properties of cement were well-known long before Hatschek put them in his patent and were fully described. Yet this is absolutely his claim. It is true that in the claim he mentions a use to which it may be put—i.e., that of making an intimate mixture with other materials—but that is only one use of the process, and the process itself is claimed in its bare entirety, without limitation to the specific use of the process to insure an "intimate association." However, even if the claim be held to include the mixing of colloidal cement with other materials, it is still invalid. Such mixtures were known for years under the name of "grout," which is a thin watery concrete in which the proportion or "bulk" of water is large. Just how large the proportion must be the complainants' witness Dyrenforth would not say, except that particles of cement must be kept separated. It is of course immaterial that the scientific results of the process were originally unknown, for the process took place, whatever it was. Moreover, grouts have been made since this property of cement was known, and all of them were within the terms of this claim. The only novelty of Hatschek's invention consisted in his use of the colloidal character of cement to make his plates upon a cardboard machine, and that he has been accorded in the opinion already handed down.

I am, in conclusion, also satisfied that the claim cannot be saved, as the complainant suggests, by incorporating the whole process, machine and all, and I must hold it invalid.

The defendant's brief calls attention to some supposed mistakes in the former opinion which require some notice. It is of no consequence that the English patent to Simmons & Bocks was not a good reference, because its use is only to show the meaning of the French patent. It was apparently the original of the French patent, and, as such, it is an authoritative and peculiarly useful indication of the meaning of the inventor's in the French patent, and much the best source of interpretation of their meaning when the French is ambiguous. Why the defendant calls it "an imperfect translation" it is impossible to see. There is no ground to say that the phrase "*de la maniere decrite au chapitre 1 ou de toute autre maniere appropriée*," creates two other alternatives to "*la machine a carton*." The assumption is that "*la machine a carton*" is the equivalent of the supposed method of the second example, yet no "*machine a carton*" is there mentioned, nor can it be supposed to have existed as I have shown in the opinion. Besides, why was the order of the examples inverted? However, the

English translation leaves no room for doubt that the natural meaning was that which was intended, and that this thick paste could be spread as in the first example or in any other way. If this conclusion be wrong, it is not through inadvertence.

My use of the term "coucher-roll" in place of the "press-roll H" accounts for the natural failure of the defendant to understand the argument in the opinion based upon the impossibility of using a cardboard machine for the Simmons & Bocks process. This misunderstanding was increased by the fact that I spoke of the "mesh of the coucher-roll," when it has no mesh. If, however, the word "press-roll" be substituted, the reasoning will, I think, be plain, and the fact that the press-roll has no mesh strengthens the argument, since the mesh can only be one introduced during the process. The conclusion I do not accept, that the pressure which "is repeated at intervals, first in layers when the separate coatings are applied," means the pressure between the press-rolls. The pressure of the press-rolls is continuous, nor "repeated at intervals," and it would be an extremely awkward way to describe the introduction of a mesh during the manufacture of the plate on such a press-roll by saying "with this paste a wire netting is coated, and the plate made by spreading in the same way as pasteboard."

The spreading machine referred to as a possible cardboard or pasteboard machine and as a "hand-dipping" machine was the old-fashioned way of making paper, by which the fluid was poured through a cloth or other mesh and the cloth then raised with the pulp upon it. It was suggested as a possibility that the paste in examples 1 and 3 might be made in some such machine. The mesh would be immersed in the paste and then raised up with the paste clinging about it. By repetition the plate would be built up. However that may be, it is too clear for argument that thin paste is used only in example 2, that the present cardboard machine can not be used with such paste, and that therefore the term "spreading or pasteboard machine" in example 3 cannot mean such a machine. There can be no question that the plates into which the mesh is to be introduced are the plates described in that example, not in example 2 which has been already fully described. In this case as before, the conclusion, right or wrong, is not inadvertent, and the proper relief to correct its errors is by appeal.

As the complainant has lost upon two claims, though he has succeeded on five, there can be no costs.

ASBESTOS SHINGLE, SLATE & SHEATHING CO. et al. v. H. W. JOHNS-MANVILLE CO.

(Circuit Court, S. D. New York. May 31, 1911.)

1. CONTEMPT (§ 8*)—MISSTATEMENT OF DECREE—JURISDICTION TO PUNISH—STATUTES.

Rev. St. § 725 (U. S. Comp. St. 1901, p. 583), provides that federal courts shall have power to administer all necessary oaths, and punish by fine or imprisonment at the court's discretion contempts of its authority, provided such power to punish shall not extend to any cases, except the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

misbehavior of any person in the court's presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of the court in their official transactions, and the disobedience or resistance of any officer, or of any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree or command of such courts. *Held* that, under such section, federal courts could no longer exercise their common-law power to punish as for contempt a misstatement of the effect of their decisions.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 14; Dec. Dig. § 8.*]

2. PATENTS (§ 323*)—EFFECT OF DECREE—MISSTATEMENT.

Where complainants, in a suit for infringement of a patent, obtained a decree, a misstatement of the effect thereof in complainants' subsequent advertising, though not punishable as for contempt, was nevertheless a civil wrong, for which defendant was entitled to relief by motion in the original case.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 323.*]

3. PATENTS (§ 323*)—INFRINGEMENT—JUDGMENT—MISSTATEMENT OF DECISION—RELIEF.

Where complainants, after obtaining a decree in a suit for patent infringement, misstated the contents of the decree in part in their subsequent advertising, but there was no indication that they acted in conscious bad faith, defendant was entitled to an order requiring complainants to desist from such misstatements on pain of a stay of further proceedings under the decree, and, if necessary, that the decree be recalled.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 323.*]

Suit by Asbestos Shingle, Slate & Sheathing Company and another against H. W. Johns-Manville Company for infringement of patent. Decree was rendered in favor of complainants (184 Fed. 620), and defendant, claiming that complainants had made an improper use of such decision, applied to punish complainants for contempt. Decree for defendant.

See, also, 189 Fed. 608.

Clifton V. Edwards, for complainants.

A. Parker-Smith, for defendant.

HAND, District Judge. [1] The first question is of power. The court certainly had power at common law to punish as for a contempt a misstatement of the effect of its own decision. That power was, however, in my judgment, taken away from federal judges by section 725 of the Revised Statutes (U. S. Comp. St. 1901, p. 583), because it is within none of the exceptions contained in the proviso. It is true that Judge Phillips in *Gorham Mfg. Co. v. Emery-Bird-Thayer Dry Goods Co.* (C. C.) 92 Fed. 774, 779, mentioned misconduct of this character as a common-law contempt, but he made no decision in regard to it, and his words were clearly not meant as a determination that the court could punish such conduct. That being the situation, may a court make an order in the suit forbidding a party's misusing its decree, and, if the party continue to misuse it, punish him for disobedience, although it could not directly punish him in the first instance as for a contempt?

[2] The misuse of a decree of the court in so far as it constitutes an offense against the dignity of the court certainly would not come

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

within its power to punish, but this is a case where one party claims to be suffering damage from the acts of another. Even if it be a contempt, it is also a civil wrong, and it would surely be an absurdity that it should not carry a remedy in some tribunal and by some procedure. May a party, therefore, apply in the main suit either on motion, or by petition, or must he bring a plenary suit? Or may the defendant apply by cross-bill? If the proceeding were in the nature of a contempt there would be no difficulty, since it is then regarded as a part of the suit itself, but this is not, and cannot be, a punishable contempt. The relief has been granted by either motion or petition in several cases, *Barnum v. Goodrich*, Fed. Cas. No. 1,036, *Birdsell v. Hagerstown Mfg. Co.*, 1 Hughes, 64, Fed. Cas. No. 1,437, *Ide v. Ball Engine Co. (C. C.)* 31 Fed. 901, and *Nat. Cash Register Co. v. Boston Cash Indicator, etc., Co. (C. C.)* 41 Fed. 51. In the last case Judge Colt mentions two other unreported cases of the same kind, one by Judge Blodgett of Illinois and one by Judge Nelson of Massachusetts. It is probably true today that all these cases were wrongly decided in view of *Birdsell v. Shaliol*, 112 U. S. 485, 5 Sup. Ct. 244, 28 L. Ed. 768. In each case the suit was against the manufacturer, or at least he had become a party thereto, and the cases all proceed upon the theory that if he were solvent the accounting for damages and profits which the complainant would obtain would act as a license to all users who had bought of the manufacturer. It was an easy thing for the courts while the law was supposed to be such, to direct the complainant not to interfere with any users who had bought of the defendant, but as soon as the law was settled to the contrary in *Birdsell v. Shaliol* supra, Mr. Justice Brown, then District Judge, in *Kelley v. Ypsilanti Dress Stay Co. (C. C.)* 44 Fed. 19, 10 L. R. A. 686, and Judge Lacombe in *N. Y. Filter Co. v. Schwarzwaldner (C. C.)* 58 Fed. 577, each declined to make such an order, when it did not appear that the complainant was acting in bad faith. Indeed, it is clear that unless the defendant did so act, it would be unjust to prevent him from advising users of his rights, and indeed, in a proper case from beginning suits against them, so as to toll the statute of limitations. Neither of these latter cases, however, questioned that it was proper procedure to make the application in the suit itself. The point seems to have been raised in *Ide v. Ball Engine Co.*, supra, before Allen, J., and it was overruled, and Judge Dyer in *Allis v. Stowell (C. C.)* 16 Fed. 783, 789, said that in a proper case he should not hesitate to follow the practice. Therefore, their authority on the point of pleading is not impaired by the fact that the disposition upon the merits was wrong. It is true that Judge Jenkins in *International Tooth Crown Co. v. Carmichael (C. C.)* 44 Fed. 350, declined leave to file a cross-bill on the ground that it was not proper subject-matter for a cross-bill, and he clearly would not have allowed the same relief by motion or petition, so that his authority must be taken as against any such relief except by plenary suit. This, however, may be accounted for by Mr. Justice Blatchford's reasoning in *Rumford Chemical Works v. Hecker*, 5 O. G. 644, Fed. Cas. No. 12,132, while he was circuit judge. There he declined to order a complainant not

to prosecute other infringers, but indicated that he might stay the accounting which was already in process of being taken, if the complainant persisted in inequitable courses. He thought, as it seems to me quite rightly, that the complainant by bringing suit subjected himself to the jurisdiction of the court only in respect of matters germane to the suit itself. That is of course also the rule as to cross-bills. Moreover, that explains the orders in cases prior to *Birdsell v. Shaliol*, supra, since they were cases in which the complainant was trying to pursue what was then thought to be the same remedy in two courts simultaneously. It does not appear that the sanction imposed in any of them was more than control over the original suit, though perhaps it is fair to suppose that those orders would have been enforced by attachment.

There are a number of other cases, in which an application was considered upon the merits without any indication that the procedure was wrong. *Tuttle v. Matthews* (C. C.) 28 Fed. 98; *Computing Scale Co. v. National Computing Scale Co.* (C. C.) 79 Fed. 862; *Warren Featherbone Co. v. Landauer* (C. C.) 151 Fed. 130. No one of these cases is of much authority under the circumstances, as in each the case went off from the point of procedure, but it is perhaps a little strange that in one of them was the point of practice raised, if the practice was not accepted by the bar as proper. However, in *Commercial Acetylene Co. v. Avery Portable Lighting Co.* (C. C.) 152 Fed. 642, Judge Quarles considered an application upon the merits at length, and although he did not grant an injunction, he said that a new application could be made if the complainant continued to memorialize the trade. There is no indication of what the sanction was to be. Finally in *Mitchell v. International Tailoring Co.* (C. C.) 169 Fed. 145, Judge Ward denied such an application on the merits, the only doubt which he indicated as to procedure being whether the proceeding should not be by cross-bill, though he in no sense indicated his opinion that it should. Indeed it would seem as though the proceeding could certainly not be by cross-bill unless the matter were germane, which Mr. Justice Blatchford held it was not. Moreover, the decree upon cross-bill would ordinarily be a final decree, which, after term passed, could not be enforced by further control of the litigation itself, but would bear directly upon the complainant personally by attachment, thus making it jurisdictionally necessary to determine that the cross-bill was germane. However that question may be decided when it comes up, it is not up here because no cross-bill can be filed after publication passed, unless the hearing be upon the depositions already taken, *Field v. Schieffelin*, 7 Johns. Ch. (N. Y.) 250, *Gouverneur v. Elmendorf*, 4 Johns. Ch. (N. Y.) 357. Here the defendant's very grievance rose after interlocutory decree entered, and it would be impossible to proceed by cross-bill. I have no doubt of the court's power at least to control the complainant's use of the decree to the extent of staying further proceedings and perhaps of reopening the decree itself.

[3] The question next arises upon the merits. There is no indication in the case that the complainant has acted in conscious bad faith,

yet at the same time it is quite clear that in order to protect its supposed rights under the patent it has in fact misstated the contents of the decree in part. None of the cases, whether the application was in the original suit or by plenary bill, seem to raise the precise facts here at bar, but I take it there can be no question that a trade injury is actionable when it arises from actual misstatements. Judge Blodgett's opinion in *Emack v. Kane* (C. C.) 34 Fed. 46, which has been much cited and the decision of the Circuit Court of Appeals of this circuit in *Adriance Platt & Co. v. National Harrow Co.*, 121 Fed. 827, 58 C. C. A. 163, were both weaker cases for the aggrieved party than this; indeed, in the latter case, Judge Coxe, who had dismissed the bill, mentions the fact that there was no false statement of fact in any of the circulars. I think there can be no reasonable dispute of the rule that any false statement of the contents of the decree would require some action. There is room for some nicety of distinction in the order for two reasons: First, because the decree was much narrower than the relief demanded, and only protected the complainant against cement shingles made on a paper-making machine; and, second, because of the yet undecided dispute between the parties upon the shingles being made by Norton and sold by them. Moreover, cement shingles are constantly made by other processes than that protected by the decree. In view of all these facts I think the complainant should say expressly what are the limits of his rights as fixed by the decree. I will not ask him not to claim that his patent covers the defendant's shingles, for I do not think he is obliged to take the defendant's word for the fact that it sells no shingles made on a paper machine, and, besides, that is outside the scope of this suit altogether, but if he advertises the decree in connection with shingles he must make it clear that the only shingles which it purports to protect are those made on a paper-making machine. As I said, the complainant has undoubtedly stated some things which are not absolutely true; thus, in the circular letter of December 29, 1910, he said that the court had held that the circulars were infringed by asbestos shingles. I think the defendant is correct in insisting that there were no shingles put in evidence. Again the letter of January 9, 1911, although written only by an employé and probably without warrant, was clearly false, as was the statement which appeared in the *Ambler Gazette*. All these things must be forbidden, and while I cannot of course undertake to pass on all the literature of the parties, especially in view of the acrimoniousness which has apparently arisen, I have prepared and enter herewith an order setting forth the limits which I think should be imposed upon the complainant in his advertisements, and which I trust will avoid further constant recourse to the court.

The order will not contain any provision for its enforcement, but if the complainant disobey its terms, the defendant may apply for a stay of any proceedings under the interlocutory decree, and if necessary that the decree may be recalled. It is not necessary to decide here whether any attachment could issue if these sanctions prove insufficient. I mean only to decide now that, if a complainant misuses

the decree of the court, the court may so modify that decree as justice requires to control such misuse. What might be the case after expiration of the term in which final decree was entered need not be considered.

RIGBY v. FERRARY BROS. CO.

(Circuit Court, D. New Jersey. June 5, 1911.)

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—KNUCKLE JOINT.

The Crutchlow patent, No. 625,150, for a knuckle joint, adapted for use on jacquard machines, was not anticipated, and discloses patentable invention, and the device is useful and meritorious. Also *held* infringed.

In Equity. Suit by Holden Rigby against the Ferrary Bros. Company. On final hearing. Decree for complainant.

Edward Q. Keasby, for complainant.

John W. Steward, for defendant.

CROSS, District Judge. This is a bill in equity in the usual form and asking for the usual relief in patent cases. The particular patent involved is No. 625,150, issued May 16, 1899, to one William Crutchlow, assignor to the complainant. It is for an alleged new and useful improvement in knuckles for jacquard machines, for which it seems to have been more especially designed and intended, although it is in form a universal joint. It contains four claims, all of which are alleged to have been infringed by the defendant's device, which follows another patent issued on November 27, 1906, to said Crutchlow, which is also for a knuckle joint adapted for use on jacquard machines. The claims are as follows:

(1) "In a knuckle-joint, the combination of two substantially similar members, said members being disposed in intersecting planes and each comprising a pair of spaced sections, a third connecting member having its extremities pivotally arranged between the sections of each pair, and a bearing situated between said sections and upon which each extremity of said connecting member is pivoted, said bearing being of greater thickness than that of said extremity, substantially as described."

(2) "In a knuckle-joint, the combination of two substantially similar members, said members being disposed in intersecting planes and each comprising a pair of spaced and integrally-connected circular sections, a third connecting member comprising integrally-connected disks pivotally arranged between the sections of each pair, a circular bearing upon which each disk is pivoted, said bearing being of greater thickness than said disk, and a bolt penetrating said sections of each member and its circular bearing, substantially as described."

(3) "A flexible connection between a lever of a jacquard-machine and a crank for operating said lever, consisting of a connecting-rod adjustably and operatively connected to said crank and a knuckle-joint consisting of two members, one of said members being adapted to be adjustably connected to said lever and the other of said members being adjustably secured to said connecting-rod, and each comprising a pair of spaced and integrally-connected circular sections, a third connecting member comprising integrally-connected disks pivotally arranged between the sections of each pair, a circular bearing situated between said bearing and upon which each disk is pivoted, said bearing being of greater thickness than that of said disk, and a bolt penetrat-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ing said sections of each member and its circular bearing, substantially as described."

(4) "The combination with an operating-lever for a jacquard-machine and with a crank for operating said lever, of a pitman pivotally connected to said crank, a connecting-rod adjustably connected to said pitman and a knuckle-joint consisting of two members, one of said members being adjustably connected to said lever and the other of said members being adjustably secured to said connecting-rod, and each of said members comprising a pair of spaced and integrally-connected circular sections, a third connecting member comprising integrally-connected disks pivotally arranged between the sections of each pair, a circular bearing upon which each disk is pivoted, said bearing being of greater thickness than said disk, and a bolt penetrating said sections of each member and its circular bearing, substantially as described."

The invention, although simple, is obviously effective and has proved to be of commercial value. It is sufficiently described by the complainant's expert as follows:

"The invention consists in the improved flexible connection and in the combination or arrangement of the various parts thereof with the actuating levers of a jacquard machine, and their operating cranks. It consists of a knuckle joint consisting of two substantially similar members, said members being disposed in intersecting planes and each comprising a pair of spaced sections, a third connecting member having its extremities pivotally arranged between the sections of each pair, and a bearing situated between said sections, and upon which each extremity of said connecting member is pivoted, said bearing being of greater thickness than that of said extremity, and a bolt penetrating said sections of each member and its circular bearings, and has for its object to obviate the wear and pounding on the length of connection. The flexible connection is usually mounted between the lever of the jacquard machine and the crank which operates the same."

As already intimated, the invention, which is for a combination, is not broad, but at the same time, upon careful examination it does not seem to have been anticipated by the prior art. Some of its elements were old, but the knuckle as a whole was not. In my judgment, it shows a clear and patentable advance upon the prior art. No protracted discussion of that art will therefore be attempted. The Little patent No. 206,184 will not do, and was not intended to do, what the patent in suit not only does, but does well. Moreover, Little's device is in no sense like the patent in suit. It was expressly intended for revolving one shaft by means of another at right angles thereto. It was not designed or fitted for a loom, nor does it have enlarged or fixed bearings, nor could it, with propriety, be called a knuckle joint.

Cooper No. 256,293, 1882, is not in the same art. It was intended, according to the specification, as an improvement:

"In those pins which are employed for attaching a connecting-rod or similar moving part of an engine or machine with the adjacent part which imparts motion to the connecting-rod, or to which motion is imparted by the connecting-rod, as the case may be, such, for instance, as the pins whereby the connecting-rod of a steam-engine is connected with the cross-head thereof, or the pins which are employed for connecting together the parts of a parallel rod of a locomotive having three driving-axes. In these pins, the greatest and often the only appreciable wear occurs in the direction in which the connecting-rod exerts its thrust against the pin, which latter, by reason of this wear gradually becomes flattened to a greater or less degree, and per-

mits the eye of the connecting-rod to play on the pin in the direction of the thrust, which occasions a thumping of the parts and often results in breaking the pin.

"The object of my invention is to avoid this difficulty; and it consists of the peculiar construction of the connecting parts, whereby the wearing surfaces which come in contact with the eye of the connecting-rod in the line of thrust can be changed at will."

From the above extract it is obvious that Cooper's invention consisted in a device for changing at will the wearing surface of the bearing in the connecting-rod of an engine. There is nothing in that patent, unless the language describing its operation and function, be forced, which at all suggests, much less describes, the invention of the patent in suit.

The Miller patent, No. 279,415, 1883, is for a universal joint and the patentee undoubtedly had in mind the idea of providing enlarged wearing surfaces, indeed, he expressly says so, but his structure is essentially different. He provides the ends of each of the forks with sockets for securing the enlarged swivel block or cross-head. The bolt which penetrates and secures the cross-head between the jaws is not made tight so as to form an immovable bearing fixedly connected with the jaws. If the bolt were thus tightened, all motion would be lost. In other words, in this patent the bearings are recessed sockets on the ends of the jaws which are engaged by the suitably formed ends of the cross-head, so that the bearings are not in any sense between the jaws or forks. Moreover, there is nothing in it which shows that it could be adapted to a jacquard loom. Again, not only is its function different, but its construction and operation are different. Even the defendant's expert is unable to find in it the circular bearing of the patent in suit, contained and held in place by a bolt between the jaws of the upper and lower member. Not one of the patents above mentioned can therefore be regarded as an anticipation of the patent in suit, and an examination of its file-wrapper, which is in evidence, shows that none of them was so regarded by the patent examiner. Furthermore, so far as appears, they are merely paper patents. The complainant's device on the contrary, has not only received the seal of the Patent Office, but has proved itself to be useful and meritorious.

The remaining question for consideration is that of infringement. The defendant is manufacturing, as above stated, under a subsequent patent issued to said Crutchlow. I regard this patent as at the most but an improvement upon his earlier patent, the one in suit. It is true that it varies somewhat in its construction and more particularly in this, that its circular bearing consists of a hollow tube extending substantially through the entire knuckle. This hollow-tubed bearing has caps over its ends having holes in them, through which, and the hollow bearing, a rod extends which is threaded at its ends, and on which nuts are secured to tighten and hold the structure together. The defendant contends that the knuckle of the patent in suit is restricted to a circular bearing located entirely between two sections or jaws of the forked members. It should be noticed, in passing, however, that two of the claims in suit are not thus re-

stricted, but aside from that, the defendant's bearing is within the sections or jaws within the meaning of the claims, and that it extends beyond the jaws does not materially alter the fact. Such part thereof as is beyond or outside of the jaws is not a bearing, does not perform the function of a bearing, and is such only in name. The bearing is in either device between the jaws. Again, the defendant's device, like the patent in suit, has a bolt penetrating the sections of each member, and also the circular bearing, which bolt is capable of performing, and does perform, the same function substantially as that of the patent in suit. Both bolts clamp the structure together. But the defendant urges that its bolt is not subjected to any strain; if that were admitted, which it is not, still it is likewise true of the complainant's bolt that it may, or may not bear any strain, thus, in his specification the patentee says:

"In order to produce as much freedom of movement as possible, the circular bearings *w w*' are made slightly thicker than the disks. Furthermore, when the bearings are properly bolted together, so that the circular bearings are tightly secured between the disks, no movement will be permitted between said bearings and the bolt, and consequently the strain and wear which would otherwise be borne by the bolt alone is practically taken up by the circular bearings and the disks. The bolt may also share in bearing the strain; but if the parts are clamped together tight enough to prevent any turning of the bearing on the bolt, there will be no wear upon the latter."

The defendant also uses his hollow bearing for containing and distributing a lubricant. This idea may be inventive and may constitute an improvement upon the patent in suit, but that does not prove that it does not infringe the latter, or afford any reason why it should not pay tribute to it, since apart from its lubricating feature, the hollow tube performs the function of the circular bearing of complainant's patent in substantially the same way. There is no essential difference between the two devices; the defendant's knuckle merely substitutes and uses mechanical equivalents for those of the patent in suit.

The complainant is entitled to a decree pursuant to the prayer of his bill, with costs:

UTICA DROP FORGE & TOOL CO. v. IRVINGTON MFG. CO.

(Circuit Court, D. New Jersey. May 15, 1911.)

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—PLIERS.

The White patent, No. 794,064, for a pliers, adapted for use in building and repairing wire fences, was not anticipated, and is valid, although the claims must be narrowly construed in view of the prior art. Also held infringed.

In Equity. Suit by Utica Drop Forge & Tool Company against the Irvington Manufacturing Company. On final hearing. Decree for complainant.

Martin & Jones, for complainant.

George L. Wheelock and Emerson R. Newell, for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

CROSS, District Judge. In this case the bill of complaint charges the defendant with infringement of patent No. 794,064, issued July 4, 1905, to one Hubert L. White, and duly assigned by him to the complainant. The patent is for an improvement in pliers, adapted for use in building and repairing wire fences. The only real question in the case is the validity of the complainant's patent, if that be sustained infringement must be found, since the defendant's device is exactly like the commercial form of the complainant's. In respect of infringement there is, however, one matter which should be alluded to. It appears that 12 or 13 years prior to April, 1909, the complainant had, as its selling agents, in New York City, a corporation known as the Smith & Hemenway Company; that at that time one Landon P. Smith was the president of the company; that on the 1st of April above mentioned the relationship between that company and the complainant ceased; that subsequently and during the summer or fall of 1909 the defendant placed its infringing device upon the market, of which the Smith & Hemenway Company were the selling agents. It also appears that the same Smith who was president of that company is the vice president of the defendant company, and as such verified the answer for it in this suit. These facts should tend to cause a court of equity to be especially careful to protect whatever rights, if any, the complainant may have in the premises.

The patent in suit has three claims as follows:

1. "The combination in a pliers of a pair of similar jaws having transverse broad ends and points or projections, 3, 3, of outer corners of the jaws, and, 5, in the middle of the end, and outwardly standing from a direct line between points, 3, 3, substantially as set forth."
2. "The combination in a pliers of jaws, each having broad ends, and a central rib on said ends, and each having the projecting points, 3, 3, at the corners, and, 5, on the rib, substantially as set forth."
3. "In a pliers, the combination of opposing jaws, each having three projecting ribs, forming fulcrums, and having opposing holding-points on the meeting ends of the ribs projecting beyond the faces of the respective jaws, substantially as set forth."

The device itself is simple, and does not show any great advance over the prior art; it nevertheless is effective, and has met with a very large sale. Thus we find that the complainant's sale of pliers made under the patent in suit for the year 1906, amounted to 62,063; for the year 1907, to 51,591; for the months from March to December, inclusive, in 1908, to 39,466; for the year 1909, 33,044; and for 1910, from January to August, inclusive, 19,792. The improvement in the pliers of the White patent relates to the construction upon the meeting portion of the jaw of projecting points or teeth, adapted to be used in extracting fence wire staples from fence posts. The patent calls for such points at each of the outer corners of the jaws and also in the center thereof; that is to say, each of the jaws of the pliers has on it three points with more or less extended grasping surface, which are adapted to register with each other when the jaws are closed. Another feature of the patent is that the jaws are rounded or crowning, or, adopting the language of the specification, "the jaws are made comparatively broad transversely as shown particularly in the end view in figure 3, and are made rounded or crowning as shown in this and

other figures." At another place in his specification, the patentee says that "on the broad face end of the jaw, there is provided a raised, or projecting surface or rib, 4." From these expressions it is manifest that while he contemplated what might be called, and what he did call, a rib, he also considered that that rib might consist merely of a raised or projecting surface having its apex at the center of the face of the "rounded or crowning" portion of the jaws. The defendant insists, however, that in view of the prior art the complainant at the best can only claim novelty for its device in case there is a rib actually constructed and outstanding on the broad face of the tool, on which rib the center tooth must be located. All other features of the patent are claimed to have been anticipated by the prior art. Before dealing with that question, it should be noted that all of the claims are for a combination, hence, while, taken singly, all of the elements of the combination may be old, the combination itself may be new. The patents mainly relied upon to show anticipation will now be considered. The Russell patent, No. 545,537, is owned by the complainant, which manufactured and sold under it large numbers of tools prior to the issue of the patent in suit. The Russell patent was not cited by the patent examiner as an anticipation, as it manifestly is not, although it has teeth at the outer corners of the jaws like those of the patent in suit. The center portion of its jaws where they register, however, is quite like that of an ordinary pair of pinchers, and is not adapted to, and could not be used to enter the eye or loop of a fence staple, for the purpose of drawing it. It cannot therefore, perform the function which the center tooth of the patent in suit performs. White is manifestly an improvement upon Russell. The Davis patent, No. 541,076, shows a tool with cutting jaws, having a single staple pulling tooth, located upon one side of the jaws. It does not have the centrally located staple-pulling teeth outstanding from the side teeth. The Musgrave patent, No. 561,337, shows a single center tooth, and apparently has small side teeth. The face of the jaws, however, is flat transversely, and the center tooth does not stand outwardly from a direct line between the side teeth. Musgrave, in other words, does not show a center pair of staple engaging teeth located as required by the patent in suit. A simple glance at the drawings of these patents, shows distinctive differences. The Krutsch patent, No. 600,082, also shows staple-pulling teeth, but the face of the jaws is shown to be flat transversely, and it contains nothing which corresponds to the outwardly standing central grasping teeth of the patent in suit. The Krutsch patent is more like the Russell patent than the White patent. The Cottrell patent No. 724,669, has central staple-pulling points or teeth, but does not have the corner teeth. The specification described the points which the defendant's expert claims are corner teeth, as the plier portion of the jaws, and it is denominated in the specification of the patent as a flat portion adapted for use as pliers for pulling wire taut. The teeth, if they can be called teeth, shown at the corners of the jaws in the Cottrell patent, are not the equivalents of the grasping teeth of the patent in suit, and the same may be said of what is called the Sayre tool, which was offered in evidence. It has the center

teeth of the patent in suit, but no side-grasping teeth, or teeth designed for, or capable of performing the function of the side teeth of the White patent. Material alterations would have to be made in it before it could fully perform the function of the patent in suit.

These are all of the patents which seem to require consideration. It must be acknowledged that some of them closely approximate the patent in suit. The art previously to the White patent, had been quite fully developed, but among all of the devices referred to, I find no one which embraces the combination of the patent in suit, which is manifestly superior to them all. The combination pliers made under the White patent, advanced the art quite as much as did any of its patented predecessors, concerning which, apart from Russell, it may be added that it does not appear whether they were or were not successful. I have reached the conclusion that the patent in suit is valid, notwithstanding I had a different impression at the argument. The combination tool of the White patent seems well nigh perfect. The teeth are strong, sufficient in number, are properly and carefully disposed, and so arranged as to grasp and pull any fence staple. The specification shows the working of the combination. The claims, it is true, must be narrowly construed, but even at that the defendant has infringed them, and in view of the fact that the patent is of great commercial use and value, it is entitled to, and should be given, the presumption of validity which attaches to its issue.

The prayer of the complainant's bill will be granted, with costs.

ROYDEN MARBLE MACHINERY CO. v. DAVIS.

(Circuit Court, E. D. Pennsylvania. May 19, 1911.)

No. 53.

PATENTS (§ 328*)—NOVELTY—MACHINE AND PROCESS FOR CUTTING STONE.

The Pierce patents, No. 876,087, for a stone cutting apparatus, consisting essentially of a cutting wheel of agglomerated carborundum, of dished shape, and No. 914,303, for a process of dividing marble slabs by means of a similar wheel, are both void for lack of patentable novelty in view of the prior art.

In Equity. Suit by the Royden Marble Machinery Company against Frank L. Davis. On final hearing. Decree for defendant.

D. Anthony Usina, for complainant.

Edward S. Beach, Clarence D. Kerr, and Walter C. Flanders, for defendant.

J. B. McPHERSON, District Judge. This litigation concerns two patents issued to John Royden Pierce—a machine patent, No. 876,087, granted in January, 1908, on an application filed May 17, 1905, and a process patent, No. 914,303, granted March 2, 1909, on an application filed June 13, 1907. This suit was brought in April, 1908, and was originally based on No. 876,087 and on No. 858,466, but the latter

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

patent was afterwards withdrawn, and No. 914,303 was added by supplemental bill. The earlier of the patents now in dispute refers to the use of carborundum wheels in the art of cutting stone, especially (as the specification says) "the cutting of marble or similar hard stone"; and the process patent is definitely restricted to the "coping" of marble slabs, by which is meant the dividing of comparatively thin slabs into pieces of smaller area. The first four claims of the machine patent, which will be called the dished-wheel patent, are those relied upon. They are essentially alike, and present for consideration a specially constructed wheel:

"1. A stone-cutting apparatus including a cutting wheel molded integrally from center to periphery of agglomerated carborundum, and having its periphery of greater thickness than its sides.

"2. A stone-cutting apparatus including a cutting wheel, A, molded integrally from center to periphery of agglomerated carborundum, having a peripheral face, D, and side faces, E, tapering from the peripheral face to the central portion.

"3. A stone-cutting apparatus including a cutting wheel, A, molded integrally from center to periphery of agglomerated carborundum, having a peripheral face, D, a flat-sided central portion F, and side faces E tapering from the peripheral face to the central portion.

"4. A stone-cutting apparatus including a cutting wheel molded integrally from center to periphery of agglomerated carborundum, and having its periphery of greater thickness than its sides, in combination with means for directing jets of water upon the edges of the periphery."

The characteristics of this wheel are these: (a) The material of the wheel is partly carborundum and partly any agglomerating material to hold the particles of carborundum in place; (b) the wheel is a molded integral whole; (c) it is dished—that is, its periphery is thicker than its sides.

The process patent contains six claims; the first three are as follows:

"1. The process of dividing a marble slab, which consists in cutting through it with a wheel of carborundum rotating rapidly with slight pressure, said wheel having a diameter of approximately twelve inches, and being agglomerated with such a firm vitrified bond that the sharp particles cut like fixed teeth, and the bond being so hard and strong that notwithstanding the thinness of the wheel it cannot be substantially deflected by the oblique irregularities of the marble while operating with a rapid feed, said wheel being approximately five-sixteenths of an inch thick at its edge and having its side faces dished.

"2. The process of dividing a marble slab, which consists in cutting through it with a rapidly rotating wheel of carborundum, said wheel having a maximum thickness of not more than approximately half an inch and being agglomerated with such a firm bond that the sharp particles cut like fixed teeth, and the bond being so hard and strong that notwithstanding the thinness of the wheel it cannot be substantially deflected by the oblique irregularities of the marble while operating with a rapid feed.

"3. The process of dividing a marble slab, which consists in cutting through it with a rapidly revolving thin wheel composed of carborundum agglomerated with such a firm bond that the sharp particles cut like fixed teeth, and the bond being so hard and strong that the wheel notwithstanding its thinness, cannot be substantially deflected by the oblique irregularities of the marble while operating with a rapid feed."

In all these claims the bond must be firm, or hard and strong (one claim calls for it as vitrified), so that the sharp particles of the carbo-

rundum shall cut like fixed teeth, and so that the wheel shall not be substantially deflected by the oblique irregularities of the marble while the cutting proceeds with a rapid feed. The wheel also must be thin—approximately one-half inch—although it may be more or less within the limits of thinness; and its diameter may be approximately 12 inches, or of any other length greater or less within the limits referred to in the specification. And the wheel must rotate or revolve rapidly, although the pressure between the wheel and the slab may be either slight, or of any other degree. The remaining claims explain how the process is to be carried out:

"4. An apparatus for dividing a marble slab, including a wheel composed of carborundum, and means for rotating it rapidly with slight pressure and for moving it through the slab, said wheel having a diameter of approximately twelve inches, and being agglomerated with such a firm vitrified bond that the sharp particles cut like fixed teeth, and the bond being so hard and strong that the wheel, notwithstanding its thinness, cannot be substantially deflected by the oblique irregularities of the marble while operating with a rapid feed, said wheel being approximately five sixteenths of an inch thick at its edge and having its side faces dished.

"5. An apparatus for dividing a marble slab, including a wheel composed of carborundum, and means for rotating it rapidly and for moving it through the slab, said wheel having a maximum thickness of approximately half an inch, and being agglomerated with such a firm bond that the sharp particles cut like fixed teeth, the bond being so hard and strong that notwithstanding the thinness of the wheel, it cannot be substantially deflected by the oblique irregularities of the marble while operating with a rapid feed.

"6. An apparatus for dividing a marble slab, including a thin wheel composed of carborundum, and means for rotating it rapidly and for moving it through the slab, the carborundum being agglomerated with such a firm bond that the sharp particles cut like fixed teeth, the bond being so hard and strong that the wheel, notwithstanding its thinness, cannot be substantially deflected by the oblique irregularities of the marble while rotating with a rapid feed."

As no apparatus or means is specifically described, it is evident that the last three claims are like the first three in laying the essential stress on the wheel. In a word, both patents center about this particular feature, and may be considered together in examining the prior art.

It is clear that the art before Pierce is full of devices for cutting stone, and some are of great antiquity. The use of sand, shot, and other loose abrasives, either by hand or by machinery, is too familiar to need a reference. But in more recent times new substances of great hardness and abrading power have come into common use, and it is with some of these that we are especially concerned. Dr. Acheson's invention of carborundum goes back to the early 90's, and since that date this abradant has been turned to many uses. Wheels for abrading were well known for years before Pierce applied for his patents, and dished wheels were also old in this and in other arts. Moreover, wheels of abrading substances must ordinarily have a bond, and it is obvious that, the harder and firmer the bond, the more durable and effective will be the wheel. It is admitted also that wheels composed of agglomerated carborundum and molded into shape were old and well known. And, as already stated, dished wheels in various arts have been common property for a long time; two reasons in favor of this shape being (1) the diminution of friction and of consequent

loss of power during the operation of the tool, and (2) the diminished likelihood of breaking the tool if it can move more freely in the cut. Even if we lay aside the evidence concerning prior wheels molded integrally of carborundum, it cannot be denied that dished wheels employing other abrading substances, or employing carborundum in part, were well known before the date of these patents, and I cannot admit the validity of the argument which claims a practically fundamental position for these patents in the stone cutting art. In view of the admissions on this subject, I do not think it necessary to discuss the prior art in detail. Apparently, what happened was this: The inventor probably acquired a good deal of his knowledge about the valuable abrading properties of a carborundum wheel by independent investigation and experiment, and supposed he had made a discovery of the first importance, while in fact he was only one among a crowd of inventors who had long been occupied with the problem, and the labors of his predecessors had left little if anything for him. I do not think either patent can be sustained. The earliest date that can be assigned to the practice of the invention is the middle of 1904—probably in July—and before that date the prior art contains patents to Walters, Poole, Maloy, Hyde, Theil, Jackson, Henderson, Hergenbahn, Blanpain & Jaspert, and Offenbacher—to mention no others—which among them contain the essentials of both patents. As it seems to me, the dished wheel patent is certainly not valid, and even if the disclosures of the method patent were more definite than they are, I do not think that patentable novelty in the use of such a wheel has been established.

I may add that it would have been much less difficult to understand this dispute if the rule of the circuit court had been followed, and if both parties had presented clear and definite statements of the essential facts that in their opinion were established by the evidence. Argument is of course essential and always helpful, but it is not a substitute for such statements; they are intended to assist the court by presenting definitely the questions of fact (not the evidence of the facts) upon which the parties may agree or differ. It is not always easy to disentangle the precise points in dispute from a voluminous record with which counsel are much more familiar than the court can be.

A decree may be entered dismissing the bill, with costs.

PERKINS ELECTRIC SWITCH MFG. CO. V. YOST ELECTRIC MFG. CO.

(Circuit Court, N. D. Ohio, W. D. November 1, 1910.)

No. 1,855.

1. PATENTS (§ 322*)—SUIT FOR INFRINGEMENT—ACCOUNTING FOR PROFITS AND DAMAGES.

Where the controversy between the parties to an infringement suit over a certain device of which defendant had made only a small number and had discontinued before suit brought involves no substantial amount

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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in the way of damages or profits an accounting will not be directed although infringement is found.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 590–595; Dec. Dig. § 322.*]

Accounting by infringer for profits, see note to *Brickill v. Mayor, etc., of City of New York*, 50 C. C. A. 8.]

2. PATENTS (§ 325*)—SUIT FOR INFRINGEMENT—DIVISION OF COSTS.

Where a complaint alleged infringement by a number of devices made by defendant, but succeeded as to one only, a division of the costs of the trial court will be made proportionate to the final result.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 607–612; Dec. Dig. § 325.*]

In Equity. Suit by the Perkins Electric Switch Manufacturing Company against the Yost Electric Manufacturing Company. On settlement of decree.

Howson & Howson, for plaintiff.

Owen & Owen, for defendant.

KILLITS, District Judge. The parties are in controversy over the decree to be entered in this court on mandate from the Circuit Court of Appeals. The defendant was found by this court to infringe patents of the complainant for the manufacture and sale of four separate styles of socket for incandescent lamps. On appeal, the Court of Appeals (179 Fed. 511) reversed this court as to three of the four sockets, and the opinion concludes as follows:

"As to the appellant's socket No. 1, before mentioned, these facts appear: The appellant for two or three months at a period of about one year before the bill was filed, made and sold some of these sockets; that they then discontinued the use of that form and adopted the later numbered styles. It does not appear that the appellee was notified of the discontinuance of the infringing style or had any knowledge that it had been discontinued. We cannot say that it had no reason for apprehending that its use would be discontinued, or would not be renewed. In these circumstances, the appellee was entitled to file its bill for an injunction.

"The decree will be reversed in all other respects, with costs of this court to the appellant, but affirmed in respect to appellant's socket No. 1. The controversy over the socket No. 1 is of so small account that the general rule in regard to costs should not be varied."

Two drafts of a decree, following the mandate of the Circuit Court of Appeals, have been submitted to the court by the respective parties. The complainant contends that the decree should provide for an accounting for the infringement in the manufacture and sale of the socket known as Exhibit No. 1, and that only the costs in the Circuit Court of Appeals should be recovered from it. The defendant, on the other hand, insists that, substantially, the action of the Circuit Court of Appeals involved a complete reversal of this court, and that there should be no accounting for its infringement involved in the manufacture of socket Exhibit No. 1, and no recovery of costs from it, and it has prepared a decree consistent with this position.

[1] From an examination of the record, including the testimony,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

it appears to be very plain that there is nothing of a substantial nature involved in the controversy over the socket designated as No. 1, and that the contention between the parties was almost wholly over the structures described in the record as Exhibits 2, 3 and 4, offered as the products of defendant and which the Circuit Court of Appeals held did not infringe any rights of the complainant.

On page 20 of the printed record is a stipulation entered into by counsel for the parties to the effect that "the socket marked 'Complainant's Exhibit Defendant's Socket No. 1,' is one of a small number of sockets made and sold by the defendant in the early part of 1903." And it appears from an examination of the testimony of the experts on both sides that the consideration of this Exhibit No. 1 by them was hardly more than preliminary and introductory to a discussion of what both parties appear to have treated as the most serious controversy, the conflict over the other three structures. Without going more into the detail of this situation, we are of the opinion that this is one of the cases wherein the language of the court in *Merriam Company v. Ogilvie*, 170 Fed. 167, 95 C. C. A. 423, that "an inquiry as to damages or profits would * * * yield no compensatory profits or damages proportionate to the cost of the investigation," describes the situation very clearly, and that, therefore, further litigation on this subject ought not to be indulged in. An order for accounting, will, therefore, be refused.

[2] As will be seen, the Circuit Court of Appeals distinctly holds that the complainant, on the score of this socket No. 1 alone, was entitled to file its bill for injunction, but, inasmuch as the defendant was victorious on the main contention, it would not be equitable to charge to it all the costs made in this court. A division of costs in this court proportionate to the final results of the litigation seems to be the proper course to take.

It is therefore ordered that a decree be prepared refusing an accounting and directing a recovery against the defendant of all costs made up to and including the filing of complainant's bill and the service thereunder, including the suing out of a temporary injunction and the service of the same, and such other costs as may be clearly involved alone in the complainant's vindicating its right to an injunction touching the manufacture and sale of Exhibit No. 1, and that all other costs made in this case be recovered by the defendant against the complainant.

PEIRCE SPECIALTY CO. et al. v. HARVARD ELECTRIC CO.

(Circuit Court, N. D. Illinois, E. D. August 4, 1911.)

No. 29,969.

PATENTS (§ 328*)—INFRINGEMENT—INSULATOR.

The Peirce patent, No. 856,801, for improvements in insulators, consisting of a bracket formed of a metal bar having a slot at the top for the attachment of a sheet metal cone, threaded to receive and hold the insulator, the purpose being to provide an elastic seat for the insulator, *held infringed* by a device differing only in the means of attachment of the cone to the bracket, which difference is merely colorable.

In Equity. Suit by the Peirce Specialty Company and Hubbard & Co. against the Harvard Electric Company. Decree for complainants.

Offield, Towle, Graves & Offield (James R. Offield, of counsel), for complainants.

Cheever & Cox (Howard M. Cox, of counsel), for defendant.

KOHLSAAT, Circuit Judge. Complainants seek to restrain defendant from infringement of the four claims of patent No. 856,801, issued to C. L. Peirce, Jr., June 11, 1907, for improvements in insulators, and for other relief. The claims in suit read as follows, viz.:

"1. In combination with an insulator, a bracket formed of a metal bar provided with a slot in one of its sides, and a sheet metal strip surrounding said bar and having one of its ends secured in said slot, substantially as described.

"2. In combination with an insulator, a bracket formed of a channel bar and provided with slots, a sheet metal strip adapted to substantially surround said bar and provided with ears to enter said slots, and means for securing said strip to said bar, substantially as described.

"3. In combination with an insulator, a bracket formed of a channel bar and provided with slots, an elastic sheet metal strip formed to have a threaded exterior and adapted to surround said bar, and means for retaining said strip within said slots and around said bar, substantially as described.

"4. In combination with an insulator, a bracket formed on its end and provided with slots, and a spring metal strip formed to have a threaded exterior and provided with ears entering said slots and retained therein by swaging over said ears on said bar, substantially as described."

Defendant has taken no evidence and relies upon the defense of noninfringement appearing upon the record as presented by complainants.

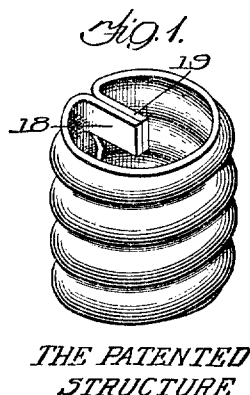
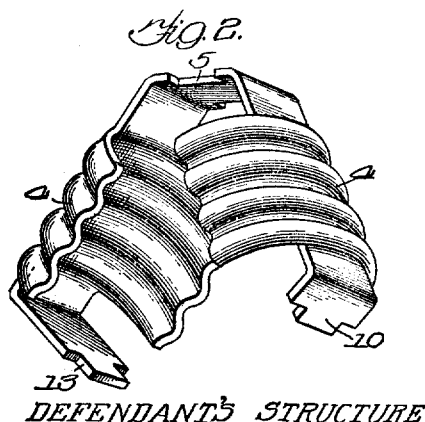
As the record now stands, it is assumed by the court that the patent is valid for what its claims import. The only prior art disclosed in the record consists of insulator supports comprising a rigid bracket having either a wooden or solid metal pin in combination with a glass insulator. These are not satisfactory, owing in part to the expanding and contracting properties of glass as affected by heat and cold and unavoidable vibration. The patentee says (line 18, column 1, page 1):

"In my construction I overcome these results by the combination of a bracket, preferably made of a channel bar or strip, and a spring metal strip provided with a screw-threaded exterior surrounding and secured to the bracket, the holding means for the strip being accomplished by providing

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ears thereon, slotting the end of the bar, inserting the ear in the slot, when the strip is set in position, and then swaging over the end of the bar to firmly clamp the ears therein. This construction not only serves as a holding means, but also gives a taper to the strip, as the bar is made somewhat narrower at its upper end by the formation of the slot."

It is the theme and gist of the patent that the glass or other insulator shall be mounted upon an elastic peg or cone, which shall respond to variations in the insulator and which shall in turn be mounted upon a rigid bracket or arm. It is the elastic support of the insulator which dominates the invention. Defendant has appropriated every feature of the patent, except the means for attaching the spring metal strip or envelope to the bracket, as will appear from the following drawings presented by defendant:



While there is, perhaps, no presumption that the patent in suit is basic and entitled to a broad construction, it would be unjustifiable to hold the claims down to the details of attachment to the bracket. The invention is, as stated in the specification, to provide an elastic seat for the insulator. The claims are unnecessarily explicit in respect to the means used for securing the spring-seat to the bracket; but, even so, we are left in no doubt as to what the invention was.

The differences between the two devices are merely colorable, and consist in the substitution of one well-known equivalent for another, and therefore do not avoid infringement. *Westinghouse Electrical & Mfg. Co. v. Condit Electrical Mfg. Co.* (C. C.) 159 Fed. 144; *Devlin v. Paynter*, 64 Fed. 398, 12 C. C. A. 188; *Lamson Consol. Store Service Co. v. Hillman*, 123 Fed. 416, 59 C. C. A. 510.

It follows that defendant's device is an infringement of the patent in suit. The prayer of the bill is therefore granted.

BEEKMAN SANITARY SPECIALTY CO. v. BERNZ.

(Circuit Court, D. New Jersey. May 23, 1911.)

PATENTS (§ 328*)—ANTICIPATION—DEVICE FOR TESTING PIPING SYSTEM.

The Heiland patent, No. 903,973, for a device for testing plumbing and pipes, claim 2, is void for anticipation by the Lutz patent, No. 382,172.

In Equity. Suit by the Beekman Sanitary Specialty Company against Otto Bernz. On final hearing. Decree for defendant.

Lewis J. Doolittle, for complainant.

Russell M. Everett, for defendant.

BRADFORD, District Judge. The Beekman Sanitary Specialty Company has filed its bill against Otto Bernz charging infringement of United States patent No. 903,973, and praying for an injunction and account. The patent in suit is dated November 17, 1908, and was granted to George W. Heiland for alleged "Improvements in Devices for Testing Plumbing and Pipes," and was subsequently assigned to and is now held and owned by the complainant. It contains six claims, of which claim 2 only is in issue. That claim is as follows:

"2. In a device for testing a piping system, the combination of a reservoir adapted to contain mercury, a tube connected to said reservoir, a nipple detachably connected to said reservoir and extending from the upper part thereof to a point near the bottom of the same, said nipple having a bore forming a continuation of the bore of said tube and adapted to permit the mercury to ascend into said tube, a nipple detachably connected to said reservoir and extending from the bottom to a point near the top of the same and adapted to permit the introduction of an air pressure into said reservoir to force the mercury up into said tube."

The elements of the above combination are:

1. A reservoir adapted to contain mercury.
2. A tube connected to such reservoir.
3. A nipple detachably connected to said reservoir and extending from the upper part thereof to a point near the bottom of the same, said nipple having a bore forming a continuation of the bore of said tube and adapted to permit the mercury to ascend into said tube.
4. A nipple detachably connected to said reservoir and extending from the bottom to a point near the top of the same and adapted to permit the introduction of an air pressure into said reservoir to force the mercury up into said tube.

The alleged infringing device beyond all doubt contains the first, second and third elements of the above combination. Whether it contains the fourth or its equivalent under a legitimate application of the law of equivalents may not be altogether clear. It is doubtful if the nipple in the defendant's device extending from the bottom to a point near the top of the mercury reservoir is "detachably connected to said reservoir" in the sense in which those words are employed in claim 2. On this subject the complainant's expert testified:

"XQ. 25. Do you find the nipples in defendant's device to be detachable?
A. Yes. The downward extending nipple is unquestionably detachable. It

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

is not only detachable but readily removable. The upward extending nipple has all the appearance of being detachable. * * * Q. 26. Kindly detach the lower nipple in defendant's device. A. Having no suitable implements at my disposal, I cannot comply with your request. XQ. 27. What instruments would you need? A. While not claiming to be a mechanic, I would suggest a cutting tool with which to form a slot in the lower end of the screw plug, so that a screw driver could be used to unscrew and remove the plug. I would then suggest a tool adapted to enter the open top of the reservoir provided with a head or offset to rest upon the top of the nipple, to enable blows to be transmitted from a hammer or the like to the nipple, to force the same downward through the opening in which it is seated."

But having reached the conclusion that claim 2 is invalid by reason of anticipation by U. S. patent No. 382,172, to Lutz, dated May 1, 1888, and of the prior art, it is not necessary to express an opinion on the question of infringement. The bill must be dismissed with costs.

SCHMEISER MFG. CO. v. LILLY et al.

(Circuit Court, D. Oregon. February 27, 1911.)

No. 3,538.

1. PATENTS (§ 297*)—INFRINGEMENT—INJUNCTION—EFFECT OF PRIOR ADJUDICATIONS.

In patent cases, conclusive effect is accorded by each of the Circuit Courts to a prior judgment of any one of them, whenever the patent, the question, and the evidence are the same.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 481-488; Dec. Dig. § 297.*]

2. PATENTS (§ 288*)—SUITS FOR INFRINGEMENT—EQUITY JURISDICTION—EFFECT OF EXPIRATION OF PATENT.

The expiration of a patent pending a suit in equity for its infringement does not deprive the court of jurisdiction for the purpose of awarding damages.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 288.*]

3. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—DRAFT EQUALIZER.

The Schandoney patent No. 490,214 for a draft equalizer *held* valid and infringed.

In Equity. Suit by the Schmeiser Manufacturing Company against John Lilly and Richard McGilvery. Decree for complainant.

Charles E. Townsend and Wm. L. Brewster, for complainant.

E. V. Littlefield and W. R. Litzenberg, for defendants.

BEAN, District Judge. This is a suit for an injunction against and an accounting by the defendants who, it is alleged, infringed letters patent No. 490,214, granted to P. V. Schandoney in January, 1893, for a draft equalizer. The validity of the patent has been before the Circuit Court for the Northern district of California and for the Eastern district of Washington, and in both cases was contested and the patent upheld upon substantially the same testimony as in the present case.

[1] This court will not examine anew the question which has been thus adjudicated, for in patent cases conclusive effect is accorded by

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

each of the Circuit Courts of the United States to a prior judgment of any one of them, wherever the patent, the question, and the evidence are the same in both cases. *Office Spec. Mfg. Co. v. Winternight & Cornyn* (C. C.) 67 Fed. 928; *Wanamaker v. Enterprise Mfg. Co.*, 53 Fed. 791, 3 C. C. A. 672.

Upon the question of infringement, I do not deem it necessary to enter upon a detailed examination of the evidence or comparison of the two devices. It appears plain to me that the Hines patent, which was being used by the defendants at the time this suit was commenced, embodies all the essential elements of the complainant's patent. They were both intended and designed for the same purpose and perform the same office in substantially the same way. The differences consist wholly in structural details, but the fundamental essential of the two patents is the same.

[2] The complainant's patent has expired since the commencement of this suit, but that does not deprive the court of jurisdiction of the case for the purpose of awarding damages. *Ross v. Ft. Wayne*, 63 Fed. 466, 11 C. C. A. 288.

[3] Decree will be entered in favor of complainant, and the case referred to a commissioner to ascertain and report the amount of damages, if any. Costs will be determined upon final hearing.

BABCOCK & WILCOX CO. v. MOSHER et al.

(Circuit Court, S. D. New York. March 31, 1911.)

SPECIFIC PERFORMANCE (§ 116½*)—PLEADING—ANSWERS—AMENDMENT—INCONSISTENT DEFENSES.

Where in a suit for specific performance of a contract to assign improvement patents, defendant answered alleging that the patents in question were not for improvements, but for separate and distinct inventions, and admitting that they had not disclosed the patents to complainants, defendants were not entitled, after the commencement of the taking of prima facie proofs, to have leave to amend so as to allege the inconsistent defense that defendants had disclosed the subsequent patents to complainant's assignor, who declined to receive them, admitting as to some of them that they were not for improvements, and for this reason complainants were estopped to maintain a suit for specific performance.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 116½.*]

Bill by the Babcock & Wilcox Company against Charles D. Mosher and Mosher Water Tube Boiler Company. Replications were filed July 2, 1910, and the taking of prima facie proofs was commenced August 26th following. On motion to amend answers filed June 6, 1910. Denied.

Gifford & Bull, for complainant.

McCurdy & Yard (Louis F. Doyle), for defendants.

COXE, Circuit Judge. The bill was filed to enforce specific performance of an agreement entered into between Charles D. Mosher

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and James M. Dodge, whereby the former, on December 15, 1894, assigned to the latter his patent No. 525,856 for a boiler or steam generator. Mosher also agreed to assign to Dodge "his heirs, executors, administrators and assigns" any improvements which he has made or may hereafter make upon the type of boiler covered by the said patent and all patents which may be granted for such improvements.

Thereafter patents were granted to Mosher which were assigned by him to the defendant corporation. The complainants who succeed to the rights of Dodge assert that these patents are all for improvements upon the invention described and claimed in No. 525,856. Manifestly, then, the important, if not the only, question between the parties is whether the subsequent patents cover improvements. If so, they belong to complainant, who is entitled to a specific performance of Mosher's agreement to assign them. If, on the contrary, these patents are not for improvements but for separate and distinct inventions, complainant has no right to them. The answers, which are signed by experienced patent solicitors and counsel, clearly present this issue.

The amended answers propose to substitute for this defense a new, inconsistent and contradictory defense to the effect that the subsequent patents were disclosed by Mosher to Dodge who declined to receive them, admitting, as to some of them, that they were not for improvements. The proposed amended answers aver that the complainant is now estopped from asserting that the subsequent patents were for improvements. This position is in flat contradiction of the averment in the answers that:

"This defendant further admits that he did not communicate the invention or improvement shown and covered by the said letters patent * * * to said James M. Dodge or his assigns at the time that he, the said Mosher, made the same or at any other time."

The long delay, insufficiently excused, would be a proper reason for refusing the amendments, but I prefer to rest my opinion upon the principle that parties should not be permitted, unless for some extraordinary reason not here present, to interpose new defenses which are antagonistic to those already in the case. In other words, an amendment should not be permitted which must be false if the original pleading be true.

The entire subject is admirably covered by Judge Story's opinion in *Smith v. Babcock*, 3 Sumn. 583, Fed. Cas. No. 13,008.

The answers as filed give the defendants ample opportunity to prove their real defense, viz., that the patents in controversy are not within the provisions of the assignment of December 15, 1894.

The motions to amend are denied.

VACUUM CLEANER CO. v. DUNN.

(Circuit Court, S. D. New York. January 30, 1911.)

1. PATENTS (§ 271*)—INFRINGEMENT—ACTIONS—PLEAS.

A plea in an action for infringement of a patent, which seeks to present the defense that the patentee is not the original and sole inventor of the combination set forth in the several claims, presents a defense enumerated as such in Rev. St. § 4920 (U. S. Comp. St. 1901, p. 3394), and must be presented by answer.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 271.*]

2. PATENTS (§ 271*)—INFRINGEMENT—ACTIONS—PLEAS.

A plea in an action for infringement of a patent, which attempts to unite two defenses, and where a part of the proposed proof relates to only one of the claims of the patent, is bad, under the rule that a plea, to be good, must present a single issue, which, if decided in favor of defendant, disposes of the action.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 271.*]

In Equity. Suit by the Vacuum Cleaner Company against Elias B. Dunn, doing business under the trade-name of Dunn's Improved Vacuum System. On motion to strike off plea. Granted, with leave to answer.

Timothy D. Merwin, for complainant.

Edwin J. Prindle, for defendant.

COXE, Circuit Judge. Counsel for the defendant asks leave to amend his plea by inserting at the end of the third paragraph the words "and that said Andrew Kenney was not an employee of the said David T. Kenney." This request is granted and the plea may be so amended.

[1] The amended plea seeks, inter alia, to present the defense that the patentee is not the original and sole inventor of the combination set forth in the several claims. This is a defense enumerated as such in section 4920 of the Revised Statutes (U. S. Comp. St. 1901, p. 3394) and should be presented by answer.

[2] Again, the plea is bad because it attempts to unite two defenses and part of the proposed proof relates to one only of the claims of the patent. If the issue were joined on the plea and the alleged facts were determined in favor of the defendant, it would not necessarily dispose of the case. A plea to be good should present a single issue which, if decided in favor of the defendant, will dispose of the action. Schnauffer v. Aste (C. C.) 148 Fed. 867; Korn v. Wiebusch (C. C.) 33 Fed. 50; Glucose Co. v. Douglas (C. C.) 145 Fed. 949.

The motion to strike off the plea is granted, the defendant to answer within 20 days from the date of the order.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

REDINGTON v. OFFICE EQUIPMENT CO.

(Circuit Court, W. D. Kentucky. May 27, 1911.)

PATENTS (§ 328*)—INVENTION—MUCILAGE HOLDER.

The Redington patent, No. 625,517, for a mucilage holder, is for a combination of old elements, requiring no more than mechanical skill, and is void for lack of patentable invention.

In Equity. Suit by William H. Redington against the Office Equipment Company. Decree for defendant.

Brown & Hopkins, for complainant.

W. P. Preble, Jr., for defendant.

EVANS, District Judge. The complainant alleges an infringement of his patent, No. 625,517, for certain alleged new and useful improvements in mucilage holders. Whether or not the construction exhibited by the complainant as having been made in conformity with his patent and its third claim conforms thereto, it is certain that the defendant's construction is an exact, and we think intentional, imitation of it. This, however, is not a suit to restrain unfair competition in business, if such were admissible; but it is a suit to enforce rights based upon the patent, and relief necessarily depends upon the validity of the patent itself.

All the separate elements sought to be combined by complainant's device certainly are old, and we must not be misled by the facility of technical speech apparent here, as in patent cases usually. The cup, the brush, the top or cover, and the screws by which the latter is fastened to the cup, and the interior well or cup for holding water, one and all are far from being novelties. The complainant claims, however, that he so arranged, relocated, or combined these things as to produce better and more useful results than any heretofore obtained. In a sense probably this is quite true; but, notwithstanding the presumptions indulged in favor of patents issued by the government, we have not been able to see how the mechanical effort necessary to aggregate and readjust the various old and commonly used elements in the way it was done by complainant amounted to what is called "invention" in patent law. *Rodiger v. Thaddeus Davids Co.* (C. C.) 126 Fed. 960, affirmed 133 Fed. 1021, 66 C. C. A. 240; *Walker on Patents*, § 32.

The temperate and clearly stated views of the defendant's expert witness Brandenburg are, to say the least, more agreeable reading than those of Matthews, who testified as an expert for the complainant. In a somewhat extended experience we have never seen anything quite like the tone of the latter, and it may be barely possible that his manner of expressing himself has obscured the merits that otherwise might appear in his testimony. The contrast between the manner of stating their views by the two witnesses respectively is so remarkable as to suggest comment.

It results, from the conclusion we have reached as to the absence of invention in complainant's device, that his claim to relief has not

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

been made out. Other grounds of opposition to the claims made by the bill need not be passed upon.

The bill will be dismissed, with costs.

In re JACKSON BRICK & TILE CO.

(District Court, Judicial D. Missouri, S. E. D. July 18, 1911.)

No. 21.

1. BANKRUPTCY (§ 341*)—VALIDITY OF LIENS—JURISDICTION OF REFEREE.

Where a trustee is in possession of real estate incumbered by a deed of trust, deposited as collateral security with a creditor of the bankrupt, and the creditor voluntarily appears before the referee and presents his claim for allowance as a secured claim by virtue of the deed of trust, the referee has jurisdiction to summarily determine the validity of the lien.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 341.*]

2. DEEDS (§ 208*)—DELIVERY—EVIDENCE—SUFFICIENCY.

A corporation, by its president, executed a deed to another corporation of which the same person was president, and on the same date the grantee, by its president, executed a deed of trust to secure purchase money notes. Both corporations treated the deed as delivered, and the deed of trust and the purchase money notes were pledged as collateral for a loan made to the grantor by a third person. *Held* to show that the deed was delivered so that title passed thereunder prior to the execution of the deed of trust.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 208.*]

3. CORPORATIONS (§ 28*)—ORGANIZATION—DE FACTO CORPORATIONS.

Where the incorporators took the formal steps required by statute to entitle the corporation to a certificate of incorporation, and the Secretary of State issued a certificate in due form, the corporation was a de facto corporation, though it had no stockholders, and though no part of its capital stock was paid in.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 26, 70; Dec. Dig. § 28.*]

4. CORPORATIONS (§ 28*)—DE FACTO CORPORATIONS—CONVEYANCES—COLLATERAL ATTACK.

A transfer of property by or to a de facto corporation cannot be collaterally attacked, and is valid against all persons except the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 26, 70; Dec. Dig. § 28.*]

5. BANKRUPTCY (§ 161*)—PREFERENCES—ACTS CONSTITUTING.

Bankr. Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), as amended by Act Cong. Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 (U. S. Comp. St. Supp. 1909, p. 1314), which provides that where the preference consists of a transfer, the period of four months shall not expire until four months after the record of the transfer, as required by law, extends the time within which a transfer may be attacked as a preference, and where a transfer is one which is required to be recorded, the four months' period does not begin to run until the conveyance is recorded, but where the transfer, when made, was based on a present consideration, delay in recording does not warrant the court in treating the conveyance as if made as security for an antecedent debt, and a transfer given as security for a present loan is not a voidable preference, though the transfer is not recorded until within four months of the adjudication in bankruptcy of the transferor.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 161.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

6. BANKRUPTCY (§ 184*)—FRAUDULENT CONVEYANCES—FAILURE TO RECORD CONVEYANCES.

Rev. St. Mo. 1899, § 925, provides that no instrument shall be valid except between the parties and such as have actual notice, until deposited for record. Bankr. Act July 1, 1898, c. 541, §§ 67a, 67e, 70e, 30 Stat. 564, 565 (U. S. Comp. St. 1901, pp. 3449, 3451), confer on trustees the right to avoid transfers, voidable as fraudulent conveyances, or which may be avoided by creditors under the state law for want of record. A grantor, a corporation, conveyed its land to a grantee, a corporation, which on the same day executed a deed of trust to secure the purchase money notes. The grantor borrowed money from a bank and pledged as collateral the notes and deed of trust. Neither of the deeds were then recorded, but the bank later returned the deed of trust to the president of the grantor with instructions to record it, which was not done for nearly five years, and until within four months of the adjudication of the bankruptcy of the grantor. Before the record of the deed the grantor incurred debts to persons who relied on its ownership of the property. *Held*, that the deed of trust was constructively fraudulent as to creditors extending credit to the bankrupt, and the lien of the bank must be treated as invalid as against the trustee as a representative of the creditors.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 184.*]

In the matter of the bankruptcy proceedings against the Jackson Brick & Tile Company. Proceeding for review of an order of the referee in bankruptcy, allowing the claim of the Sturdivant Bank as an unsecured claim, and denying claimant's prayer for the allowance of its claim as a secured claim. Affirmed.

Oliver & Oliver, for Sturdivant Bank.

Fordyce-Holliday & White, for Merchants-Laclede Nat. Bank.

Moses Whybark and W. D. Hines, for trustee.

DYER, District Judge. This is a proceeding for review of an order of the referee in bankruptcy, allowing the claim of the Sturdivant Bank as an unsecured claim against the bankrupt estate and denying the prayer of the claimant that its claim be allowed as a secured claim. The Sturdivant Bank presented its claim against the bankrupt in the sum of \$15,410, and set forth therein that it held as security for said indebtedness 25 promissory notes, each for \$500, executed by the Jackson Chemical Manufacturing Company, a corporation, and that the last-mentioned notes were secured by a deed of trust upon 117 acres of land, and also upon two lots in Cape Girardeau county, Mo. The claimant prayed that its claim be allowed as a "preferred claim" against the bankrupt, and prayed that the land described in the deed of trust "be stricken from the schedule of assets belonging to the bankrupt estate and applied to the credit of the notes," referred to in the claim. The trustee of the bankrupt estate filed written objections to the allowance of the claim as a preferred one, alleging, in substance: (1) That the claimant obtained a preference in respect of its claim by means of a judgment rendered in its favor against the bankrupt; (2) that the transfer of the land mentioned in the deed of trust from the bankrupt company to the Jackson Chemical Manufacturing Company, and the deed of trust executed by the Jackson Chemical Manufacturing Company, constituted a voidable preference

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

under the bankrupt law; (3) that the deed from the bankrupt to the Jackson Chemical Manufacturing Company, and the deed of trust of the latter company securing the notes held by the bank, were withheld from record by the bank for about four years, and that the withholding of said conveyances from record gave the bankrupt a fictitious credit and enabled it to procure material and labor and to borrow money on credit, and constituted a fraud in law against the creditors of the bankrupt; (4) that the "Jackson Chemical Manufacturing Company never had any legal existence, nor was a charter ever issued by the state of Missouri, or any other state, creating such corporation, and * * * if it did have such legal existence, it never had any assets or property of any kind, but was created solely for a fraudulent purpose, * * * and that said conveyance and the said incumbrance were executed with the intent to hinder, delay, and defraud the creditors of the bankrupt."

One Hugh R. Quinn, a creditor, by leave of the referee, also filed written objections to the allowance of the bank's claim, alleging, in substance: (1) That the real estate described in the deed of trust held by the bank is and always has been the property of the bankrupt company; (2) that the deed from the bankrupt company to the Jackson Chemical Manufacturing Company was never delivered and no title passed thereby; (3) that the said deed was not filed for record until within four months of the adjudication of bankruptcy; (4) that the Jackson Chemical Manufacturing Company, if incorporated in fact, had no authority under its charter to take and hold said real estate, and that the deed of trust made by the Jackson Chemical Manufacturing Company is null and void and of no effect; (5) that the deed of trust executed by the Jackson Chemical Manufacturing Company was never delivered, and no title passed thereunder; (6) that the deed of trust executed by the Jackson Chemical Manufacturing Company was not filed for record until within four months of the adjudication of bankruptcy herein and is null and void as a lien upon the estate of the bankrupt.

The referee afterwards heard the evidence submitted by the respective parties, and on March 23, 1908, made an order disallowing the claim "as a preferred or secured claim," and allowing it as a general claim in the sum of \$16,275; and also made an order denying the application of the claimant to strike from the schedule of assets the land described in the deed of trust referred to in the claim. Thereafter, on April 2, 1908, the claimant, the Sturdivant Bank, filed with the referee a petition for review of the foregoing order and the referee has certified the matter to this court.

The material facts bearing upon this controversy, as they appear from the referee's summary of the evidence, are as follows:

The bankrupt company was incorporated in Missouri in April, 1897, under the name of the English Mining & Manufacturing Company, and in December, 1902, changed its name to the Jackson Brick & Tile Company. From the time of its original incorporation in 1897, until July, 1906, the bankrupt company was engaged in the business of manufacturing brick, fire brick and drain tile near Jackson, Mo., and had

a manufacturing plant and certain lands in that locality. Henry R. English was the organizer and principal stockholder of the bankrupt company and throughout its career was its president and in complete control of its affairs. On September 12, 1902, Henry R. English caused a corporation to be organized under the statutes of Missouri under the name Jackson Chemical Manufacturing Company, said corporation purporting to have a full paid capital stock of \$20,000, but the evidence tends to show that no part of this capital was ever paid in, and that Henry R. English caused the company to be incorporated for the purpose of borrowing money for the bankrupt company, and that the company never transacted any business with the exception of the transaction to be hereafter mentioned. Immediately upon the incorporation of the Jackson Chemical Manufacturing Company, the bankrupt company, then known as the English Mining & Manufacturing Company, executed a warranty deed, dated September 12, 1902, whereby it conveyed to the Jackson Chemical Manufacturing Company, one hundred and seventeen acres of land and two lots in Cape Girardeau County, Mo., for an expressed consideration of \$15,000. The deed just mentioned was acknowledged by English as president of the English Mining & Manufacturing Company, on September 18, 1902, and after being so acknowledged was left by English in the possession of one Limbaugh, the notary who took the acknowledgment, and remained in the possession of the notary for several months, and was then returned by the notary to English who placed it in his box in the vault of the Jackson Exchange Bank at Jackson, Mo., where it remained until July, 1906, when it was taken out and afterwards recorded under circumstances to be presently stated.

It further appears from the evidence that on September 12, 1902, the Jackson Chemical Manufacturing Company executed a deed of trust whereby it conveyed the 117 acres of land and the 2 lots here in question to one Henry L. Jones, as trustee, to secure the payment of 25 promissory notes for the sum of \$500 each, executed by it and payable five years after date to the English Mining & Manufacturing Company. On December 4, 1902, the English Mining & Manufacturing Company borrowed \$8,500 from the Sturdivant Bank and pledged with the bank as collateral security for the loan, the 25 notes of the Jackson Chemical Manufacturing Company above referred to. The evidence shows that in negotiating this loan the bankrupt company was represented by Henry R. English, who informed the bank that the notes were secured by a deed of trust upon certain lands formerly owned by the bankrupt company and that the bankrupt company had conveyed the lands to the Jackson Chemical Manufacturing Company by warranty deed, and that the notes were secured by a deed of trust upon the land executed by the Jackson Chemical Manufacturing Company.

It further appears from the evidence that at the time the loan was obtained from the Sturdivant Bank, Henry R. English forwarded to the bank by mail the deed of trust executed by the Jackson Chemical Manufacturing Company to secure the collateral notes and requested the bank to return the deed of trust to him and that he would record

it, and that the bank, on December 4, 1902, mailed the deed of trust to English and requested him to place it of record. The evidence further shows that the bankrupt company from time to time renewed the note evidencing the debt owing by it to the Sturdivant Bank and afterwards increased its debt to the bank by borrowing additional money so that in July, 1906, it was indebted to the bank in the sum of \$15,000 for which the bank held as collateral security the twenty-five notes executed by the Jackson Chemical Manufacturing Company and secured by deed of trust before mentioned. The evidence shows that when the deed of trust executed by the Jackson Chemical Manufacturing Company was returned by the Sturdivant Bank to Henry R. English on December 4, 1902, that English did not file the deed for record, but placed it in his box in the vault of the Jackson Exchange Bank, and that it remained there until July, 1906, when it was taken out and afterwards placed of record under circumstances to be presently stated. Henry R. English testified that the reason he did not record the warranty deed from the bankrupt company to the Jackson Chemical & Manufacturing Company and the deed of trust from the Chemical Company to Jones, trustee, was that he was advised by his attorney not to do so, and that he thought the recording of the instrument might affect the interests of the Jackson Exchange Bank of which he was president, and that he was at the time negotiating with parties in St. Louis to secure money and expected to take up the loan in a short time.

The evidence further showed that in September, 1902, the bankrupt company executed a deed of trust whereby it conveyed to Henry R. English lots 154, 155, 167, and 168 in the city of Jackson, and also certain lands in Cape Girardeau county, including the plant used by it for the purpose of making brick and tile, to secure 25 notes of \$500 each executed by the English Mining & Manufacturing Company to the order of Henry R. English, that on September 12, 1902, English obtained a loan of \$8,500 from the Merchants-Laclede National Bank of St. Louis, giving the bank a note for that sum executed by him, and deposited with the bank as security for the \$8,500 and the twenty-five notes of the English Mining & Manufacturing Company referred to above. It further appeared that this deed of trust was not recorded, but remained in the possession of English until about July 19, 1906, when he delivered it to his attorney, one W. H. Miller, under circumstances to be stated hereafter. It further appeared that about July 6, 1906, the bankrupt executed and delivered to one Hugh R. Quinn a note for about \$27,000 to cover an indebtedness due Quinn by the bankrupt company, and to secure this note the bankrupt executed and delivered to Quinn a mortgage covering the entire property and plant of the bankrupt company and embracing substantially all the land described in the prior deeds of trust held by the Sturdivant Bank and the Merchants-Laclede National Bank.

The evidence further showed that in July, 1906, the bankrupt company had become heavily involved, was insolvent and unable to meet its obligations, and that English as president of the company placed the affairs of the company in the hands of his attorney, W. H. Miller, of

Jackson, Mo., and turned over to Miller the deed from the English Mining & Manufacturing Company to the Jackson Chemical Manufacturing Company, the deed of trust from the latter company to Jones, trustee, and also the deed of trust from the English Mining & Manufacturing Company to the trustee of Henry R. English, purporting to secure the notes held by the Merchants-Laclede National Bank. It further appeared that about July 19, 1906, W. H. Miller, as attorney for the bankrupt company, informed the Sturdivant Bank, the Merchants-Laclede National Bank and other creditors, that the company was in financial difficulties and unable to proceed with its business, that on or about that date Mr. Albert, president, and Mr. Oliver, attorney, of the Sturdivant Bank, Mr. Quinn, Mr. English, and Mr. Miller, had a conference in Jackson, Mo., in which the affairs of the bankrupt company were discussed. At this conference the president and attorney of the Sturdivant Bank learned that the deed from the English Mining & Manufacturing Company to the Jackson Chemical Manufacturing Company, and the deed of trust from the Jackson Chemical Manufacturing Company to Jones, trustee, had never been recorded, and also learned of the existence of the Quinn mortgage, and of the prior deed of trust purporting to secure the notes held by the Merchants-Laclede National Bank. The evidence tends to show that Mr. Quinn first learned at this conference of the existence of the deed of trust from the English Mining & Manufacturing Company to the Jackson Chemical Manufacturing Company, of the deed of trust executed by the latter company purporting to secure the notes held by the Sturdivant Bank, and of the deed of trust executed by the English Mining & Manufacturing Company purporting to secure the notes held by the Merchants-Laclede National Bank. The evidence showed that the president of the Sturdivant Bank and all of the persons present at this conference were informed of the financial condition of the bankrupt company, and of the fact that the company owed about \$69,000 and was insolvent. It further appears that after this meeting an endeavor was made to secure the consent of the creditors of the bankrupt to turn over its property to trustees with a view to carrying on the business for the benefit of the creditors, but that this arrangement was not perfected because of the objections of certain creditors. It further appears that on August 8, 1906, Hugh R. Quinn placed the mortgage given him by the bankrupt company of record, and that immediately thereafter and on the same day Mr. Miller, attorney for the bankrupt company, filed for record the deed from the English Mining & Manufacturing Company to the Jackson Chemical Manufacturing Company, the deed of trust of the Jackson Chemical Manufacturing Company to Jones, trustee, and the deed of trust of the bankrupt company securing the notes held by the Merchants-Laclede National Bank. It further appears that on August 9, 1906, the Sturdivant Bank filed a suit against the bankrupt company upon the note of the company held by it, in the Cape Girardeau Court of Common Pleas, and caused a writ of attachment to be issued and levied upon the property of the bankrupt, and on September 27, 1906, secured judgment against the bankrupt by default in the sum of \$15,410, and also a judgment sustaining the

attachment; and that afterwards, on March 9, 1907, the court, upon the application of Joseph E. Schmuke, trustee of the bankrupt estate, made an order directing the sheriff to turn over to the trustee all of the property attached, together with the cash in his hands, and to return the execution previously issued in the cause unsatisfied and without prejudice to the plaintiff.

It further appeared from the evidence that a petition in involuntary bankruptcy was filed by creditors against the bankrupt on October 8, 1906, and resulted in an adjudication of bankruptcy on October 31, 1908. The evidence showed that in July, 1906, and thereafter, up to the time of its bankruptcy, the bankrupt company owed debts amounting to \$69,959; that upwards of \$25,000 of this indebtedness arose after the Sturdivant Bank had received the collateral notes delivered to it by the bankrupt in December, 1902; that between December 4, 1902, and July 19, 1906, the Bank of Whitewater had loaned the bankrupt about \$2,600, and before making the loan had caused the title to bankrupt's real estate to be examined and had found no incumbrances thereon of record. It further appeared that in June, 1906, Hugh R. Quinn had made a loan to bankrupt company of about \$27,000, and received from the bankrupt as security for the loan a deed of trust covering all the bankrupt's property including that embraced in the deed of trust to the claimant bank, and before loaning the money that Quinn had examined the records and found that no incumbrances were of record affecting the bankrupt's real estate. Quinn testified that at the time he received his mortgage he had no knowledge of the deed of trust given the claimant bank. The evidence makes it clear that Henry R. English, the president of the bankrupt company, withheld the various conveyances heretofore mentioned from record in order that the bankrupt might obtain credit upon its apparent ownership of the property described in such conveyances.

[1] It is contended by the claimant bank that the referee has no jurisdiction to summarily determine the validity of its lien upon the land described in the deed of trust from the Jackson Chemical Manufacturing Company to Jones, trustee, and that the validity of such lien can only be adjudicated in a plenary suit. But the evidence shows that the land described in this deed of trust is in the possession of the trustee of the bankrupt estate, and it further appears that the claimant bank voluntarily appeared before the referee in bankruptcy and presented its claim for allowance as a secured claim, alleging that it had a lien upon the land by virtue of the deed of trust, and under these circumstances there can be no question that the referee had jurisdiction to determine the validity of the lien asserted, and to adjudge whether or not the claim should be allowed as a secured one. *Chauncey v. Dyke Bros.*, 9 Am. Bankr. Rep. 444, 119 Fed. 1, 55 C. C. A. 579; *In re Rochford*, 10 Am. Bankr. Rep. 608, 124 Fed. 182, 59 C. C. A. 388; *In re Granite City Bank*, 14 Am. Bankr. Rep. 404, 137 Fed. 818, 70 C. C. A. 316; *In re Schermerhorn*, 16 Am. Bankr. Rep. 508, 145 Fed. 341, 76 C. C. A. 215; *In re McMahon*, 17 Am. Bankr. Rep. 531, 147 Fed. 684, 77 C. C. A. 668; *In re Dana*, 21 Am. Bankr. Rep. 683, 167 Fed. 529, 93 C. C. A. 238; *Thomas v. Woods*, 23 Am.

Bankr. Rep. 132, 173 Fed. 585, 97 C. C. A. 535, 26 L. R. A. (N. S.) 1180; Mound Mines Company v. Hawthorn, 23 Am. Bankr. Rep. 242, 173 Fed. 882, 97 C. C. A. 394; Whitney v. Wenman, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157. Under the facts disclosed in the evidence there can be no question that the debt due from the bankrupt to the claimant bank is a bona fide debt and that the bank gave a present consideration for the collateral notes secured by the deed of trust from the Jackson Chemical Manufacturing Company to Jones, trustee. The case, therefore, presents no question of positive fraud on the part of the bank, and if the bank's lien upon the property described in the deed of trust is to be held invalid as against the trustee in bankruptcy, it must be because the deeds are to be treated as inoperative by reason of the delay in recording them or for constructive fraud or for some other reason.

[2] The referee in bankruptcy held that the deed from the bankrupt company to the Jackson Chemical Company was never delivered and that, therefore, the title to the property here in question never passed from the former to the latter company. But in my opinion the evidence does not warrant this conclusion, and I feel constrained to find that there was sufficient delivery of the deed to pass the title from the grantor to the grantee company. The evidence shows that English was the president of both the English Mining & Manufacturing Company and the Jackson Chemical Manufacturing Company, and that he was in control of the affairs of both companies. It also appears that the deed from the English Mining & Manufacturing Company to the Jackson Chemical Company, and the deed of trust from the Jackson Chemical Company to Jones, trustee, were executed on behalf of the respective grantors by English as president, and that they were acknowledged on behalf of said grantors respectively by English as president on September 16, 1902, and that after being executed and acknowledged, both deeds were left for a time in the hands of the notary who took the acknowledgments, and were afterwards placed by English in his box at the Jackson Exchange Bank where he kept papers belonging to himself and his companies. It appears that later on, in December, 1902, when English negotiated the loan from the claimant bank, he forwarded the deed of trust by mail to the bank and suggested that the bank return the deed of trust to him to be recorded. The bank afterwards returned the deed of trust to English, requesting him to record it. It thus appears that English as president of English Mining & Manufacturing Company executed and acknowledged the deed whereby the company conveyed the land to the Jackson Chemical Company, and on the same day English, as president of the Jackson Chemical Company executed and acknowledged a deed of trust whereby the latter company conveyed the property to a trustee, purporting to secure the purchase price and shortly thereafter English, as President of the English Mining & Manufacturing Company, pledged the notes secured by the deed of trust with the claimant bank to secure a present loan. Under the facts here disclosed, I am of opinion that the deed from the bankrupt company to the Jackson Chemical Manufacturing Company must be regarded as having been delivered prior to the time the deed of trust was forwarded by English

to the bank. What acts are sufficient to constitute delivery of a deed is largely a question of intention, and in the present case it appears that both the grantor and the grantee corporations treated the deed as duly delivered, and the grantee executed a deed of trust upon the property for the benefit of the grantor, and the grantor in turn pledged the notes secured by the deed of trust as collateral for a loan made by it by a third party, and under these circumstances the deed must be regarded as having been delivered so as to pass the title from the grantor to the grantee. *Stevens v. Hatch*, 6 Minn. 64 (Gil. 19); *Wall v. Wall*, 30 Miss. 91, 64 Am. Dec. 147; *Farrar v. Bridges*, 5 Humph. (Tenn.) 411, 42 Am. Dec. 439; *Bunnell v. Bunnell*, 111 Ky. 566, 64 S. W. 420, 65 S. W. 607; *Devlin on Deeds* (2d Ed.) § 262.

[3] In reaching the conclusion that the claimant bank did not acquire a valid lien under the deed of trust, the referee seems to have held that the Jackson Chemical Manufacturing Company was not legally incorporated, or that by reason of irregularities attending its incorporation, the company did not become a corporation *de jure* such as could acquire and convey title to the real estate here in question.

[4] The evidence, however, shows that the incorporators of this company took all the formal steps required by the statute to entitle it to a certificate of incorporation, and that a certificate in due form was issued by the Secretary of State, and, although the evidence seems to show that the company had no bona fide stockholders, and that no part of its capital stock was ever paid in, it seems to admit of no doubt that the company was at least a *de facto* corporation, and it is well settled that the transfer of property by or to a *de facto* corporation cannot be collaterally attacked and will be held valid against all persons except the state. *Finch v. Ullman*, 105 Mo. 255, loc. cit. 263, 16 S. W. 863, 24 Am. St. Rep. 383.

[5] In support of the order made by the referee it is further contended that the deed of trust is invalid because it constitutes a voidable preference under section 60, pars. "a" and "b" of the bankrupt act as amended. This contention is based primarily upon the amendment to section 60, paragraph "a," contained in the act of February 5, 1903, which provides, that:

"Where the preference consists of a transfer such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required."

It is to be noticed that the deed of trust here in question was executed in September, 1902, and that the notes secured thereby were delivered to the bank for a present loan on December 4, 1902; but that the deed was not recorded until August 8, 1906, within four months of the filing of the petition in bankruptcy. The transfer of title effected by the deed of trust was made prior to the enactment of the amendatory act of February 5, 1903, and it is open to doubt whether the amendment to section 60a contained in that act can be given retrospective effect so as to render it applicable to this transaction. But even if it is to be assumed that the amendment of 1903 is applicable to the transfer here in question, it still seems clear that the transaction cannot properly be treated as a voidable preference be-

cause the deed of trust was given to the bank as security for a present loan, and not for an antecedent indebtedness. *In re Union Feather & Wool Mfg. Co.*, 7 Am. Bankr. Rep. 472, 112 Fed. 774, 50 C. C. A. 524; *City Bank v. Bruce*, 6 Am. Bankr. Rep. 311, 109 Fed. 69, 48 C. C. A. 236; *Stedman v. Bank*, 9 Am. Bankr. Rep. 4, 117 Fed. 237, 54 C. C. A. 269; *Farmers' Bank v. Carr*, 11 Am. Bankr. Rep. 733, 127 Fed. 690, 62 C. C. A. 446.

The provision of the statute that "where the preference consists in a transfer, such period of four months shall not expire until four months after the recording or registering of the transfer, if, by law, such recording or registering is required, was intended to postpone the time within which a transfer is open to attack as a preference until four months after the date of the recording of the transfer, where such recording is required by the local law; but while the statute postpones the time within which the transfer can be attacked the statute cannot properly be so applied as to materially alter the essential character of the transaction. If the transfer is one which is required to be recorded, the four-month period during which it may be attacked does not begin to run until the conveyance is recorded, but if the transfer when made was based upon a present consideration, a delay in recording the instrument does not warrant us in treating the conveyance as if it were made as security for an antecedent debt, because to do so would be to create by construction a transaction different from the actual one. It is true that in certain cases where the conveyance has no force and validity whatever as to creditors until recorded, the courts have held that the transfer may be regarded as first coming into existence when it is recorded (*McElvain v. Hardesty*, 22 Am. Bankr. Rep. 320, 169 Fed. 31; *In re Newton*, 18 Am. Bankr. Rep. 567, 153 Fed. 841, 83 C. C. A. 23; *Bank v. Connett*, 15 Am. Bankr. Rep. 662, 142 Fed. 33, 73 C. C. A. 219, 5 L. R. A. [N. S.] 148); but in my opinion these cases are inapplicable to the facts here presented, and, as the transfer here in question was for a present consideration, it cannot properly be treated as a voidable preference.

[6] The principal contention made on behalf of the trustee in bankruptcy is that the deed of trust must be held invalid against the trustee because they were withheld from record from September, 1902, to August 8, 1906, and during this period the bankrupt remained in possession of the property, continued to carry on its business, and obtained credit to the extent of more than \$25,000 from various persons whose claims are now unpaid, and who, in extending credit, relied upon the bankrupt's apparent ownership of the property. In support of this contention the trustee relies upon the provisions of sections 67a, 67e, and 70e of the act. These sections of the statute confer upon trustees in bankruptcy the right to avoid transfers, incumbrances, or liens which are voidable as fraudulent conveyances, or which might be avoided by creditors under the state law for want of record, or other reasons. In respect of the present contention we are thus remitted to the state law and the validity of the deed of trust here in question is to be determined by reference to that law. Section 925 of the Revised Statutes of Missouri 1899, referring to instruments

conveying real estate, or whereby any real estate may be affected in law or in equity, provides that:

"No such instrument in writing shall be valid, except between the parties thereto and such as have actual notice thereof, until the same shall be deposited with the recorder for record."

This statute, although broad and comprehensive, in its terms, has been so construed as to have little effect, the general doctrine laid down in Missouri cases being that an unrecorded conveyance of real estate is good, except to bona fide purchasers or incumbrances for value and without notice. *Cape Girardeau Road Co. v. Renfroe*, 58 Mo. 265; *Bank v. Rohrer*, 138 Mo. 370, 39 S. W. 1047; *Hord v. Harlin*, 143 Mo. 469, 45 S. W. 274.

But it is well-established law in Missouri that a conveyance of real estate may, under certain circumstances, be held constructively fraudulent or inoperative as to creditors because of its being withheld from record. In *Goldsby v. Johnson*, 82 Mo. 602, loc. cit. 606, the Supreme Court, speaking through Judge Norton, said:

"It seems to be an established principle that a deed not at first fraudulent may become so by long being concealed, because by its concealment, persons may be induced to give credit to the grantor. In such cases the use that is made of it relates back and shows the intent with which it was made. The omission to place the deed on record or leaving it in the hands of the grantor, or placing it in the hands of a third person to be produced or suppressed as exigencies may demand, are instances of delay that are within the rule."

In *Central National Bank v. Doran*, 109 Mo. 40, loc. cit. 49, 18 S. W. 838, it was held that where one indebted to a bank executed a deed of trust on his land with the understanding that it was to be withheld from record so as not to impair his credit, and another bank, relying upon the indicia of solvency thus created, extended credit to the debtor after execution of the deed of trust and before it was recorded, that the deed would be treated as constructively fraudulent as to the creditor so extending credit although there was no actual intent to defraud. In its opinion in this case the court said:

"The authorities cited by the plaintiff bank fully bear out the position that in circumstances similar to those related, a court of equity will postpone or set aside as fraudulent an instrument whose recording has been clandestinely delayed as aforesaid. And, apart from any agreement of the sort mentioned, some of the authorities hold that where a deed is concealed from the public, at least for a considerable length of time, while the record-owner remains in possession and is given a suppositious credit thereby, which results detrimentally to others who rely upon the outward indicia of solvency thus created, such deed will be declared constructively fraudulent, though no actual intent to defraud exists."

In *Bank v. Buck*, 123 Mo. 141, 27 S. W. 341, it appeared that a bank had taken two deeds from a customer as security for his indebtedness and withheld them from record for two and three years respectively, and did not place them of record until the day the grantor failed in business. While the deeds were so withheld from record, the grantor continued in business and incurred various debts. There was no agreement that the deeds should be withheld from record for any definite time, but the court concluded from the evidence that there

was an understanding between the parties that the deeds should not be recorded until the bank regarded it as necessary for its protection to place them of record. The court in its opinion quotes with approval the language used in *Hungerford v. Earle*, 2 Vern. 261, that "a deed not at first fraudulent may afterwards become so by being concealed, or not pursued, by which means creditors are drawn in to lend their money"; and applying the principle that "every man is presumed to intend the necessary consequences of his act, and if an act necessarily delays, hinders, or defrauds creditors, then the law presumes it was done with a fraudulent intent," adjudged that the deeds were fraudulent and void as to the grantor's creditors. The same doctrine is laid down in case of *Singer Manufacturing Co. v. Stephens*, 169 Mo. 1, loc. cit. 10, 68 S. W. 903, 905, where the court said:

"The essential facts authorizing the decree entered herein by the trial court * * * are these: That although the appellant was found to have been the real owner of the land in controversy prior to the creation of the debt of plaintiff's assignor, and although she was found to have accepted the deed to the land at the time it was made in good faith and without the contemplation of a fraud upon the rights of any one, the court found that while she was the real owner of the land, she suffered the record title thereof to be and remain in her codefendant Charles Clifton, whereby he, on the strength of his apparent ownership of same induced the plaintiff's assignor to extend to him a credit which otherwise would have been denied. The mere recital by the court in its finding of facts 'that the conveyance of the land to the defendant Isabel Stephens was made and accepted by her in good faith and without fraud on her part' is no impeachment of the correctness or the validity of the decree subjecting appellant's land to the claim of a creditor of the apparent owner of the land, prior to the time appellant was invested with the legal title thereto in November, 1894. It was not necessary that the defendant Isabel Stephens should actually have known that her codefendant Clifton was obtaining credits from the plaintiff's assignor on the faith of his apparent ownership of the land in controversy which stood of record in his name, or that she did in fact know that credit had actually been extended to Clifton's creditor on the faith of his apparent ownership of the land, prior to the time the conveyance of the land was made to her. Actual knowledge of either of those conditions on part of appellant would have amounted to a positive fraud against plaintiff, and of this the court's finding of facts shows she was not guilty; but the decree entered was predicated upon the fact not that an intentional fraud was committed by appellant upon the plaintiff, but that a wrong had resulted to plaintiff by means of the conduct of appellant in so managing her property that plaintiff was induced to give to another on the strength of his apparent ownership of it a credit which otherwise would have been denied."

The facts in this case, in my opinion, bring it within the doctrine announced in the cases just referred to and constrain me to treat the deed of trust as constructively fraudulent and unenforceable as against the trustee in bankruptcy. The evidence in this case shows that the claimant bank exercised little care or vigilance for its own protection, but relied implicitly on English. At the time the deed of trust was delivered to the bank in December, 1902, the record title to the property was in the bankrupt company and not in the Jackson Chemical Manufacturing Company, the grantor in the deed of trust. The bank made no investigation into the state of the record title, but simply accepted the statement of English that the Jackson Chemical Company had a warranty deed to the property and

made no inquiry as to the whereabouts of the deed or whether or not it had been placed of record. The bank, after making the loan, returned the deed of trust to English on December 4, 1902, and English was permitted to remain in possession of both deeds for nearly four years without any inquiry upon the part of the bank as to the state of the title or as to the disposition made by him of the deeds. The evidence shows that the bank had knowledge of the fact that the bankrupt company was actively carrying on its business during this period, and as reasonable men they were bound to infer that the company was seeking and obtaining credit from at least some of those with whom it had business relations. The evidence makes it clear that English willfully withheld both deeds from record for the purpose of securing for the bankrupt company such credit as would result from its apparent unincumbered ownership of the property, and the evidence also conclusively shows that the company availed itself of this fictitious credit, and after December, 1902, contracted debts amounting to upwards of \$25,000, and that this indebtedness remains unpaid, and that the creditors extending the credit relied upon the company's ownership of this property, and, indeed, that one creditor, Mr. Quinn, was subsequently given a mortgage by the bankrupt upon the same property embraced in the bank's deed of trust. The evidence constrains me to conclude that English, during this entire period, was pursuing a deliberate policy of raising money by mortgages upon the bankrupt's property and then retaining possession of the mortgages and suppressing them so that the company's credit might remain unimpaired. The evidence shows that English, by means of the execution and suppression of the various mortgages and deeds of trust, including the deeds here in question, has grossly imposed upon those who have dealt with the company and perpetrated a series of frauds upon the company's creditors, and it is apparent that English was enabled to practice these frauds because of the blind confidence of the mortgage creditors, who, without taking any care to safeguard their own interests or to protect others, placed their mortgages in his custody and allowed them to remain in his possession for years without any inquiry as to the disposition of them by him until they learned of the bankrupt's failure in business. It is conceded that the bank made English its agent for the purpose of recording the deed of trust, but it is contended that the fraudulent purpose of English in failing to record the deed, cannot properly be imputed to the bank, because in suppressing the deed, English violated his instructions and was pursuing a course hostile to the bank and in the interest of the bankrupt company only. I think it is clear that the bank should not be charged with the positive fraud of English, but there can be little question that the failure of the bank's agent to record the deed must be given precisely the same legal effect and must entail the same legal consequences as if the bank itself had withheld the deed from record during the period it remained in the custody of English.

It is, however, contended on behalf of the bank that in Missouri a deed cannot in any case be treated as fraudulent or inoperative as

to creditors because of failure to record it, unless it is withheld from record pursuant to an agreement between the parties. But a careful examination of the reported cases has led me to conclude that an agreement to withhold the deed from record is not, under all circumstances, necessary in order that the court may be justified in setting aside the deed as constructively fraudulent where the grantor has been permitted to continue in possession of the land, has to the knowledge of the grantee been carrying on his business, and has secured credit from persons who have dealt with him in reliance upon his apparent title. The real vice of withholding a deed from record results from the fact that knowledge of the conveyance is thereby withheld from the public, and persons are induced to give the grantor credit in reliance upon his ostensible ownership of the property; and the injury inflicted upon creditors is precisely the same whether the conveyance be withheld from record as the result of an agreement between the parties, or because of the grantee's negligent or willful failure to record it, and the detrimental effect which will probably result can be as well foreseen by the grantee in one case as in the other. It is of course well settled in Missouri that the mere withholding of a deed from record, even if it be so withheld by agreement of the parties, will not render it voidable at the instance of creditors where the evidence does not affirmatively show that the complaining creditors were induced to give credit to the grantor in reliance upon his apparent ownership of the property. *Bank v. Roher*, 138 Mo. 369, 38 S. W. 1047; *Bank v. Newkirk*, 144 Mo. 472, 46 S. W. 606; *Wall v. Beedy*, 161 Mo. 625, 61 S. W. 864. The strongest case tending to support the validity of the bank's lien as here asserted is the case of *Hord v. Harlan*, 143 Mo. 469, 45 S. W. 274, where the absence of any agreement to withhold the deed from record is treated as a controlling circumstance, justifying the court in upholding the deed; but even in this case the court lays emphasis upon the fact that there were no circumstances in evidence tending to bring home to the grantee knowledge that the grantor was obtaining credit upon the faith of his apparent ownership of the land. In the still later case of *Clark v. Lewis*, 215 Mo. 173, loc. cit. 187, 114 S. W. 604, 608, the court discusses the effect of withholding a deed from record and says that, "The mere withholding a deed to, or mortgage upon, land from record will not, ipso facto, vitiate the instrument. It is only when the withholding the instrument from record gives the grantor, upon the faith of the ownership by him of the property conveyed, a fictitious credit, and some one has thereby been misled to his injury, that such failure to record will be held to be fraudulent." Independently of the question of constructive fraud, I am of opinion that the lien of the bank should be treated as invalid as against the trustee as the representative of the bankrupt's creditors upon the equitable principle laid down in *Singer Mfg. Co. v. Stephens*, 169 Mo. 1, 68 S. W. 903. The bank must be charged by virtue of the recording laws, with knowledge of the fact that the title to the property in question stood from December 4, 1902, to August 8, 1906, in the bankrupt company, and in negligently permitting the title to stand in the bankrupt company during this

period, a wrong has resulted to the creditors of bankrupt who have thereby been induced to give bankrupt a credit which would not otherwise have been bestowed.

Upon a careful consideration of the facts disclosed in the evidence and of the law applicable thereto as laid down in the Missouri cases, I have reached the conclusion that the deed of trust held by the bank should be treated as constructively fraudulent or inoperative as to those creditors who extended credit to the bankrupt subsequent to December 1902, and as the amount of these debts considerably exceeds the value of the property embraced in the deed, the lien here asserted cannot be sustained. In my opinion the referee's order was justified by the evidence, and it will be affirmed.

In re JACKSON BRICK & TILE CO.

(District Court, Judicial D. Missouri, S. E. D. July 18, 1911.)

No. 21.

In the matter of the bankruptcy of the Jackson Brick & Tile Company. Proceeding for review of an order by the referee, allowing the claim of the Merchants-Laclede National Bank as a general claim, but refusing to allow the claim as a secured one. Order affirmed.

Oliver & Oliver, for Sturdivant Bank.

Fordyce-Holliday & Ware, for Merchants-Laclede Nat. Bank.

Moses Whybark and W. D. Hines, for trustee.

DYER, District Judge. This is a proceeding for review of an order made by the referee in bankruptcy, allowing the claim of the Merchants-Laclede National Bank as a general claim against the bankrupt estate and refusing to allow said claim as a secured one. The claimant, the Merchants-Laclede National Bank, filed with the referee its claim against the bankrupt in the sum of \$12,500, and set forth therein that it is the holder of 25 promissory notes, each for the sum of \$500, executed by the bankrupt, and that it held said notes as collateral security for an indebtedness due it by Henry R. English, and that as security for said collateral notes it holds a deed of trust executed by the bankrupt to Henry L. Jones, trustee, and the claimant prayed that its said claim be allowed as a secured claim.

The trustee of the bankrupt estate filed written objections to the allowance of the claim, alleging, in substance, that the trustee was in possession of the property alleged to be embraced in the deed of trust; that the deed of trust was executed by bankrupt September 1, 1902, but was withheld from record until August 9, 1906, on which date it was recorded; that said deed of trust was so recorded within four months prior to the filing of the petition in bankruptcy against the bankrupt; that the bankrupt was insolvent at the date of the recording of said deed of trust, and intended by said deed of trust to prefer the claimant over its other creditors, and that the claimant, at the time of placing said deed of trust of record, had reasonable

cause to believe the bankrupt intended thereby to give it an unlawful preference. The trustee further alleged in his said objections, that said deed of trust was given by the bankrupt to the claimant "with the specific intent at the time of recording the same, to hinder, delay or defraud its other creditors," and that said deed of trust was null and void. The trustee further alleged:

"That after the date of the execution and before the date of the recording of said deed of trust, said bank delivered said instrument back to the bankrupt, and the bankrupt, with intent to mislead persons dealing with it, failed and refused to record said instrument; that the bankrupt corporation had incurred a great indebtedness of \$35,000 or \$40,000 to various creditors, who would not have extended credit to said corporation had said deed of trust been recorded on the date of its execution, and that said creditors have had their said claims allowed against said bankrupt estate, and that said deed of trust is void as to all such creditors, none of whom had any notice of its existence until it was recorded."

The trustee thereupon prayed that claimant be required to show cause why the deed of trust should not be canceled and declared null and void as constituting an unlawful preference. Thereafter a hearing was had before the referee upon the claim of the Merchants-Laclede National Bank, and the objections of the trustee thereto, and the referee, after having heard the evidence submitted by the respective parties, made an order adjudging that the lien asserted by the bank under the deed of trust executed by bankrupt to Henry L. Jones, trustee, was void and of no effect, and disallowing the bank's claim as a secured claim and allowing it as a general claim against the bankrupt estate in the sum of \$17,246.16. Thereupon the claimant, the Merchants-Laclede National Bank, filed its petition for review of the foregoing order, and the referee has certified the matter to the court.

The material facts as certified by the referee are as follows: The bankrupt company was originally incorporated in 1897 under the name of the English Mining & Manufacturing Company, and afterwards, in 1902, changed its name to the Jackson Brick & Tile Company. The company from the time of its incorporation until it failed in July, 1906, was engaged in the business of manufacturing brick, fire brick, and drain tile, at Jackson, Mo. Henry R. English was president and principal owner of the company, and had complete control of its affairs from the outset until the time of its failure. On September 12, 1902, Henry English borrowed from the Merchants-Laclede National Bank, at St. Louis, for the use of the bankrupt company, \$8,500, and gave the bank his personal note for that sum, dated September 12, 1902, and pledged with the bank as collateral security for the note, 25 notes, each for the sum of \$500, executed by the English Mining & Manufacturing Company, dated September 1, 1902, payable five years after date, with interest at 8 per cent. per annum from date. The 25 notes last mentioned were secured by a deed of trust executed by the English Mining & Manufacturing Company, dated September 1, 1902, whereby the grantor conveyed certain real estate in said deed described, together with the buildings, machinery, kilns, and dryhouses thereon, and also its carts,

wheelbarrows, shovels, and all the personal property used in its business to one Henry L. Jones, as trustee, as security, for said notes. At the time Henry R. English obtained the loan of \$8,500 from the claimant bank, he delivered this deed of trust to the bank, and the bank, at English's request, at once returned the deed of trust to him, and requested him to have it recorded. English did not record the deed of trust, but retained it in his possession or under his control for nearly four years, until August 8, 1906, when it was filed for record. The deed of trust was recorded within four months prior to the filing of the petition in bankruptcy. At the time it was recorded, claimant bank and creditors generally knew that the bankrupt company was insolvent and unable to continue its business. From the time the money was borrowed from the claimant bank in September, 1902, until July, 1906, it continued to carry on its business, and incurred debts amounting to \$30,000 or \$40,000, which remained unpaid at the time of the commencement of the bankruptcy proceedings. English testifies that the reason he did not have the deed of trust recorded was "that there were other matters pending at the time," that the recording of the instrument "might have interfered with a new loan," and that it might have affected the standing of the Jackson Exchange Bank with which he was connected.

It appears from the evidence that after September, 1902, and while this deed of trust was withheld from record, the bankrupt company borrowed \$2,500 from the bank of Whitewater, and the representatives of the bank examined the records before making the loan, and found that there were no incumbrances on the bankrupt's property, and the evidence shows that this debt to the bank of Whitewater remained unpaid when the petition in bankruptcy was filed. The evidence further showed that in July, 1906, one Hugh R. Quinn, loaned the bankrupt company \$27,600 to pay certain notes of the bankrupt held by the Jackson Exchange Bank, on which said Quinn was indorser, and as security for the loan took a mortgage on the bankrupt's property, including the property embraced in the deed of trust to Henry L. Jones, trustee, dated September 1, 1902, and Quinn testified that before making this loan he examined the records of Cape Girardeau county and found no incumbrances on the bankrupt's property. He further testified that he would not have made this loan if he had known of the existence of the deed of trust held by the claimant bank.

The case presents the same essential features as that of the *Sturdivant Bank* (189 Fed. 636), just decided, and for the reasons set out in the opinion filed in that case, I am of opinion that the order made by the referee was right, and it will be affirmed.

THE QUEEN CITY.

THE EDWARD Y. TOWNSEND.

THE JOHN W. MOORE.

(District Court, E. D. Michigan, S. D. September 20, 1910.)

1. COLLISION (§ 94*)—VESSELS MEETING—FAULT OF OVERTAKING VESSEL.

The steamer Moore was passing up the Detroit river at night when she was overtaken by the Townsend, a much larger and longer vessel, and an agreement was made for her to pass to the starboard of the Moore. As she was passing the vessels met the Queen City coming down, and an agreement was made to pass her port to port. When the Moore and Queen City were some 1,200 feet apart the Moore suddenly sheered to port, and a collision resulted in which she was sunk. The evidence tended to show that the Moore was practically following the range lines, and shortly before the collision changed from the Grassy Island to the Mamajuda range at their intersection, which required a change of course to starboard of three-quarters of a point, and that the Queen City was on a course which would have left a space of from 100 to 200 feet between the vessels at the point of passing; also, that the Townsend had been from 100 to 150 feet from the course of the Moore, but approached nearer after the latter changed to the new range. *Held*, on all the evidence, that neither the Moore nor the Queen City was in fault, but that the collision was due solely to the fault of the Townsend in approaching so near the Moore that her suction caused the latter to sheer, and brought about the collision notwithstanding all reasonable efforts of the other vessels to prevent it.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 197-199; Dec. Dig. § 94.*]

2. COLLISION (§ 94*)—RULES FOR OVERTAKING VESSELS—NAVIGATING IN RIVER.

The rule of all navigation statutes and regulations which requires an overtaken vessel to keep her course and speed, as applied to a river, relates, not to the course on which the overtaken boat is directed when the passing agreement is made, but to her normal course in the channel, and every turn and change of direction in that course must be anticipated and guarded against by the overtaking vessel.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 197-199; Dec. Dig. § 94.*]

Overtaking vessels, see note to *The Rebecca*, 60 C. C. A. 254.]

3. COLLISION (§ 94*)—OVERTAKING VESSELS—PASSING MEETING VESSEL.

Where, while an overtaking vessel is passing on the starboard side of the leading vessel, another vessel is met and an agreement made between the three for her to pass port to port, the overtaken vessel may yield reasonably to the one met and the overtaking vessel must anticipate such movement and keep at a safe distance.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 197-199; Dec. Dig. § 94.*]

4. COLLISION (§ 98*)—FAILURE TO SIGNAL.

Fault cannot be predicated by the T. on the failure of the M. to sound an alarm, when the developing danger was as apparent to the T. as to the M.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 208-210; Dec. Dig. § 98.*]

5. COLLISION (§ 91*)—VESSELS MEETING IN RIVER—MIDDLE OF CHANNEL.

In the Detroit river, where ranges have been established to mark the regular path of vessels, such ranges, and not the winding and unknown midline between the irregular channel banks, fix the normal course which

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

affects the rights and duties of meeting boats as to their position in the channel.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 187-192; Dec. Dig. § 91.*]

6. COLLISION (§ 108*)—ACTS IN EXTREMIS.

In the face of a sudden sheer by one boat only one minute before the resulting collision, the other boat may invoke the rule of in extremis.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 225-231; Dec. Dig. § 108.*]

In Admiralty. Suit for collision by Frank M. Osborne and others, owners of the steamer John W. Moore, against the steamer Edward Y. Townsend, Cambria Steamship Company, claimant, by the Pittsburgh Steamship Company, owner of the steamer Queen City, against the steamers Townsend and Moore, and for Duncan McIntyre, deceased, against the owners of all three vessels. Decrees against the Townsend and owner only.

Goulder, Holding & Masten, for the Moore.

Hoyt, Dustin, Kelley, McKeehan & Andrews, for the Queen City.
Brown, Ely & Richards, for the Townsend.

DENISON, District Judge (sitting by designation). [1] At about half past 2, on the morning of October 30, 1907, the Queen City, down bound, met the Moore and the Townsend, up bound, in Detroit river, opposite Wyandotte. The Queen City and the Moore met port to port, and the Townsend was overtaking and passing the Moore on the latter's starboard. Just before the meeting, three abreast, the Moore suddenly swung over across the course of the Queen City and collided with her. The Moore was sunk and one of her crew killed; the Queen City was severely injured. Upon the theory that her change of course was caused by suction from the Townsend, passing too near, the Moore libeled the Townsend; the latter boat, by its answer, charged the chief fault to the Moore, and also accused the Queen City of fault in not yielding proper passing room; and the Queen City proceeded against both the other boats. The representatives of the sailor who was killed filed their libel against all three boats. All these cases are heard together to determine the fault.

The primary burden is clearly upon the Moore to explain that erratic course by her which was the immediate cause of the disaster. This burden is fully met. All the positive testimony and all the reasonable inferences from the undisputed facts are to the effect that this change of course was due to a sheer, resulting from the Townsend's suction, which caught the stern of the Moore and pulled it up stream for a moment, so that when this suction let go the Moore was headed partly across the channel. The conditions attending the creation and exercise of this force called "suction" seem to be imperfectly known, but many of the characteristic conditions were here present. The Townsend was more than twice as long as the Moore and was running ten miles (past the land) as against the Moore's seven. The sterns were, at the instant of the sheer, about abreast and quite close together. The draught of the Townsend, 8 feet for-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ward and 16 feet aft, whereby the full displacement occurred only at the stern, may have been of some importance. The Townsend's crew do not undertake clearly to deny that their suction was the moving cause; they only suggest that the Moore's navigators deliberately or recklessly crossed over into the Queen City's course. Such suggestion can hardly be seriously considered. No other cause, except this suction, reasonably accounts for the Moore's extraordinary action. Finding, then, that the Townsend's suction was the immediate cause of the sheer, and it being apparent that the evil effect of the suction followed on the undue proximity of the two up-bound boats, the vital question must be which boat is at fault in creating this undue proximity. This leads to a more detailed consideration of the facts.

The Detroit river channel, having a depth of more than 20 feet, varies in width from the full distance between the shores down to 300 or 400 feet, and has frequent turns and angles. In aid of navigation, the government has established, on the banks or on islands or on shoals, certain monuments called ranges, visible by day and lighted by night. Two lights, main and front, constitute a range, and, obviously, a boat going to or from such ranges, and keeping the two in line over her bow or stern, may thus pursue a fixed and known course all the way up or down the river. For example, the navigator may be going up, on a course having certain ranges in line over his bow; at a certain point, he will observe that ranges, which have been open over his quarter and have been gradually closing, are closed and in line; he will then alter his course, keeping the new ranges in line over his stern, until he comes to the next reach intersection; and so on. There is no rule requiring a boat to follow the exact ranges; it may, if all conditions permit, go anywhere in the channel; but these range courses constitute the only definite, marked path and the only track that can be accurately kept, especially at night; and to "follow the ranges" is the regular and normal course of action, just as it is with a wagon to follow the beaten track in a highway.

Coming up the river, the course is upon the North Channel ranges (stern) until it intersects Grassy Island reach; upon the latter (bow) to the Mamajuda reach; upon these ranges (stern) to Ecorse reach; upon this (bow) to the next; and so on up the river. Going down, these courses are reversed. The course distance on the Grassy Island reach is about one mile. The Moore was following the ranges up, and shortly before it struck the Grassy Island reach the Townsend, following at a higher speed, blew one whistle, indicating an intention to overtake and pass on the Moore's starboard. The Moore assented; a passing agreement was thus established. Shortly after the Moore turned on to the Grassy Island ranges, the Townsend began to lap, being from 100 to 150 feet to one side. This was, under ordinary circumstances, just a safe passing distance. When the boats were part way up this reach, the Queen City was observed coming down on the upper part of the Mamajuda range. Whistles were exchanged between the Queen City and each of the others, thus establishing a port to port meeting agreement. As the boats proceeded in this way,

nothing was observed, by any one, unusual or alarming; but from this moment of apparent safety it was probably less than two minutes—perhaps not much more than one—until the Moore was on the bottom. All agree that the first abnormal occurrence was the change of the fairly safe distance, of from 100 to 150 feet, between the Moore and the Townsend, into the dangerous proximity of from 25 to 50 feet. All agree that from this position, almost of contact with the Townsend, the Moore shot away across the course of the Queen City. Concerning nearly every other circumstance, there is the usual conflict of testimony.

First, as to the exact position of the boats. I think the proper inference from all the testimony is that the Moore was practically on the ranges at the point of intersection, and that she then followed the Mamajuda ranges, perhaps yielding slightly to the eastward for the Queen City meeting. This is, practically, the Moore's testimony, although her crew do not concede such yielding. The Townsend's crew would put the Moore much further east, and the Queen City's theory is that the Moore was much further west. Both these claims I think inaccurate. There was every reason why the Moore should substantially follow the ranges, and no reason for going to the westward, just before meeting a down-bound steamer which had a tow, and no reason for going to the eastward so as to crowd the passing Townsend, except as it would be natural to make the usual slight change of course for a port meeting. Of the three boats, the Moore was the only one able to locate herself accurately, because in line with the ranges; the other two depend on estimates as to how far the ranges were open, and such estimates must be a highly unsatisfactory means of fixing lateral distances from the range line, especially when the longitudinal distances must also be only estimated, and when such estimates must be made at night and by looking at a distant light. The only criticism on this conclusion as to the Moore's location, as far as it is based on her testimony, is that her crew say that the Mamajuda lights were in range over the starboard side of her stack, and, as this was $2\frac{1}{2}$ feet from the midship line, it is therefore said she would be heading to the eastward of the range. This criticism is perhaps accurate, but is overnice. Navigators who use on board some sighting point which is not amidships, must of necessity compensate in some way for any material inaccuracy so caused. Such an inaccuracy is either too slight to be material or is compensated in some way, or else the course cannot be kept. To keep a course so determined would, if the variance was substantial, require that the ship move sideways as well as forward. The Queen City must be placed from 50 to 150 feet west of the Mamajuda range. Her evidence puts her 400 or 500 feet west; but in view of the position of the wreck, this is impossible. She was fully laden, was towing a large and heavy barge and was with the current. These things made it unnecessary and unlikely that she would make an extraordinary swing to avoid the up-bound boats, and I do not think she did. Such placing of the boats as I have adopted would leave from 100 to 200 feet between their

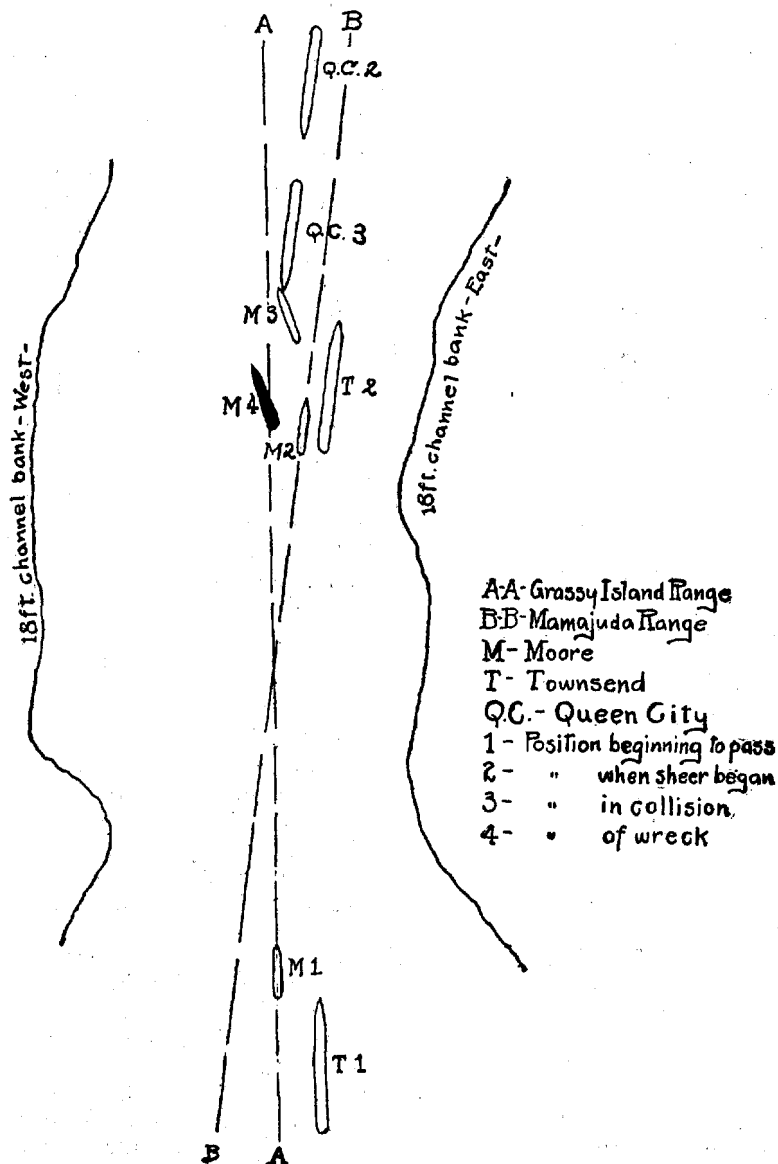
expected courses at the meeting point. This is the Moore's testimony, and this would have been safe.

The Townsend, at the range intersection, was 100 or 150 feet on the Moore's starboard. She concedes this distance shortly before, but claims below that point to have ported and headed on the Ship Yard lights, thereby gradually drawing away. This claim is too indefinite to be convincing. There is no testimony, oral or by chart, accurately locating these lights, and if, as counsel state, they extend across the whole Ship Yard property, as it is indicated on the chart, then a course headed on these lights might have been diverging from the Grassy Island and parallel to the Mamajuda range, or might have been nearly parallel to the Grassy Island and intersecting the Mamajuda range. The sufficient fact is that the Moore was nearly on the Mamajuda range, and that the courses of the two boats did intersect.

At the range intersection, the Moore ported three-fourths of a point to take the Mamajuda range and, perhaps, either then or just afterwards, enough more, on account of the meeting, to make nearly or quite one point. One point would put her bow about 18 feet to the eastward of the course for every 100 feet traveled forward; and if the Townsend was keeping a course substantially parallel to the Grassy Island range, the two boats would approach accordingly. If the Moore ported only three-fourths of a point and the Townsend's course diverged one-fourth of a point from the Grassy Island range, then the two boats approached each other at one-half of this supposed rate. Something of this kind is what occurred; and when the bow of the Moore was about 750 feet north of the intersection, the Townsend observed what was happening. The crew might well have thought that the Moore was coming over into them—as indeed she was, but rightfully. At about that instant, either because of the observed approach of the Moore, or because, just before or just then, the Townsend's navigators supposed that they were at the point of change in range course, the Townsend ported. Upon the oral argument, counsel said that a boat, loaded as the Townsend was, would swing approximately on its central point as a pivot, and it may be so considered; though this result is somewhat modified by the fact that the pivot is moving on the arc of a circle. On this assumption, porting one point would swing the stern of a 600-foot boat more than 50 feet to port, and in this way, the dangerous proximity would be created, if it did not already exist. In the meantime, the Moore would be running another length, so that I locate her bow about 1,000 feet above the intersection when the sheer began.

I allow 500 feet for the entire sheer; extending about 150 feet across the channel. This allowance cannot be far from right, because the boats are said to have been 1,200 feet apart, up and down stream. They were approaching at the rate of 1,500 feet per minute, and the Queen City was covering nearly two-thirds of the disappearing distance. The Queen City struck the Moore on the latter's starboard bow, and I fix the point of collision as about 100 feet west of the Mamajuda range, and about 1,500 feet above the intersection.

The Moore filled and sank, by the bow, very quickly, but if we allow one minute after the shock and before the bow grounded, the current alone would carry the boats down stream 150 feet. At the angle of impact, the resulting impulse must have carried the boats also considerably to the westward, thus leaving the grounded wreck at the point shown in the Heinze survey. The accompanying sketch shows the positions of the boats at the different times indicated:



These conclusions are, of course, only approximate, as to locations and distances, and are, in part, reasoned backwards from the position of the wreck, which I believe to be correctly shown by Heinze. The conflicts between the different surveys are discussed at length by counsel. I see no reason why, upon the technical questions of surveying involved, Heinze may not be more accurate than Van Schon, but the controlling consideration in my mind is that two witnesses, Reid and Baker, disinterested and familiar with the ranges, stood upon the wreck in daylight and observed, and say that it was upon the Grassy Island ranges, as Heinze plots it, and was not on the Mamajuda ranges, as Van Schon plots it. Further, during all the wrecking operations, up and down boats passed to the eastward, which, seemingly, would not have occurred if the wreck had been on the Mamajuda range.

I cannot accept the Queen City's theory that the boats hung together after the collision while she was able to check her headway, back, and pull the Moore 200 or 300 feet upstream and across, easterly, to the point where the wreck rested. Nor can I accept the Townsend's theory that the sheer was 400 or 500 feet across the channel, and therefore started away over toward the east bank, where the Moore had no business to be. This theory has no support, except exaggerated estimates computed from an erroneous location of the wreck.

[2] The Townsend urges the familiar rule that the overtaken boat must keep her course and speed. It seems to me obvious that this rule, applied to a river, relates, not to the course on which the overtaken boat is directed when the passing agreement is made, but to her normal course in the channel; that every turn and change of direction in that course must be anticipated and guarded against by the overtaking boat; that the latter must, at its peril, keep away far enough to permit the former safely to make these changes and turns. Such seems to be the established rule (The Hasbrouck, 93 U. S. at page 407, 23 L. Ed. 962).

[3] It seems also obvious that if a meeting occurs, and if all boats join in a meeting agreement, the overtaken boat may yield reasonably to the boat met, and the overtaking boat must anticipate this also. The Whiteash (D. C.) 64 Fed. 893. This absolute duty to keep away a safe distance, the Townsend did not meet. The reason may be, as indicated by her captain's examination before the inspectors, that he erroneously thought he was over along the east bank; but whatever the reason, the fact is quite clear. The Moore did not go to starboard, except as it was her right and duty under this rule to do so. The collision was the direct and not unnatural result of the Townsend's failure to maintain a safe distance, under these conditions which she should have anticipated; and the fault is, therefore, to be fixed upon that boat.

[4] Complaint is also made of the Moore for not giving warning to the Townsend of the danger. The Moore did blow a four-blast signal, which seems to be regarded as a request to check, but there is conflict as to when that was, whether more than one, and whether

the Townsend paid any attention. However that may be, all danger existing, at any time, from any cause, was obvious to the Townsend at least as early and as clearly as to the Moore. As to the gradual drawing together of the boats, on converging courses, the Townsend knew that she had not ported on the range intersection, while the Moore could not know this fact until the convergence became pronounced. As to the sudden swing of the Townsend's stern, at the moment when most dangerous, this could not be anticipated by the Moore. Hence, fault cannot be predicated on the Moore's failure to sound an alarm.

The Queen City is charged with fault (1) for not keeping further to the starboard; and (2) for not porting and reversing when she saw the Moore sheer.

[5] As to the first point, the argument is that even if the Queen City kept to the westward of the range course, she was east of mid-channel, and that, anticipating a three-abreast meeting, she should have given the other two boats at least half the channel. The Queen City, judging only by the lights, had much less reason than the up-bound boats to anticipate such a meeting, but, even if anticipating, the Queen City met its full duty when it swung away reasonably from the ranges. True, the ranges do not mark mid-channel, but they do mark the normal and regular path of vessels, and regulate meetings under ordinary conditions. It is these ranges, and not the winding and unknown line between the irregular channel banks, which should be the normal basis of fixing the rights and duties of meeting boats. Here, the Queen City captain knew there was ample channel room for both the up boats east of the range, and he was justified in assuming that they would both stay there. If the Moore had held on, as the Townsend now claims she should have done, upon the Grassy Island range, until the Townsend was well past, this would have taken her a thousand feet or so past the intersection and into the Queen City's course, a collision at about the location of the wreck would have been likely, and I think the Moore would have been in fault.

As to the second point, I am satisfied that everything done or not done either by the Queen City or by the Moore, after the sheer started, was *in extremis*. From the time the sheer started until the collision was not over one minute. Less time than this intervened after the Moore had swung so that her lights would indicate that she was crossing into the Queen City's course. The Queen City was certainly justified in waiting for a few seconds, at least, to see whether the Moore did not recover from the sheer. Making these deductions, we have hardly more than 30 seconds' time during which it can be said that perhaps the Queen City ought to have appreciated what had happened. It must also be remembered that the Queen City had a barge in tow upon a 500-foot line, and that it could not stop and back, except with danger of collision with her tow. If, a half or three-quarters of a minute before the collision, she had ported as much as possible and gone to starboard, she *might* have avoided the collision, but, on the other hand, she *might not*, and might also have brought her barge into collision with the Moore.

Looking back, with our present knowledge of the Moore's actual course, it would seem that the Queen City could have avoided her by starboarding and going under her stern, but, at the moment, that would have seemed a very reckless maneuver. The court cannot say, putting itself in the place of the Queen City's captain at that moment, that any other course should have then appeared to him clearly better and safer than the course which he did take. Thirty or forty-five seconds for consideration, in the face of entire uncertainty as to when the Moore would recover, did not call for any other course.

The Moore did everything possible to break the sheer. The captain doubtless hoped and perhaps expected that she would recover before reaching the Queen City's course, but, even with our present knowledge, nothing else appears that he could have done.

I have examined the cases cited by counsel. So far as they hold that the overtaken boat contributed to the injury, I think the circumstances fully distinguish them from the present case. Counsel especially relies upon *The Edward Smith*, 135 Fed. 32, 67 C. C. A. 506; but in that case, it appears that the danger came from passing in a narrow channel, in violation of established rules, and that the overtaken boat had consented to that kind of a passing, while, in the present case, the Moore consented to a passing in a wide channel, where there was no reason for not consenting, and the Moore's acquiescence in a passing in progress at a distance close to the margin of safety was on the necessarily understood condition that the Townsend would maintain at least that distance during the entire passing, and in spite of the well-known turns in the regular course.

Counsel may prepare a decree in accordance with this opinion.

PENNSYLVANIA STEEL CO. v. NEW YORK CITY RY. CO. et al.

(Circuit Court, S. D. New York. June 27, 1911.)

Nos. 2—9, 2—33, 2—149, 3—37.

1. CORPORATIONS (§ 473*)—RIGHTS AND REMEDIES OF BONDHOLDERS—REFERENCE TO MORTGAGE.

A reference in bonds issued by a corporation to the mortgage securing the same puts the bondholders and their trustees on notice as to the terms of the mortgage.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1842-1855; Dec. Dig. § 473.*]

2. STREET RAILROADS (§ 54*)—MORTGAGES—CONSTRUCTION—PERSONAL LIABILITY OF MORTGAGOR.

The effect of a provision in a mortgage securing bonds of a street railroad company, that "for the debt and bonds secured hereby the railroad company is liable in personam, and any deficiency, after exhausting the mortgage security, may be enforced against the railroad company," is to require a resort first to the mortgage security, and to limit the personal liability to such deficiency as may remain after such security has been exhausted.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 133; Dec. Dig. § 54.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. STREET RAILROADS (§ 58*)—INSOLVENCY AND RECEIVERS—CLAIMS PROVABLE AGAINST RECEIVERS.

A lease of a street railroad system, made up in part of lines held by the lessor under leases, contained a provision that "the lessee shall also from time to time pay or cause to be paid all rentals and other sums of money which are or may be or become due or payable under or by reason of any leases and other contracts to which any of the demised property is or may be subject, and the lessee hereby assumes all the obligations of the lessor under all such leases and contracts, and the lessee agrees to pay all interest upon the funded debt of the lessor and other fixed charges of the lessor, provided that the lessee shall not be required to pay the principal of any funded obligations of the lessor or of its subsidiary companies except as hereinafter provided." Subsidiary companies were defined in the lease as including companies whose lines had been leased to the lessor, and the lessor had guaranteed payment of both principal and interest of bonds issued by one of such companies at the time and in the manner provided in the mortgage securing the same. Both lessor and lessee became insolvent and receivers were appointed, who surrendered the lease of such subsidiary company's line and restored the property to the owner. The mortgage was not due, but was declared due for default in the payment of interest under a provision therein, although it had not been foreclosed. It contained a provision making the mortgagor liable in personam only for the deficiency after the mortgaged property was exhausted. *Held* (1) that the sums agreed to be paid by the lessee under such provisions of the lease were in the nature of rent, and on termination of the lease the liability ceased as to sums subsequently becoming due; (2) that the liability of the lessor on its guaranty was contingent on there being a deficiency, and that neither principal nor interest of the mortgage debt were provable against the estate of either insolvent company.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 58.*]

In Equity. Suits by the Pennsylvania Steel Company against the New York City Railway Company and others, by the Farmers' Loan & Trust Company, successor to the Morton Trust Company, against the Metropolitan Street Railway Company and others, by the Guaranty Trust Company of New York against the Metropolitan Street Railway Company and others, and by the Farmers' Loan & Trust Company against the Metropolitan Street Railway Company and others. In the matter of claims of the Second Avenue Railroad Company bondholders. On exceptions to report of special master. Exceptions overruled.

This cause comes here upon exceptions to report of special master disallowing the claims of Alexander J. Hemphill and others as holders of first consolidated mortgage bonds of the Second Avenue Railroad Company. The claims were filed separately against the estates (now in receivers' hands) of the Metropolitan Street Railway Company and the New York City Railway Company. The details of the claims with full quotations from the documents upon which they are founded will be found in the exhaustive opinion of the special master which accompanies his report.

Following is the report of W. L. Turner, Special Master:

In addition to the individual claims of bondholders on which the hearings have been had, and which are now submitted for disposition, there have been filed with me in pursuance of orders in that behalf made, by the Guaranty Trust Company, as trustee under the mortgage above referred to, by the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Second Avenue Railroad Company, and by its receiver, claims against the estates in the hands of the receivers of the Metropolitan and City Companies, which arise out of the same transactions. The incidental and unavoidable effect of disposing of the claims now submitted will be to dispose of these latter claims also, and while these claimants, although appearing by the same solicitors as the bondholders, have not been noted on the record as actually represented, I shall, in addition to passing on the submitted claims, indicate the disposition of these claims which I shall recommend to the court.

By an indenture dated January 20, 1898, the Second Avenue Railroad Company mortgaged to the Guaranty Trust Company, as trustee, its property to secure a proposed issue of bonds amounting to \$7,000,000, of which \$5,682,000 are actually outstanding, and \$4,047,000 are represented by individual claimants, and on January 28, 1898, it leased its entire railway system to the Metropolitan Company. The lessee assumed the payment of the bonds in the lease, and by indorsement on the back of the bond before actual issue it guaranteed payment, the assumption clause and guaranty so called being the bases of the claims against its estate. The relevant portions of the bond, guaranty, mortgage, and lease, I quote, italicizing language which has suggested contentions, the bond being as follows: "The Second Avenue Railroad Company in the city of New York, a corporation organized and existing under the laws of the state of New York, United States of America, for value received, promises to pay to the Guaranty Trust Company of New York, or bearer, or, if registered, to the registered owner thereof, the sum of one thousand dollars in gold coin of the United States at the office or agency of the said railroad company in the city of New York, on the 1st day of February, 1948, and to pay interest on the said sum in like gold coin semi-annually at said office or agency on the first days of August and February in each year, on the presentation and surrender of the respective annexed interest coupons. This bond is one of a series of bonds of like tenor numbered consecutively from 1 to 7,000, inclusive, and amounting in the aggregate to \$7,000,000 and the payment of the principal and interest of and upon said bonds is equally secured *by and according to the terms of a certain mortgage or deed of trust* duly executed and delivered by the said railroad company to the Guaranty Trust Company of New York, as trustee, bearing date the 20th day of January, 1898, conveying to said trustee, by way of mortgage, the property, rights and franchises described therein."

The coupons annexed both to bearer and registered bonds read as follows: "The Second Avenue Railroad Company in the city of New York will pay to bearer, at the office or agency in the city of New York, twenty-five dollars in gold coin of the United States on the 1st day of ———, being six months' interest on the first mortgage five per cent. gold bond numbered."

The contract of the Metropolitan Company respecting these bonds is not in terms referred to in, nor required by, either the lease or the mortgage, but was indorsed on each of said bonds issued and outstanding prior to their inception and is in the following language: "For value received, the Metropolitan Street Railway Company hereby guarantees *to the trustee of the within mentioned mortgage* for the benefit of the holders hereof the punctual payment of the principal of the within bond and the interest thereon *at the time and in the manner specified therein* and according to the tenor of the several coupons belonging thereto."

The mortgage contains in its third paragraph the following provisions: "If default shall be made in the payment of all or any part of two consecutive installments of the interest hereby secured to be paid, and should the same remain unpaid and in arrears for the space of thirty days after the last of said installments shall become due and be duly demanded, or should any taxes or assessments upon the said mortgaged premises remain in arrears for the space of one year after the same shall become due and payable, then, and in that event, after the lapse of said periods, respectively, the entire principal sum secured by said bonds then outstanding, together with all arrearage of interest thereon, shall forthwith become due and payable,

provided a majority in interest of the holders of said bonds shall so elect and certify their said election in writing to the said trustee, its successors or assigns, signed by them or their lawful attorneys, and duly acknowledged, even though the time in said bonds limited for the payment thereof shall not then have expired, anything in said bonds contained to the contrary thereof notwithstanding. * * *

The mortgage also provided in the fourth paragraph that in case of default in the payment of the principal, if such default should continue "for sixty days after such payment shall become due *either by the maturity of the bonds or by reason of the declaration of the trustee under the provisions of this mortgage,*" it should be the duty of the trustee, on the written request of a majority of the bondholders, to sell the mortgaged property; and in its fifth paragraph, that it should be its duty upon indemnification to execute the power of sale therein granted or to take appropriate proceedings at law or in equity to enforce the rights of the trustee and of the bondholders, the several remedies specified being cumulative and not exclusive one of the other. The mortgage contains no provision authorizing bondholders to sue for principal when the maturity of that principal has been accelerated on the happening of the specified defaults.

In the eleventh paragraph the following language occurs: "For the debt and bonds secured hereby the railroad company is liable in personam, and any deficiency, *after exhausting the mortgage security,* may be enforced against the railroad company, but not against the directors and stockholders individually, and it is expressly agreed between the parties hereto and *by every person who shall take or hold any bond or bonds hereunder,* that the existing and all future directors and stockholders of the railroad company shall not be individually liable to any extent or for any purpose with respect to said bonds or any of them."

The lease from the Second Avenue Company, dated just 8 days later than this mortgage, was for the unexpired term of that company's charter, which was for 99 years, but it covenanted to perform any corporate act appropriate to secure the full enjoyment of the demised premises making the Metropolitan Company its attorney to that end, among others, and it expressly stipulated to take all necessary steps to secure such extensions of its corporate existence as it should be entitled to under the laws of the state of New York, so that the property and franchises demised might be fully secured in possession and enjoyment. As those laws permitted the extension of corporate existence at any time before expiration, and as such existence may be perpetual, the term "demised" was substantially in perpetuity. It recites the making of the mortgage referred to, its purpose, execution, and delivery, and the fact that none of the bonds had been issued and disposed of. Certain promises of the lessor as to the disposition of the bonds, not important to note, are followed by the assumption clause, which reads thus: "This lease is made subject to all debts and liabilities of the party of the first part, except debts due or liabilities incurred to the party of the second part, and such debts and liabilities, except as aforesaid, and subject to the provisions and conditions of the lease, are hereby assumed and are to be paid by the party of the second part as a part of the consideration hereof, and all bonds that shall be issued by the party of the first part *under the mortgage to the Guarantee Trust Company hereinbefore referred to,* when issued and disposed of as hereinbefore provided, or as provided in said mortgage or in this lease, shall be included among the obligations which the party of the second part assumes and agrees to pay under the provisions of the lease."

On February 14, 1902, the Metropolitan demised to the Interurban Company, the name of which was afterwards changed to New York City Railway Company, all the "benefits and rights arising from any and all contracts which the Metropolitan Company has or shall hereafter be entitled to, for the full term of 999 years from the date hereof, as the same may have been or may be acquired by the lessor." By a recital in the lease, companies, the lines of which were leased to, or a controlling interest in the stock of

which was owned by the Metropolitan Company, or by one of its lessor companies, are referred to as subsidiary companies. The Second Avenue Company was one of these and comes within the language of paragraph 3 of this lease, which is the assumption clause relied on by claimants as fastening a provable liability against the estate of the City Company, the paragraph in question being as follows: "The lessee shall also from time to time pay, or cause to be paid, all rentals and other sums of money which are or may be or become due or payable under or by reason of any leases and other contracts to which any of the demised property is or may be subject, and the lessee hereby assumes all the obligations of the lessor under all such leases and contracts, and the lessee agrees to pay all interest upon the funded debt of the lessor and other fixed charges of the lessor, *provided that the lessee shall not be required to pay the principal of any funded obligations of the lessor, or of its subsidiary companies*, except as hereinafter provided. All rentals and other payments made, as in this and the preceding article provided, shall be apportioned between the periods respectively preceding and succeeding the date of taking possession hereunder."

On September 24, 1907, receivers of the properties of the New York City Company were appointed by this court, and on October 1, 1907, the same receivers were appointed of the properties of the Metropolitan Company. The interest coupons, maturing February 1, 1908, after their appointment, were paid by the receivers, but those maturing August 1, 1908, were not, and on November 5, 1908, the court entered its order instructing its receivers not to adopt the Second Avenue lease. Coupons maturing subsequently have accordingly remained unpaid, as have the taxes for more than the year specified in the mortgage, and a majority of the bondholders having on the 18th of February, 1910, requested the trustee so to do, it did on the 21st day of February in pursuance of the mortgage, notify the railroad company that it declared the entire principal secured by said bonds then (as now) outstanding, viz., the sum of \$5,682,000, together with the interest due, to be forthwith due and payable. A foreclosure suit had been commenced in the national court by the trustee against the Second Avenue Company in 1908, and a similar suit in the state court, and in this latter action by an order entered September 19, 1908, a receiver has been appointed of the mortgaged property of the defendant company, but no decree has been entered in either suit nor a sale had, and, of course, no judgment for any deficiency has been entered.

Counsel for the claimants in the main brief filed in their behalf has urged the provability of the bondholders' claims against the estate of the New York City Railway Company for the amount of the principal of the bonds upon two theories. One of these theories has been definitely abandoned in the reply brief filed by him and the other he abandoned in the oral argument though not in the brief, so that both for the sake of identification as well as to indicate the reasons for rejecting them, they are here stated before taking up the more serious and difficult contentions suggested by the guaranty, and the assumption clause entered into by the Metropolitan Company respecting principal and interest, and by the similar assumption clause entered into by the City Company respecting interest.

The first theory was that the true construction of paragraph 3 of the Inter-urban (City) lease above quoted is that the City Company (lessee) was not bound to pay the principal of any funded debt merely because the Metropolitan Company had created the debt or was liable as guarantor thereon, but that if the payment of such funded debt constituted an obligation under one of the underlying leases, then it was assumed by the lessee in common with all "other sums of money which are or may be or become due and payable under or by reason of any leases." The language of the exception from the language quoted, however, is that the lessee "shall not be required to pay the principal of any funded obligations of the lessor's subsidiary companies," which, by the recital I have referred to, are defined so as to include the Metropolitan's lessor companies, of which the Second Avenue Company was one, and as it is beyond dispute that the claimant's bonds are a funded obli-

gation of a subsidiary company, it is clear that so far as they represent principal they come within the exception, whether the Metropolitan was liable to pay them, either primarily or as guarantor, or not.

On the other theory, it was claimed that the City Company by the lease to it became the assignee of the lease from the Second Avenue Company to the Metropolitan and liable as such to pay both principal and interest by reason of a resulting privity of estate, whether it had, in the lease to it, by express language assumed such payment or not.

This theory rests on the assumption that the Metropolitan demised to the City Company its entire interest in the unexpired term of the Second Avenue Company's lease to it, retaining no reversionary interest, however slight, but as has been stated, the latter lease was practically in perpetuity, while the lease to the City Company was for 999 years, so that under the authorities there being a reversionary interest left in the lessor, it was a sublease of Second Avenue properties, and not an assignment, with its resulting obligation as to such covenants in the lease assigned as ran with the land, of which covenants of assumption of existing indebtedness may or may not be types (*Stewart v. L. I. R. R. Co.*, 102 N. Y. 601, 8 N. E. 200, 55 Am. Rep. 844; *Herzig v. Blumenkrohn*, 122 App. Div. 758, 107 N. Y. Supp. 570).

As neither the bondholders nor their trustee are parties to the contracts evidenced by the guaranty indorsed upon the bonds and by the assumption clauses contained in the leases, it is evident that their claims must rest upon the doctrine laid down in *Lawrence v. Fox*, 20 N. Y. 268, permitting a third party to sue upon a contract made for his benefit. Counsel for both receiver-ships earnestly urge that the doctrine of that case has never been unreservedly adopted in the federal courts, and has been so far limited and qualified in New York that it is not applicable to the facts suggested by these claims. I think, however, that under the federal decisions the rights of claimants are to be determined by the law of the place where the claims are asserted and their subject-matter lies even though they be asserted in a federal forum (*Union Life Ins. Co. v. Hanford*, 143 U. S. 187, 12 Sup. Ct. 437, 36 L. Ed. 118; *Johns v. Wilson*, 180 U. S. 440, 21 Sup. Ct. 445, 45 L. Ed. 613), so that, in passing on the contentions, the discussion narrows itself to an application to the suggested facts of the doctrine as evolved in the decisions of the state courts.

The qualifications relied on are two in number; the first being that there must be some obligation or duty owing from the promisee to the third party which would give that party an equitable right to compel the former to bring suit, and, the second, that the contract must be made for the third party's benefit as its object, and that he must by its express terms be identified as one whom it is intended to benefit. The New York cases cited are *Simson v. Brown*, 68 N. Y. 355, *Vrooman v. Turner*, 69 N. Y. 280, 25 Am. Rep. 195, and *Durnherr v. Rau*, 135 N. Y. 219, 32 N. E. 49. In the first case a mortgagee assigned to plaintiff the bond and mortgage, and the mortgagor, without notice of the assignment, paid the mortgagee, thereby freeing himself from liability to any one. Thereafter the mortgage executed a penal bond to the mortgagor conditioned on payment to plaintiff and the saving of the mortgagor harmless, and this bond defendant guaranteed. Plaintiff, assignee of the first-mentioned bond and its mortgage, sued on the guaranty of the latter bond as made for his benefit, but the court held that the obligation guaranteed was not to pay to plaintiff, but to the mortgagor, the condition in which alone the plaintiff was mentioned being, not a promise, but an alternative for the benefit of the obligor, and that the fact that the performance of the condition would have worked consequentially a benefit to plaintiff did not give him a right of action, as it did not appear from the contract that it was intended for his benefit. *Vrooman v. Turner* decides that a grantee of real estate who has assumed payment of an outstanding mortgage cannot be sued on his promise for a deficiency by the holder of the mortgage as third party, if his grantor, the promisee, was not personally liable to pay the mortgage, either as principal debtor or as the result of assumption, because there existed no legal right in such third party founded upon some obligation of the promisee

to him to adopt and claim the promise as made for his benefit. In *Durnherr v. Rau*, plaintiff and her husband made a deed to defendant with covenant of warranty, plaintiff reserving her right of dower, and by the deed the defendant as grantee covenanted to pay all incumbrances by mortgage or otherwise. An outstanding mortgage thus assumed in which the plaintiff had joined with her husband having been foreclosed and the premises sold, plaintiff sued on the covenant of assumption for the deprivation of her dower right, but the court held that whatever his moral obligation may have been, as the husband was under no legal obligation to the plaintiff to pay off the mortgage for the purpose of saving that right, there did not exist such a legal relation as made the performance of the covenant a satisfaction of some legal or equitable duty owing by the husband as grantor and promisee, to her as third party, and that such a relation was essential to an action by her, as such.

These cases undoubtedly sustain the distinctions asserted and the question is whether the claims under consideration are within them so that neither the bondholders nor their trustees have a right of action. It is not contended that the contract evidenced by the Metropolitan guaranty is, since it by its terms provides for payment to the trustee for the bondholders and the necessary legal obligation running from the Second Avenue Company as promisee to such trustee as third party is present, the effect of the guaranty as establishing a claim provable now, being resisted on other grounds. It is insisted that they control as to the contracts of assumption contained in both leases; counsel for the Metropolitan receivers arguing that the Metropolitan's promise of payment contained in the lease to it comes within both grounds of distinction, and counsel for the receiver of the City Company arguing that as the debt was pre-existing at the time of the assumption of interest payments in the lease to it, the promise can be regarded as made solely for the benefit of the Metropolitan Company and not of the bondholders, citing federal authorities which tend to sustain such contention. It seems to be clear, however, under the New York authorities that where one owing a debt leases, conveys, or assigns property to another on the strength of the latter's promise to assume and pay the debt, without any more specific designation of the creditor than such words imply, there is a legal presumption that the latter was intended to be benefited, and as the necessary obligation from the promisee to him as third party exists he may accordingly sue. *Burr v. Beers*, 24 N. Y. 178, 80 Am. Dec. 327; *Wager v. Link*, 134 N. Y. 127, 31 N. E. 213; *Clark v. Howard*, 150 N. Y. 232, 44 N. E. 695. It does not matter that the primary and perhaps the only purpose of the parties to the contract was to benefit the debtor, the creditor may, nevertheless, as third party, adopt it when he learns of it, unless, indeed, the contract by express terms negative the right.

Assuming, then, that the bondholders or their representative, and the Second Avenue Company or its receiver, have claims which may be asserted, either at once, or in the future, against the Metropolitan and City Companies respectively by virtue of the guaranty and these assumption clauses, there remains to be considered whether such claims are provable in favor of any of the parties named against the estates of these last-mentioned companies now in the custody of the court. The rights of the claimants are to be determined by the contracts of guaranty or of assumption, as the case may be, and by those contracts alone; and it is not, I think, to be doubted that if these contracts evidence claims, whether solvable now or in the future, which depend upon a contingency which has not yet happened, they are not, in the absence of a statute in express terms directing it, provable in a court of equity engaged in administering the estate of an insolvent corporation. In *insolvency*, *Gay Mfg. Co. v. Gittings* (4th Cir.) 53 Fed. 45, 3 C. C. A. 422; *New York Sec. & Trust Co. v. Lombard Investment Co.* (C. C. West Mo.) 73 Fed. 537; *Fidelity Safe Deposit Co. v. Armstrong* (C. C.) 35 Fed. 567; *Malcomson v. Wappoo Mills* (C. C.) 88 Fed. 680; *People v. Globe Mutual Life Ins. Co.*, 91 N. Y. 174; *People v. Commercial Alliance L. I. Co.*, 154 N. Y. 95, 47 N. E. 968; *Deane v. Caldwell*, 127 Mass. 242; *Wells v. Hartford*

Manila Co., 76 Conn. 27, 55 Atl. 599. In bankruptcy, *Roth v. Appel* (2d Cir.) 181 Fed. 667, 104 C. C. A. 649; *In re Pettingill & Co.* (D. C.) 137 Fed. 143.

An examination of the guaranty as heretofore quoted shows that the precise engagement of the Metropolitan Company is to guarantee the "punctual payment of the principal of the bond and the interest thereon at the time and in the manner specified therein." The time specified in the bond for the payment of principal is February 1, 1948, and of interest semiannually, on August 1st and February 1st in each year, and on each bond there is this statement that the payment of all of the bonds identified is "equally secured *by and according to the terms*" of the mortgage described. This reference the claimant bondholders originally contended has the effect of incorporating into the bond and through it into the guaranty those provisions of the mortgage above set forth which have for their object the acceleration of the maturity of the bond, and that, as both bondholders and trustee have already acted on them, the effect has been to precipitate that maturity so that the bonds are now due for all purposes. That contention they now abandon, adopting the view originally insisted on by both receiverships, which is in turn modified, to the effect that the reference to the mortgage is for the purpose of identification merely, and not of incorporating all of its terms into the bond, and that the bonds do not mature until the date named therein, until which time there is no right of action in personam in favor of the bondholders against either the debtor or its guarantor. The bondholders strive to avoid the effect of their concession by insisting that an absolute and unconditional promise based on a valid consideration constitutes a claim provable against the estate of an insolvent corporation even though it be payable in the future—debitum in praesenti, salvandum in futuro—and this, while disputed, is, I think, the rule (*Deane v. Caldwell*, supra). They further insist that all their remedies whether against primary or secondary debtors or the insolvent estates may be pursued concurrently or singly and without foreclosure with the limitation that the aggregate amount collected shall not exceed the total due them. This latter contention they rest on two cases which constitute their main reliance, *Matter of Simpson*, 36 App. Div. 562, 55 N. Y. Supp. 697, affirmed, 158 N. Y. 720, 53 N. E. 1132, and *Thorp v. Keokuk Coal Co.*, 48 N. Y. 253, which are instances of claims asserted by third parties on promises made for their benefit. In both of these cases the promises construed related to debts which had matured which they now insist is not the case here, and what is of more importance, the promises of payment there construed were absolute and unconditional, a fact which, as a reference to the opinions in both cases will show, the court was careful to emphasize. If, then, the effect of the reference to the mortgage which the bond contains was to import into the contract which it evidences terms from that document which make it contingent, it is clear that these cases do not control, and that none of the claimants, either the bondholders individually, their trustee, the Second Avenue Company, or its receiver, has a claim provable in a class with creditors holding fixed obligations, if that contingency has not yet happened. *Gay Manufacturing Co. v. Gittings*, 53 Fed. 45, 3 C. C. A. 422.

That the reference in the bond to the mortgage does put the bondholders and their trustee on notice as to its terms seems to me to be beyond question under the authorities notwithstanding such uncertainty as the exigencies of a discussion from very different standpoints may have involved the question. In *Mallory v. West Shore R. R. Co.*, 35 N. Y. Super. Ct. 174, bondholders brought actions in personam on bonds, which, unlike these here, contained no reference whatever to a mortgage, but had indorsed upon the back of each a certificate of the trustee that it was one of a series equally secured in accordance with the terms and conditions of the mortgage specified. This the court treated as importing into the bond such terms and conditions and it held that its provisions similar to those here appearing looking to an acceleration of the maturity of the principal on the happening of specified defaults did not give a right of action in personam to the bondholder but only a right to the trustee under the mortgage to foreclose. *Batchelder v.*

Council Grove Water Co., 131 N. Y. 42, 29 N. E. 801, and *Dougan v. Ev. & T. H. R. R. Co.*, 15 App. Div. 492, 44 N. Y. Supp. 503, suggest instances in which rights of bondholders asserted in actions on the bond have been held to be qualified by the terms of a mortgage referred to in the bond and while the words of reference there construed are somewhat more direct with reference to the qualification there sustained, which is the same as that in the *West Shore* case cited, they illustrate a general principle that such references do put the bondholder on notice and qualify his rights. Moreover, that the mortgage here involved was intended by the parties to it to have just that effect is clear from its language. Thus in the eleventh paragraph which I have quoted in full "every person who shall take or hold any bond or bonds issued hereunder" is made to agree that "existing and future directors and stockholders shall not be individually liable as to said bonds"—a provision which would be absurd, if the reference to the mortgage in the bond had not been regarded as sufficient to put the bondholder on notice as to the mortgage and its terms and to qualify his rights.

Adopting, then, the view that the mortgage by the terms of the bond itself is part of the bondholders' contract it remains to be determined whether it contains provisions making that contract contingent. The paragraph relied on as having that effect is this same eleventh paragraph which states that "for the debt and bonds secured hereby the railroad company is liable in personam and any deficiency, *after exhausting the mortgage security*, may be enforced against the railroad company." By this clause it is insisted the railroad company intended to limit its obligation in personam to the payment of any deficiency after exhausting the mortgage security and it is clear, if it have that effect, that not only is the amount of the bondholders' claim contingent but the very existence of any claim whatever is dependent upon an event which not only has not yet happened, but may never happen. It is quite the same as the claim rejected as provable in *Lamson Consolidated Stove Service Co. v. Bowland*, 114 Fed. 641, 52 C. C. A. 335, where Judge Lurton says that "the liability of the lessee would be contingent upon a deficiency and clearly not such a fixed and absolute liability as would be provable in bankruptcy." The claimants, besides insisting that the mortgage is no part of the bond, say that the words quoted were not intended to cut down the railroad company's liability in personam, but only to "exclude the idea of an election of remedies by virtue of which it might be claimed that a sale of the mortgaged property relieved the mortgagor from personal liability." If, however, the language quoted were not present, the liability in personam, unconditioned and absolute, would nevertheless result from the language of the bond in the absence of anything else in the mortgage to the contrary, and there not only is nothing to the contrary, but there is an explicit declaration that the several remedies specified are cumulative and not exclusive and are in addition to all other remedies. Unless, therefore, this language have the meaning attributed to it, it would be without meaning and mere surplusage and such meaning must, I think, be assigned to it.

What the Metropolitan Company undertook by the assumption clause in the lease from the Second Avenue Company to it was to pay "all bonds that shall be issued by the party of the first part (the Second Avenue Company) *under the mortgage* to the Guaranty Trust Company" therein referred to. Its engagement is to pay the bonds issued under that mortgage, and if the bond as qualified by the mortgage suggests a contingent liability, the obligation of the Metropolitan created by this assumption clause must be held to be contingent also.

So, by the guaranty, the undertaking running to the "trustee of the within mentioned mortgage" is to guaranty the punctual payment of the bond *at the time and in the manner* specified therein. If the time and manner specified include not only the time fixed in the bond but, as originally contended, any earlier date as determined under the provisions of the mortgage, then, in this latter event, the mortgage controls as to such time and manner, the promise guaranteed is to pay a deficiency—if the Second Avenue Company's promise be to pay only the deficiency—and the guaranty becomes

in effect one of collection the breach of which has not yet occurred, so that there exists no claim based upon it which is now provable. On the other hand, if the construction now placed on these writings by the learned counsel for the claimant be the correct one, and the date of maturity has not been hastened, the contract of guaranty suggests another contingency that has not yet happened, for it becomes then a guaranty of punctual payment on February 1, 1948. The obligation of the Metropolitan Company, evidenced by the guaranty, whether a contract of suretyship in the strictest sense of the term, or not, and it perhaps is not, since the consideration undoubtedly moved directly to it instead of wholly to the party named as principal debtor as in the case of the usual contract to answer for the debt, default, or miscarriage of another, is nevertheless distinctly a secondary obligation. No action for the principal sum against it would lie on such guaranty which did not turn on an allegation that the Second Avenue Company had failed punctually to pay on February 1, 1948, such sum (First Nat'l Bank of Waterloo v. Story, 200 N. Y. 346, 93 N. E. 940), so that any cause of action on any theory of construction of the bond which makes that date control, leaves the claim still dependent on a future contingency which, improbable as it now seems, may never happen (Gay Mfg. Co. v. Gittings, supra).

The asserted liability of the City Company respecting the interest on the Second Avenue debt is based on the broad assumption in the lease from the Metropolitan to it, of "all the obligations of the lessor under all leases and contracts" from which alone the principal of the funded debt of the lessor and its subsidiary companies is, as noted, excepted. The claimants contend that this agreement, in legal meaning and effect, is, to pay certain installments of money evidenced by the interest coupons at certain specified times in the future in consideration of receiving the leasehold estate which was demised by the lease of February 14, 1902, and that a sum representing the aggregate of the present worth of the outstanding coupons, ascertainable by a comparatively simple arithmetical calculation when the prevailing rate for money has been established by competent proof, is provable as a claim against the estate of the City Company. The obligation resulting from the language of the covenant, it is urged, is not to pay sums accruing at intervals in the nature of rent, in which case it is conceded that it would be contingent and not the basis of provable claim; nor is it to pay sums accruing at regular intervals in the nature of an interest charge, in which case none not due at the date of the appointment of the receivers (and none was) would be provable (Sexton as Trustee v. Dreyfus, 219 U. S. 339, 31 Sup. Ct. 256, 55 L. Ed. 244, Jan. 23, 1911), but it is a new obligation, absolute and unconditioned in its nature and provable as such, distinct from that owed by the Metropolitan Company and based on an equally new and distinct consideration moving to the City Company, to pay a sum representing the aggregate of the coupons maturing after the lease to the City Company became effective in installments at fixed future intervals and not terminable, without the consent of the claimants, by anything that might be done by lessor and lessee, or might happen to either or both of them.

I cannot assent to this construction of the language of the covenant. The promise is to assume "all the obligations of the lessor under all such leases and contracts," of which the lease from the Second Avenue Company is one. If the obligation assumed is absolute, then the obligation of the City Company respecting it is absolute also. If, on the other hand, it is contingent, then the obligation of the City Company is contingent. If the obligation of the Metropolitan Company under the lease to it is what I think it—a promise to pay any deficiency of principal and interest due—then the promise of the City Company is to assume that and not any other or different obligation. The obvious purpose of the covenant is to put the City Company in the position of the Metropolitan respecting obligations owed by the latter under its underlying leases, and there is much room for the answering contentions of the receiver that the obligation under examination should justly be regarded as creating either a rental or an interest charge, but if the claimants' contention were to prevail, it is clear that, as the matter now stands, the

City Company would owe a sum in excess of the sum to become due as interest when a sale under foreclosure is had, if such sale take place at any time in the reasonably near future, for it is for the latter sum only as interest that either the Second Avenue or the Metropolitan would be ultimately liable, since the obligation to pay interest accruing after the sale and up to February 1, 1908, would cease except as to the deficiency if any. This clearly was not the intention of the parties as disclosed by the language they have used.

It is urged on behalf of the receivers of the Metropolitan Company that no rights either under the guaranty or the assumption clause can be asserted by bondholders individually as beneficiaries of an express trust save through the trustee, the argument being that even if the rule of procedure laid down by section 449 of the New York Code of Procedure, permitting the real party in interest to sue apply in an action in the state courts, it is contrary to the settled equity practice as administered in the United States courts, which is unaffected by any state rule of procedure and controls here. I, myself, doubt whether under that section the beneficiary of an express trust may sue without alleging the refusal or inability of the trustee to act, even in the state courts (*Matter of Straut*, 126 N. Y. 212, 27 N. E. 259), and there seems to be authority for the contention that the only rule that can be applied in this forum is that insisted on (*Wills v. Pauly* [O. C.] 51 Fed. 257), in which case it is clear that the bondholders have no rights under the guaranty which they can now assert individually, as that agreement runs in terms to their trustee as such, although it is perhaps not so clear that they may not assert rights under the assumption clause, since the bonds run to bearer. As, however, the view that I have taken of the effect of these contracts makes it unnecessary to pass upon this question although the facts may suggest it, I do not do so, especially as it may arise in other proceedings pending before me as special master under the orders of the court made in these actions in which it may be vital, and can be passed upon after argument in opposition has been had.

It is obvious that if the claim of any of these claimants were allowed, there would be accorded a preference over creditors whose liabilities were absolute that equity, which seeks equality, tries to avoid. The factor fixing the amount of any distributive share would be determined, once and for all, to be the amount of bonds outstanding, whereas the amount, if any, which may become due, after resort to the security, is very certain to be far removed from any such figure. It is of course true that if a deficiency result, these bondholders will be excluded from participation unless the assets in the custody of the court should prove more than sufficient to meet fixed liabilities, but, as is pointed out in the case of *Wells v. Hartford Manila Company*, supra, that is because the law attaches a higher right to this class of liabilities.

The receivers may file and serve proposed reports on or before March 15, 1911, embodying findings and conclusions in accordance with the foregoing, the claimants to have five days thereafter to file proposed amendments and objections thereto.

Davies, Auerbach, Cornell & Barry (Julien T. Davies and Brainard Tolles, of counsel), for claimants.

Masten & Nichols (William M. Chadbourne, of counsel), for receivers of Metropolitan Street Railway Company.

Dexter, Osborn & Fleming (Matthew C. Fleming, of counsel), for receiver of New York City Ry. Co.

O'Brien, Boardman & Platt (George N. Hamlin, of counsel), for contract creditors' committee.

Charles Benner (Benjamin S. Catchings, of counsel), for tort creditors' committee.

Geller, Rolston & Horan (Charles T. Payne, of counsel), for Farmers' Loan & Trust Co.

LACOMBE, Circuit Judge. On January 20, 1898, the Second Avenue Railroad Company executed a mortgage of all its real estate, franchises, railroad property, and equipment, then owned or thereafter to be owned, to secure an issue of bonds of which \$5,682,000 are actually outstanding. The petitioners are the owners and holders of nearly \$4,000,000 of these bonds. At about the same time the Second Avenue Company leased its entire railway system to the Metropolitan Street Railway Company. That company assumed the payment of these bonds in the lease, and by indorsement on the back of each bond before actual issue it guaranteed to the trustee of the mortgage for the benefit of the holders punctual payment of principal and interest "at the time and in the manner specified therein." In 1902 the Metropolitan leased its entire system to the New York City Railway Company which thereby became a sublessee of the Second Avenue road. The New York City by its lease undertook to pay all rentals and other sums of money (except principal) which the Metropolitan was obligated to pay under any leases or other contracts by which it had acquired possession of the property of the various subsidiary companies which made up its system. On September 24, 1907, receivers of the New York City Company were appointed by this court, and on October 1, 1907, the same individuals were appointed receivers of the Metropolitan. They held the estates of both companies until midnight of July 31, 1908, when a separate receiver of the New York City Company was appointed. The principal of the mortgage debt of the Second Avenue road was to come due February 1, 1948. The instrument contained the usual provisions for declaring principal due upon default in the payment of interest; also the usual provisions for foreclosure.

Being uncertain at first whether or not the Second Avenue road was a valuable part of the system, the receivers paid the coupons which fell due February 1, 1908, but subsequently decided not to accept the lease. They defaulted on the interest due August 1, 1908, and returned the road to its owners. Promptly upon default (in August or September, 1908) the mortgage trustee began a foreclosure suit in the state court, and a receiver of the property of the Second Avenue road was appointed September 19, 1908. There is no suggestion anywhere in this record of any possible defense which the mortgagor might have sustained to the foreclosure suit, nor even of any ostensible defense which might have operated to delay the trustee in performing its duty to collect the amount secured by the mortgage out of the property primarily liable therefor, so far as the same would go. Strange to say, however, the foreclosure suit has not been pressed, no decree has been entered, and of course there has been no sale and no judgment for any deficiency. So far as this record discloses the value of the property enumerated in the mortgage may be greatly in excess of the amount of bonds issued thereon. In February, 1910, in compliance with request of a majority of the bondholders the trustee notified the mortgagor that it elected to declare the entire principal due.

The record does not show whether or not the bondholders who have filed these claims or a majority of them, are also stockholders of the

Second Avenue road. If they are, it can be easily understood why the foreclosing trustee has been thus held back till the claims now under consideration could be filed and prosecuted against the estates of the lessee (and guarantor) and the sublessee. The claims were filed in February, 1910. Briefly stated they are as follows:

It is contended that the Metropolitan Company should pay to the holders of these bonds the full amount of the principal thereof (less the present value of coupons paid subsequent to October 1, 1907) amounting to \$3,979,854.38. It is also contended that New York City Railway should pay all the coupons falling due till February 1, 1948 (with proper rebate for present payment), as if each coupon were its own promissory note due at the future date named therein. This amounts to \$3,438,039.07. It is not understood that any preference is insisted on for either of these claims, but it is contended that they are entitled to share in the assets equally with the creditors of these two roads. If it should come to pass, in some way, that these estates could marshal enough assets to pay their debts substantially in full, the Second Avenue bondholders would thus collect the amount of their bonds, principal and future interest, without taking anything from the estate of the Second Avenue road which was the primary security for the loan. Such a result seems most inequitable, but as the special master points out in his careful and exhaustive discussion of the question the documents which regulate and define the rights of respective parties do not lead to any such conclusion.

[1] It is not thought necessary to add anything; the court concurs fully in his opinion. Whatever may have been held in other jurisdictions it is certainly the rule in this circuit that the reference in the bond to the mortgage does put the bondholders and their trustees on notice as to its terms. *National Salt Co. v. Ingraham*, 122 Fed. 40, 58 C. C. A. 356.

[2] As to the clause in the mortgage that "for the debt and bonds secured hereby the railroad company is liable in personam and any deficiency, after exhausting the mortgage security, may be enforced against the railroad company," I concur with the special master in concluding that it would be superfluous and meaningless, unless it be construed as requiring that resort be first had to the mortgage security.

[3] As to the agreement of the New York City Company to pay all the various sums of money which its lessor, the Metropolitan, was obligated to pay from time to time in order to maintain possession of the various subsidiary roads which made up its system, and all other sums which it agreed to pay to persons designated by its lessor, I am very clearly of the opinion that, by whatever name called, they are in reality rent agreed to be paid for the use of the property leased, and, upon the termination of the lease, should be treated accordingly.

The exceptions are overruled, and the report of the special master is confirmed.

UNITED STATES v. WASHINGTON IMPROVEMENT & DEVELOPMENT
CO. et al.

(Circuit Court, E. D. Washington. July 15, 1911.)

No. 1,552.

PUBLIC LANDS (§ 88*)—RAILROAD GRANT—FORFEITURE FOR BREACH OF CONDI-
TION SUBSEQUENT—POWER TO DECLARE.

A court of equity has no inherent power to decree a forfeiture of a land grant made by Congress, and the United States cannot maintain a suit to recover land so granted for breach of a condition subsequent, in the absence of a declaration of forfeiture by Congress or of express authority from Congress for the institution of the suit.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 235, 266-269; Dec. Dig. § 88.*]

In Equity. Suit by the United States against the Washington Improvement & Development Company, the Washington & Great Northern Railway Company, and the Great Northern Railway Company. On demurrer to bill. Demurrer sustained.

Oscar Cain, U. S. Atty., E. C. Macdonald, Asst. U. S. Atty., and A. M. Craven, Sp. Asst. U. S. Atty.

F. V. Brown, L. F. Chester, and W. A. Monten, for defendants.

RUDKIN, District Judge. By Act Cong. June 4, 1898, c. 377, 30 Stat. 430, the United States granted to the Washington Improvement & Development Company and to its assigns a right of way for its railway, telegraph, and telephone lines through the Colville Indian reservation in the state of Washington, beginning at a point on the Columbia river near the mouth of the Sans Poil river, running thence in a northerly direction to the international boundary line between British Columbia and the state of Washington, together with certain incidental rights and privileges not material to our present inquiry. Section 3 of the act provided that the company should cause maps showing the route of its located lines through the reservation to be filed in the office of the Secretary of the Interior; that, when a map showing any portion of the railway company's located line was filed as therein provided, the company should commence grading such located line within six months thereafter, or such location should be void; and that such location should be approved by the Secretary of the Interior in sections of 25 miles before the construction of any such section should begin. Section 5 of the act provided that the rights therein granted should be forfeited by the company, unless at least 25 miles of the railroad should be constructed through the reservation within two years after the passage of the act; and by section 6 Congress reserved the right to alter, amend, or repeal the act in whole or in part.

It appears from the bill of complaint filed on behalf of the government that the defendant Washington Improvement & Development Company accepted the rights and privileges granted under the provisions of the act, and filed maps from time to time in the office of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the Secretary of the Interior, showing the route of its located lines through the reservation, which maps were approved by the Secretary of the Interior on divers dates between June 23, 1899, and November 27, 1899; that the Washington Improvement & Development Company did not commence grading its located lines or any part thereof within six months after the filing of such maps, or at all; that it did not construct or cause to be constructed through the reservation any portion of its railroad within two years after the passage of the act, or at all, and that no part of the railroad has been constructed or is now under construction by the Washington Improvement & Development Company or its assigns; that on the 20th day of July, 1906, the Washington Improvement & Development Company assigned to the Washington & Great Northern Railway Company all rights and privileges granted or acquired under or by virtue of the act of Congress; that thereafter the Washington & Great Northern Railway Company made a like assignment to the Great Northern Railway Company; that neither the Washington & Great Northern Railway Company or the Great Northern Railway Company at any time located any portion of its railroad through the reservation, and that no portion of the railroad has been constructed through the reservation by either of said companies within two years after the passage of the granting act, or at all; that the United States elects to forfeit all rights and privileges granted under the act of Congress by reason of the failure on the part of the defendants to comply with the terms thereof, and the prayer of the bill is that the rights and privileges granted to the defendants and each of them be declared forfeited to the United States.

The defendants have interposed a demurrer to the bill on three grounds, but the second and third grounds of demurrer are mere amplifications of the first, which is as follows:

"That said proceeding is instituted, and said bill of complaint is filed, without any lawful authority therefor."

The question is thus presented whether the United States may maintain a suit in equity to forfeit a land grant such as this for breach of a condition subsequent, in the absence of a declaration of forfeiture by Congress, or express authority from Congress for the institution of such a proceeding. Of course, if a suit will lie under such circumstances, the Attorney General is the proper officer to institute it, for, as said by the court in *United States v. San Jacinto Tin Co.*, 125 U. S. 273, 8 Sup. Ct. 850, 31 L. Ed. 747:

"If the United States in any particular case has a just cause for calling upon the judiciary of the country, in any of its courts, for relief by setting aside or annulling any of its contracts, its obligations, or its most solemn instruments, the question of the appeal to the judicial tribunals of the country must primarily be decided by the Attorney General of the United States. That such power should exist somewhere, and that the United States should not be more helpless in relieving itself from frauds, impostures, and deceptions than the private individual, is hardly open to argument. The Constitution itself declares that the judicial power shall extend to all cases to which the United States shall be a party, and that this means mainly where it is a party plaintiff is a necessary result of the well-established proposition that it cannot be sued in any court without its consent. There must, then, be an

officer or officers of the government to determine when the United States shall sue, to decide for what it shall sue, and to be responsible that such suits shall be brought in appropriate cases. The attorneys of the United States in every judicial district are officers of this character, and they are by statute under the immediate supervision and control of the Attorney General. How, then, can it be argued that, if the United States has been deceived, entrapped, or defrauded into the making under the forms of law of an instrument which injuriously affects its rights of property, or other rights, it cannot bring a suit to avoid the effect of such instrument thus fraudulently obtained, without a special act of Congress in each case, or without some special authority applicable to this class of cases, while all other just grounds of suing in a court of justice concededly belong to the department of justice, and are in use every day?"

But the question still remains, Has a right of action accrued in favor of the government under the facts set forth in the bill? The opinions of the different Attorneys General, the declarations of the Supreme Court of the United States, the legislation of Congress, and the practice of all departments of the government through a long series of years convince me that no such right exists. By section 1 of Act Cong. May 26, 1824, c. 165, 4 Stat. 47, the United States granted to the state of Indiana a right of way for a canal "by which to connect the navigation of the rivers Wabash and Miami with Lake Erie."

Section 2 of the act provided:

"That, if the said state shall not survey, and direct by law said canal to be opened, and furnish the Commissioner of the General Land Office a map thereof, within three years from and after the date of this act; or, if the said canal be not completed, suitable for navigation, within twelve years thereafter; or, if said land, hereby granted, shall ever cease to be used and occupied for the purpose of constructing and keeping in repair a canal, suitable for navigation; the reservation and grant aforesaid shall be void, and of noneffect."

By resolution dated March 19, 1878, the United States Senate directed the Attorney General to report whether the lands and rights granted by the United States to the state of Indiana under the above act had reverted to the United States, "and if so, what action upon the part of the United States, legislative or otherwise, is necessary and proper to enable it to obtain possession thereof." In response to this resolution Attorney General Devens, after discussing the nature of the grant, reported as follows:

"In response, therefore, to so much of the resolution as directs me to report 'what action on the part of the United States, legislative or otherwise, is necessary,' I have to state that I am of the opinion that Congress may provide by appropriate legislation for the appointment of a commissioner to examine said canal and report whether in fact it has been abandoned and ceased to be used as a public highway. If such commissioner is appointed, and his report shall show that the canal has been abandoned, Congress may then declare a forfeiture, or *direct that proper legal proceedings be instituted by the Attorney General in the courts to have a forfeiture declared.*" 16 Opinions of Attorneys General, p. 250.

By section 3 of Act Cong. July 27, 1866, c. 278, 14 Stat. 292, the United States granted to the Atlantic & Pacific Railroad Company certain lands in alternate odd sections on each side of its line of road to aid in its construction. Section 8 of the act provided:

"That each and every grant, right, and privilege herein are so made and given to and accepted by said Atlantic and Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish, and complete the main line of the whole road by the fourth day of July, Anno Domini, eighteen hundred and seventy-eight."

Application was made under section 4 of the act for the appointment of three commissioners to examine a section of 25 miles of road, constructed after the time limited by the act of Congress, and the matter was referred by the Secretary of the Interior to the Attorney General. After again discussing the nature of the grant, Attorney General Devens said:

"I am, therefore, of opinion that the grant to the railroad has not been forfeited by its failure to build its road within the time named in the act, *no action, by reason of its failure to perform the conditions, having been taken by authority of Congress.* It having, then, a present grant, even if it be treated as one liable to forfeiture, it has still a right to proceed to construct the road, and, until in some form advantage shall be taken of the breach of the conditions, *it would be the duty of the executive department to give it the benefit of the grant.*" 16 Opinions of Attorneys General, p. 572.

Schulenberg v. Harriman, 21 Wall. 44, 22 L. Ed. 551, is cited in support of this conclusion.

By section 19 of Act Cong. March 3, 1877, c. 108, 19 Stat. 377, the United States granted to the county of Garland, in the state of Arkansas, a suitable tract of land not exceeding five acres "as a site for the public building of said county." The county authorities leased the land thus granted to private parties for a period of 99 years, and the Secretary of the Interior requested the Attorney General to institute legal proceedings "with a view to recover to the government the title and possession of the land, should the failure of the county authorities to carry out the purpose of Congress be regarded as operating to nullify the grant." In response to this request Attorney General Garland said:

"While it is very plain from the language of the grant that Congress intended to donate the land for the specific purpose designated therein, namely, to be used 'as a site for the public building of said county,' yet, whether this annexes a *condition* to the grant, or creates a mere *trust*, is not so clear. If a condition upon breach thereof the grant would be liable to forfeiture; if a trust, the same result would not follow upon a breach, but the aid of a court of equity might be invoked by proper parties to effectuate the trust. * * * *In the former case I submit that, in the absence of any law of Congress declaring the forfeiture or directing the institution of proceedings to that end, no authority exists to bring a suit in behalf of the United States to recover the land on the ground of failure to perform the condition.*" 18 Opinions of Attorneys General, p. 264.

A similar opinion was later given by Attorney General Miller in reference to the same matter. 20 Opinions of Attorneys General, p. 37.

In a report to the President concerning the duties of his office Attorney General Cushing said:

"Accordingly, the opinions of successive Attorneys General possessed of a greater or less amount of legal acumen, acquirement, and experience have

come to constitute a body of legal precedents and exposition, having authority the same in kind, if not the same in degree, with decisions of the courts of justice. It frequently happens that questions of great importance submitted to him for determination are elaborately argued by counsel; and whether it be so or not he feels, in the performance of this part of his duty, that he is not a counsel giving advice to the government as his client, but a public officer, acting judicially, under all the solemn responsibilities of conscience and of legal obligation. * * * Although the act requiring this duty of the Attorney General does not expressly declare what effect should be given to his opinion, yet the general practice of the government has been to follow it—partly for the reason already suggested, that an officer going against it would be subject to the imputation of disregarding the law as officially pronounced, and partly from the great advantage, and almost necessity, of acting according to uniform rules of law in the management of the public business, a result only attainable under the guidance of a single department of assumed special qualifications and official authority.” 6 Opinions of Attorneys General, p. 326.

While the Supreme Court of the United States has not passed upon this question as explicitly as we might wish, yet the language of the court in many decided cases is in entire harmony with the views of the department of justice. Thus in *United States v. Repentigny*, 5 Wall. 211, 268, 18 L. Ed. 627, the court said:

“The mode of asserting or of assuming the forfeited grant is subject to the legislative authority of the government. It may be after judicial investigation, or by taking possession directly, under the authority of the government, without these preliminary proceedings.”

This language is repeated and approved in *Schulenberg v. Harriman*, 21 Wall. 44, 22 L. Ed. 551, *Farnsworth et al. v. Minn., etc., & Pac. R. R. Co.*, 92 U. S. 49, 67, 43 L. Ed. 530, and *McMicken v. United States*, 97 U. S. 204, 218, 24 L. Ed. 947.

In *Schulenberg v. Harriman*, *supra*, the court said:

“And it is settled law that no one can take advantage of the nonperformance of a condition subsequent annexed to an estate in fee, but the grantor or his heirs or the successors of the grantor if the grant proceed from an artificial person; and, if they do not see fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. The authorities on this point, with hardly an exception, are all one way from the Year Books down. And the same doctrine obtains where the grant upon condition proceeds from the government. No individual can assail the title it has conveyed on the ground that the grantee has failed to perform the conditions annexed. * * * In what manner the reserve right of the grantor for breach of the condition must be asserted so as to restore the estate depends upon the character of the grant. If it be a private grant, that right must be asserted by entry or its equivalent. If the grant be a public one, it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for breach of the condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement.”

In *St. Louis, etc., Ry. Co. v. McGee*, 115 U. S. 469, 6 Sup. Ct. 123, 29 L. Ed. 446, the court said:

“It has often been decided that lands granted by Congress to aid in the construction of railroads do not revert after condition broken until a forfeiture has been asserted by the United States, either through judicial proceedings instituted under authority of law for that purpose, or through some leg-

islative action legally equivalent to a judgment of office found at common law. * * * Legislation to be sufficient must manifest an intention by Congress to reassert title and to resume possession."

United States v. Repentigny, *Schulenberg v. Harriman*, and *St. Louis, etc., Ry. Co. v. McGee* were cited with approval by the court in *Spokane, etc., & B. C. R. Co. v. Washington, etc., Great Northern R. Co.*, 219 U. S. 166, 31 Sup. Ct. 182, 55 L. Ed. 159 (Feb. 1, 1911), in speaking of this identical grant, and the court again affirmed the rule that in case of a public grant "the right to forfeiture must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, or there must be some legislative assertion of ownership for breach of the condition." In the case of *United States v. Northern Pac. Ry. Co.*, 177 U. S. 435, 20 Sup. Ct. 706, 44 L. Ed. 836, the Attorney General had filed a bill of complaint in the Circuit Court of the United States for the District of Minnesota against the Northern Pacific Railroad Company and others to cancel and annul a patent for a tract of land lying more than ten miles east of Duluth, in the state of Minnesota, which patent was alleged by the bill to have been inadvertently and mistakenly issued. In stating the position of the government the court said:

"In other words, if we understand the position, it is claimed that under section 8 of the act of July 2, 1864 [c. 217 (13 Stat. 370)], noncompletion of the railroad within the time limited of itself operates as a forfeiture, the grant immediately reverts to the government, and courts must so hold on the simple statement of the fact of noncompliance within the limit."

But in answer to this contention the court said: "We do not understand this to be a correct statement of the law." The court then quoted with approval from the opinion of Mr. Justice Nelson in *United States v. Repentigny*, from the opinion of Mr. Justice Field in *Schulenberg v. Harriman*, and from the opinion of Chief Justice Waite in *St. Louis, etc., Rd. Co. v. McGee*, 115 U. S. 473, 6 Sup. Ct. 123, 29 L. Ed. 446, and continued as follows:

"As the bill in this case does not allege that it is brought under authority of Congress for the purpose of enforcing a forfeiture, and does not allege any other legislative act whatever looking to such an intention, it is plain, under the authorities cited, that this suit must be regarded as only intended to have the point of the eastern terminus judicially ascertained. This being so, and that terminus having been found to be at Ashland, it follows that the courts below committed no error in dismissing the bill of complaint."

In *United States v. Tennessee & C. R. Co.* (C. C.) 71 Fed. 71, the court said:

"If the government of the United States, through its legislative body, takes no action to enforce the condition in the granting act to these lands, then by what right or authority can this suit be maintained? If it be correct that the lands in question are not within the terms of the forfeiture act, then how is it shown that it ever was the purpose of Congress to insist on any forfeiture contained in any provision of the act? On the contrary, does it not show that no such purpose was ever entertained, because never put into execution by any legislative act? It may be, and indeed the language used in the forfeiture act cited, *supra*, indicates, that the land in question may have been purposely excluded from the terms of that act, and who shall say that the Congress did not find ample reason why the construction of the railroad had been so long delayed, and why the forfeiture shall not apply to it? Con-

gress may have been influenced by the condition of the country for a portion of the time between the passage of the granting act and the final completion of the road. The intervention of the recent war may have had an influence upon this legislation; but, whatever it may have been—and the motive which influenced Congress is not open to question here—it is sufficient to say that, in the absence of congressional action as to the grant of these lands, there are no proper grounds upon which this bill can be maintained. It is clear implication from the action of Congress in the forfeiture act, September 29, 1890, that the Congress did not intend to insist on any condition subsequent which existed in the granting act."

The judgment in this case was affirmed by the Circuit Court of Appeals for the Fifth Circuit in *United States v. Tennessee & C. R. Co. et al.*, 81 Fed. 544, 26 C. C. A. 499. The judgments of the lower courts were reversed by the Supreme Court, however, in *United States v. Tennessee & Coosard Rd.*, 176 U. S. 242, 20 Sup. Ct. 370, 44 L. Ed. 452, but on other grounds.

The legislation of Congress leads me to the same conclusion. That body has at all times acted in conformity with the opinions of the different Attorneys General, and has assumed that land grants can only be forfeited for breach of conditions subsequent by direct legislative act or by judicial proceedings expressly authorized by law. Thus by Act Jan. 31, 1885, c. 46, 23 Stat. 296, there was forfeited to the United States so much of the land granted in aid of the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the state of Oregon, as was adjacent to and coterminus with the uncompleted portions of the road. By Act July 6, 1886, c. 637, 24 Stat. 123, there was forfeited to the United States the lands granted to the Atlantic & Pacific Railroad Company, with certain reservations and exceptions not material here. By Act Sept. 29, 1890, c. 1040, 26 Stat. 496 (U. S. Comp. St. 1901, p. 1598), there was forfeited to the United States all lands granted to any state or corporation adjacent to and coterminus with the uncompleted portions of the several roads in aid of which the grants were made. By Act June 26, 1906, c. 3550, 34 Stat. 482 (U. S. Comp. St. Supp. 1909, p. 640), there was forfeited to the United States all rights of way over public lands granted by Act March 3, 1875, c. 152, 18 Stat. 482 (U. S. Comp. St. 1901, p. 1568), where the road had not been completed, or was not under construction at the time of the passage of the forfeiture act. By Act March 2, 1889, c. 377, 25 Stat. 850, the Attorney General was authorized and directed to bring suit for the forfeiture of certain lands granted to the state of Oregon. By joint resolution approved April 30, 1908 (35 Stat. 571), the Attorney General was authorized and directed to bring suit to enforce all rights and remedies of the United States growing out of or appertaining to certain land grants therein mentioned.

It is a significant fact that a court of equity could not decree a forfeiture, such as was declared by Congress in any of the instances cited, without express legislative authority therefor. That court has no legislative or dispensing power. It must administer justice according to fixed rules. It can only determine whether there has been a substantial breach of the conditions, and, if that fact is established, it must forfeit the grant in its entirety, unless Congress has ordained

otherwise. In fact, it has been said by the highest authority that a court of equity will never lend its aid to enforce a forfeiture for breach of a condition subsequent. "It is a universal rule in equity never to enforce either a penalty or forfeiture. Therefore courts of equity will never aid in the divesting of an estate for a breach of a covenant or a condition subsequent, although they will often interfere to prevent the divesting of an estate for a breach of a covenant or condition." Story's Eq. Jur. (13th Ed.) § 1319. "It is a well-settled and familiar doctrine that a court of equity will not interfere on behalf of the party entitled thereto, and enforce a forfeiture, but will leave him to his legal remedies, if any, even though the case might be one in which no equitable relief would be given to the defaulting party against the forfeiture." Pomeroy's Eq. Jur. (3d Ed.) § 459. "Equity never, under any circumstances, lends its aid to enforce a forfeiture or penalty, or anything in the nature of either." *Marshall v. Vicksburg*, 15 Wall. 146, 149, 21 L. Ed. 121. "Equity abhors forfeitures, and will not lend its aid to enforce them." *Jones v. Guaranty & Indemnity Co.*, 101 U. S. 622, 628, 25 L. Ed. 1030. "Nor will the court be induced to depart from its uniform course, and take cognizance of that question because the jurisdiction is sought on the ground of removal of clouds from the title; for the right of the complainants to a dispersion of the cloud is dependent upon a favorable adjudication of the first proposition, viz., that they are owners of the estate, by reason of a breach of the condition." *M. & C. R. R. Co. v. Neighbors*, 51 Miss. 412. Whether the rule is stated too broadly by these authorities we need not inquire, for I am convinced that a court of equity will not lend its aid to enforce a forfeiture in a case such as this, in the absence of legislative authority defining its powers and prescribing the mode of their exercise.

The only case called to my attention in which the government has asserted and maintained the right to enforce a forfeiture in equity for breach of a condition subsequent, without express legislative authority therefor is *United States v. Whitney* (C. C.) 176 Fed. 593. It was there held that the government may maintain a suit in equity to forfeit and annul a grant of a right of way for canals, ditches, and reservoirs, under Act March 3, 1891, c. 561, 26 Stat. 1095 (U. S. Comp. St. 1901, p. 1535), in the absence of a legislative declaration of forfeiture, and without express authority of law therefor. The court there cited many of the cases to which I have referred, and concluded that the question now under consideration was not involved. I have already said that the Supreme Court has not decided the question as explicitly as we might wish, but nevertheless, if the law is not as I have declared it, it must be conceded that many eminent judges have been guilty of gross inaccuracy of speech in many important cases. In speaking of the decision in *United States v. N. P. R. R. Co.*, supra, in the *Whitney Case*, the court said:

"Certain expressions in *United States v. N. P. R. R. Co.*, 177 U. S. 435 [20 Sup. Ct. 706, 44 L. Ed. 836], appear to be more pointedly favorable to the defendant's contention. The particular sentence relied upon is as follows: 'As the bill in this case does not allege that it is brought under authority of Congress for the purpose of enforcing a forfeiture, and does not allege any other legislative act whatever looking to such an intention, it is plain, under the authorities cited, that this suit must be regarded as only intended to have

the point of the eastern terminus judicially ascertained.' It must be borne in mind, however, that this language was used in stating the conclusion of the court upon the question whether or not the position assumed by the government at the argument was within the pleadings."

This in my opinion is not a correct statement of the position of the Supreme Court. The conclusion of the court was based on the authorities cited, and not a single one of those authorities related even remotely to a question of pleading. They considered only the mode by which a public grant may be forfeited for breach of a condition subsequent.

In the Whitney Case the court found further warrant for its action in the constitutional provision that the President "shall take care that the laws be faithfully executed." Article 2, § 3. Conceding to the President and to the department of justice the full measure of their constitutional authority, if I am correct in the conclusion that "the mode of asserting or of assuming the forfeited grant is subject to the legislative authority of the government" (United States v. Repentigny, *supra*), that the forfeiture of a public grant must be asserted by legislative act, or "by judicial proceedings authorized by law" (Schulenberg v. Harriman, *supra*), or "through judicial proceedings instituted under authority of law for that purpose" (St. Louis, etc., Ry. Co. v. McGee, *supra*), and that a bill which does not allege "that it is brought under authority of Congress for the purpose of enforcing a forfeiture, and does not allege any other legislative act whatever looking to such intention," fails to state a cause of action (United States v. N. P. R. R. Co., *supra*), it must follow that until Congress acts there is no law for the President to execute or for the courts to administer. I think the case is rather controlled by the provision of the Constitution which declares that Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States (article 4, § 3). It is universally conceded that only the grantor or successors can take advantage of the breach of a condition subsequent, and, while in this case the government is nominally the grantor, the actual grantor is the Congress of the United States. And in my opinion a grant made by that body must remain of full force and effect until Congress ordains otherwise.

If I am correct in these conclusions, the bill of complaint states no cause of action in favor of the government, and the demurrer must be sustained. Let an order be entered accordingly.

CENTRAL VERMONT RY. CO. v. REDMOND et al., Public Service Commission.

(Circuit Court, D. Vermont. August 1, 1911.)

1. STATES (§ 67*)—PUBLIC SERVICE COMMISSION—"COURT."

The Public Service Commission of Vermont is not a court.

[Ed. Note.—For other cases, see States, Dec. Dig. § 67.*

For other definitions, see Words and Phrases, vol. 2, pp. 1672-1682; vol. 8, p. 7622.]

2. COURTS (§ 508*)—INSTRUCTIONS—PUBLIC SERVICE COMMISSION—ORDERS—APPEAL JUDGMENT—INJUNCTION BY FEDERAL COURT.

P. S. Vt. 4599, as amended by Laws 1908, No. 116, provides that any person, feeling himself aggrieved by a final order of the Public Service Commission, may appeal to the Supreme Court on the facts found and reported by the Commission. Section 4600 gives the Supreme Court the same power therein as over appeals from the court of chancery, and permits the court to reverse or affirm the judgments or orders, or remand the cause with such mandates as law and equity shall require, and requires the board to enter judgments in accordance with such mandates. *Held* that, where an order of the Public Service Commission requiring certain changes in railroad tracks, depots, and crossings at a specified point was appealed by the railroad company to the Supreme Court, where the order was affirmed and the proceeding remanded with directions to extend the time for the performance of the order, the proceedings in the state court were not terminated by the remand prior to the order being carried into effect, and hence the federal court within the district had no jurisdiction to enjoin the Commission from compelling the railroad company to comply with the order under Rev. St. § 720 (U. S. Comp. St. 1901, p. 581), providing that an injunction shall not be granted by any court of the United States to stay proceedings in any court of the state except in proceedings relating to bankruptcy.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1418-1430; Dec. Dig. § 508.*

Enjoining proceedings in state courts, see notes to *Garner v. Second Nat. Bank*, 16 C. C. A. 90; *Central Trust Co. v. Grantham*, 27 C. C. A. 575; *Copeland v. Bruning*, 63 C. C. A. 437.]

In Equity. Bill by the Central Vermont Railway Company against John W. Redmond and others constituting the Public Service Commission of Vermont. On petition for an injunction restraining the enforcement of an order relating to changes in complainant's tracks, crossings, etc., at White River Junction. Denied.

C. W. Witters and Young & Young, for petitioner.

John G. Sargent, Atty. Gen., for petitioners.

MARTIN, District Judge. The Central Vermont Railway Company, a corporation chartered and organized under the laws of the state of Vermont, and having its principal office in the city of St. Albans, in said state and district of Vermont, brings this petition against the Public Service Commission of the state of Vermont, and alleges, in substance, that it forms a part of a continuous line of railroad from St. Johns, in the province of Quebec, through White River Junction, in the county of Windsor and state of Vermont, to the city of Boston, and also southerly from said junction to New

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

London, in the state of Connecticut, and is engaged as a common carrier in the transportation of passengers and property over said line, and has been a part of said line and so engaged for more than 10 years last past, and avers that the petitionees, constituting the Public Service Commission of said state of Vermont, upon a petition duly brought before said Commission by Bacon et als., under and by virtue of the laws of the state of Vermont, after hearing the parties thereto, and in that connection hearing all motions, amended petitions, pleadings, appeals to the Supreme Court for the state of Vermont (being the court of last resort within and for the state), ordered certain changes in and about the depot and railway yards at said White River Junction, which, if enforced, will seriously delay and embarrass the interstate business conducted by the petitioner, and prays this court to restrain the execution of said order. The matters especially complained of in said order are the widening and lengthening of the depot platform, the proposed construction of a subway under the tracks of the petitioner, and the construction and proposed location of a building for baggage and express whereby the "team track," so called, will be totally abolished, or, at least, seriously interfered with. Said "team track" is used for loading and unloading freight by team. The petitioner avers that the western end of said proposed subway is within four feet of said team track and will seriously interfere with its use, and that there is no other location at White River Junction where another track can conveniently be laid for the loading and unloading of freight by team.

The original petition of Bacon et als. to the petitionees, as public officers of the state, has thrice been before the Supreme Court of the state upon appeal, in which the Central Vermont Railway Company was appellant. The evidence, petition, plans, pleading, and all other records of the proceedings before the Public Service Commission and the Supreme Court are referred to and made a part of this petition. The last hearing before the Supreme Court terminated with the following order from that Court:

"Judgment and order affirmed, and cause remanded. As the order is dated June 25, 1910, and the intervening time has been required for the presentation and decision of the questions raised on this final appeal, the Public Service Commission is at liberty to fix a new time for the completion of the work by their order directed."

The case, as it stands in this court, rests upon that judgment. By the terms of that judgment the case is remanded to the Public Service Commission to extend the time for the performance of their order by the petitioner, as may seem meet. It is not remanded for further hearing upon its merits. It is a judgment of the court of last resort that the petitioner comply with the orders of the Public Service Commission. It is a proceeding taken into court on appeal by the petitioner. Nothing remains to be done but to perform the orders of the Commission as affirmed by said court.

[1] It was claimed on hearing before this court that the case is not now pending in the state court, but is entirely in the hands of a statutory commission, which is not a court. I concur in the con-

tention that the Public Service Commission is not a court. *Miss. Railroad Commission v. Illinois Railroad Co.*, 203 U. S. 335, 27 Sup. Ct. 90, 51 L. Ed. 209. That case, however, does not apply to the case at bar, for it never was in the state court, or any court except the federal court. When the Public Service Commission of Vermont made its original order, the petitioner, the Central Vermont Railway Company, had its election to apply to the federal court for relief, on the grounds upon which this petition is based, or appeal, under the statute of Vermont, to the Supreme Court of Vermont. Can it do both? The history of this case, as it seems to me, clearly answers that question, both in justice and law. The petitioner, the Central Vermont Railway Company, filed a cross-petition, in it alleging that there was a public highway, maintained by the Town of Hartford, extending from one of its villages across the tracks of the petitioner's railway yard to the depot; that said crossing was dangerous to the traveling public and ought to be abolished in accordance with plans and specifications therein submitted, and, under the statute of Vermont, the expense should be apportioned among the state, the town of Hartford, the Boston & Maine Railroad Company, and the petitioners, but the Public Service Commission refused to hear testimony on said cross-petition on the ground that the question sought to be made thereby did not arise under the original petition of *Bacon et al.* Thereupon the petitioner, the Central Vermont Railway Company, appealed to the Supreme Court, which appeal was heard, duly considered, and the order of the Commission therein was reversed on the ground that it was in the nature of a cross-bill in equity, and the court directed that it be heard by the Commission on its merits. *C. V. R. Co. v. State*, 82 Vt. 145, 72 Atl. 324. The Commission followed the mandate of the court, and, after full hearing, held that said crossing never was a public highway, and directed that its original order be complied with. From this finding of the Commission this petitioner, the Central Vermont Railway Company, again appealed to the Supreme Court, first, upon the ground that the Commission erred in holding that the facts proved did not show that the claimed highway had been established by the town of Hartford; and, second, that the order of the said Commission in the premises was *ultra vires*.

[2] Every question presented to this court was presented to and considered by the state Supreme Court, including the contest as to the highway. Judge Haselton, for the court, in a very learned and carefully prepared opinion of 33 pages, beginning on page 425 of 83 Vt., page 130 of 76 Atl., disposes of both questions. As to the first point raised by the appeal, to wit, the finding by the Commission that there was no public highway at the place in question, the court affirmed the action of the Commission; but upon the last point, this petitioner, the appellant in that case, prevailed. Judge Haselton, speaking for the court, said in part as follows:

"In view of the subordinate findings of the commissioners, all of the facts reported, and the plans referred to as authentic and correct, it is obvious that an underpass which will subserve the public safety and convenience can be constructed without involving as an incidental feature thereof the radical changes upon the surface of the right of way which the order requires. That

being so the order in that regard cannot be upheld, for the power of the commissioners in respect to railroad corporations is that of supervision and regulation and not that of management and administration.

"Management and administration are inseparable from liabilities, risks and responsibilities which attend the exercise of the franchises under which the roads exist. To demand of railroad companies the surrender of the right to manage and administer their affairs would be to demand a surrender of the beneficial use of their property and franchises. Our statute in a large and effective sense gives to the commissioners the right of regulation and supervision of the management by railroad companies of the quasi-public business in which they are engaged; but regulation on the one part and management on the other work together in a salutary way to subserve the public welfare. Without proper regulation the interests of the public at large have been and will be lost sight of. With regulation, obtruding itself into the place of management, capital will recede from the channels of public service, and the industries most useful to the people at large will dwindle, for the incentives to the development, extension and skillful operation of those branches of business which can be said to be 'affected with a public interest' will, in great measure, be removed. The phrase 'affected with a public interest,' as applied to public service enterprises which are private in their ownership, seems to be a rather happy phrase, used, and apparently invented, by Sir Matthew Hale; and its felicity consists in the fact that it lays no undue emphasis either upon the private character or the public purposes of such enterprises.

"The statute gives the Public Service Commission jurisdiction in all matters 'respecting' railroad crossings, highway grade crossings, signs, signals, gates, flagmen, the location, sufficiency and maintenance of proper depots or stations, the construction and maintenance of proper fences, cattle guards and farm crossings, the maintenance of tracks, frogs, switches, culverts and bridges, the connections between connecting roads, the manner of operating railroads. And the statute gives the commission jurisdiction in respect to other matters not above referred to."

The learned judge then discussed the leading cases in the state and federal courts, especially the Supreme Court of the United States, upon the questions involved in the second ground of appeal, and sustained the appeal. The order of the court in the premises was in this language:

"As the crossing is not a public highway, the ruling, or virtual ruling, of the commissioners that the whole expense of the requisite underpass and other changes to be ordered is to be apportioned between the railroad companies is affirmed. The manner in which the expense falling upon them shall be apportioned between them appears to have been agreed upon. The explicit order as to what changes shall be made is reversed and the cause is remanded that the whole matter may be worked out and decreed upon in harmony with the views herein expressed. With the duty resting upon the railroad companies to promptly remedy a confessedly dangerous situation, and with the duty resting upon the Public Service Commission to finally exercise, as soon as may be, its remedial jurisdiction which has been invoked, we have somewhat advanced the consideration of this cause, to the end that both the commissioners and appellants may, without unnecessary delay, address themselves to the discharge of their duties."

Whereupon the Commission, upon due notice to all parties, held a further hearing in the case and made a further report, under date of June 25, 1910, modifying its previous order, and again the petitioner, the Central Vermont Railway Company, appealed to the Supreme Court of the state. So far as the last order relates to the reconstruction of the passenger station at White River Junction, the

appealing party, the petitioner in this cause, made no objection, and no objection in that regard was made in the hearing before this court, but the same objections that were raised in this court were raised on that appeal. The same judge delivered the opinion of the court. See *Bacon v. Boston & Maine R. Co.*, 83 Vt. 528, 77 Atl. 858. In that case the action of the Commission was affirmed, as heretofore stated. All the judges concurred in the conclusions of law, but Judges Watson and Powers dissented on the disposition of the case, suggesting that it be referred back to the Commission for further findings relative to the claimed interference with the so-called "team track." It is evident that when the petitioners elected to take their case into the Supreme Court of the state they made no mistake. That court was very careful to preserve all the rights of the petitioners; it examined all the facts, and weighed with great deliberation and research every question of law presented, and finally, on the third hearing, affirmed the order of the Public Service Commission, by its decree heretofore quoted verbatim.

That the present condition of affairs is dangerous to the public was not questioned in the state court, neither is it questioned in this court. All agree that something ought to be done. The main controversy at first was that the town of Hartford and the state of Vermont, under the statute of Vermont, should contribute with the railroads in interest to the expense. The petitioner, being defeated in that, sought in the state court a modification of the order of the Commission and prevailed, but, when the Commission modified its order, the petitioner was not satisfied with the plans, and insists that another way would alleviate the danger and be more convenient. This identical question was presented to the Supreme Court and passed upon in these words:

"It was the duty of the commissioners to relieve a situation demonstrated and confessed to be highly dangerous. It should be the part of the appellant not to magnify slight inconveniences, but to surmount them. If the manager of the Central Vermont is correct in his judgment that the team track at White River Junction, as it now is, has a capacity for five cars only, and that a team track with a capacity for ten or twelve cars is needed, then there is a difficulty presented which requires solution, but that difficulty cannot be attributed to the Public Service Commission."

Whether the order of the commission is performed or not, the petitioner has a difficulty to overcome relative to said team track, as its present condition seems to be inadequate for the public use in view of the increase of business thereabouts.

It is evident that the real basis of this petition is not that the Public Service Commission of Vermont has undertaken the "management and administration" of the affairs of this petitioner, and thus deprived it of constitutional rights, for in that the Supreme Court carefully guarded its rights, but it is the being compelled to submit to the "supervision and regulation" in detail contained in the commission's order, and that also the Supreme Court—the court to which this petitioner voluntarily appealed—has fully reviewed and decided, and the proceedings in the premises are still pending in that court awaiting the performance of the specific orders which it affirmed.

Section 720, R. S. U. S. (U. S. Comp. Ct. 1901, p. 581), reads as follows:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The petitioner contends that the proceedings in the state court are ended, and that the whole matter is now in the hands of the Public Service Commission, and therefore, section 720, above quoted, does not apply. So, too, it might be, and often has been, contended that when final judgment is rendered by a state court and execution issues, the case has passed out of the hands of the court to those of a sheriff, and therefore the power of the federal court to grant relief by injunction is not affected by said section. I do not concur in that view.

In *Wayman v. Southard*, 10 Wheat. 1, 6 L. Ed. 253, Justice Marshall, speaking for the court, said:

"The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied. Many questions arise on the process subsequent to the judgment, in which jurisdiction is to be exercised."

In *Covell v. Heyman*, 111 U. S. 176, 182, 4 Sup. Ct. 355, 358 (28 L. Ed. 390), Justice Matthews, speaking for the court, said:

"The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States, it is something more. It is a principle of right and of law, and therefore of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system so far as their jurisdiction is concurrent; and, although they coexist in the same space, they are independent and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and, when one takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void. The regulation of process, and the decision of questions relating to it, are part of the jurisdiction of the court from which it issues."

In *Re Chetwood*, Petitioner, 165 U. S. 443, 460, 17 Sup. Ct. 385, 392 (41 L. Ed. 782), Mr. Chief Justice Fuller, speaking for the court, said:

"The doctrine is firmly established that where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court, and that where property is actually in the possession of one court of competent jurisdiction such possession cannot be disturbed by process out of another court of concurrent jurisdiction. *Moran v. Sturges*, 154 U. S. 256 [14 Sup. Ct. 1019, 38 L. Ed. 981], and cases cited. And by section 720 of the Revised Statutes the granting of injunctions to stay proceedings in any court of a state is prohibited in express terms."

In *Taylor v. Taintor*, 16 Wall. 366, 370, 21 L. Ed. 287, Mr. Justice Swayne, speaking for the court, said:

"Where a state court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exclusion of the other,

until its duty is fully performed and the jurisdiction invoked is exhausted; and this rule applies alike in both civil and criminal cases. It is indeed a principle of universal jurisprudence that where jurisdiction has attached to person or thing, it is—unless there is some provision to the contrary—exclusive in effect until it has wrought its function.”

It remains in the hands of that court so long as there is any judicial proceeding essential to the full and complete execution of the judgment.

The doctrine that where different courts may entertain jurisdiction of the same subject, the court which first obtains it will retain it to the end of the controversy is not only upheld by numerous decisions, but it promotes comity between the federal and state courts, justice among litigants and tends to terminate litigation.

In *Sharon v. Terry* (C. C.) 36 Fed. 337, 359, 1 L. R. A. 572, Mr. Justice Field, said:

“Having first acquired possession of the subject, it cannot be rightly ousted by subsequent proceedings in another court having no supervising or appellate authority.”

In *Peck et al. v. Jenness et al.*, 7 How. 612, 624, 12 L. Ed. 841, Mr. Justice Grier, said:

“It is a doctrine of law too long established to require a citation of authorities, that, where a court has jurisdiction it has a right to decide every question which occurs in the cause, and, whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other.”

“In the case of *Kennedy v. The Earl of Cassilis*, Lord Eldon at one time granted an injunction to restrain a party from proceeding in a suit pending in the court of Sessions of Scotland, which, on more mature reflection, he dissolved; because it was admitted, if the Court of Chancery could in that way restrain proceedings in an independent foreign tribunal, the Court of Sessions might equally enjoin the parties from proceeding in chancery, and thus they would be unable to proceed in either court.”

In *Gaylord v. Fort Wayne, etc., Railroad*, 6 Biss. 286, Fed. Cas. No. 5,284, Drummond, Judge, said:

“We think that there is no other safe rule to adopt, in our mixed system of state and federal jurisprudence, than to hold that the court which first obtains jurisdiction of the controversy, and thereby of the res, is entitled to retain it until the litigation is settled.”

The citation of further authorities on this subject is needless. An examination of the state statute, under which the Public Service Commission was proceeding in this matter to remedy a dangerous condition of things shows conclusively, in my opinion, that this case is still pending in the state court. Observe its language relating to an appeal from decisions of the Public Service Commission.

Section 4599, Public Statutes of Vermont, provides:

“Any party to a cause who feels himself aggrieved by the final order, judgment or decree of said board shall have the right to take the cause to the

Supreme Court by appeal, for the correction of any errors excepted to in its proceedings, or in the form or substance of its orders, judgments and decrees, on the facts found and reported by said board."

(This was amended by Act No. 116 of the Laws of Vermont for 1908 by changing the word "board" to "commission.")

Section 4600 provides:

"Appeals from said board shall be taken and the cause entered in the Supreme Court in the county where the cause arises, in the manner and under the law and rules of procedure which govern such appeals from the court of chancery. The Supreme Court shall have the same power therein as it has over appeals from such court. It may reverse or affirm the judgments, orders or decrees of said board, and may remand a cause to said board with such mandates as law or equity shall require; and said board shall enter judgment, order or decree in accordance with such mandates. Said appeal shall not vacate any judgment, order or decree of said board, but the Supreme Court or, when not in session, a judge thereof, may suspend execution of the same as justice and equity require, unless otherwise specifically provided by law."

Section 4601 relates to the recovery of costs, and provides that the same shall be taxed as in the court of chancery unless otherwise provided.

Appeals to the Supreme Court are regulated by the rules of chancery, and said court is vested with the same power that it has over appeals from courts of equity. Is there any question but what the power of the Supreme Court in chancery proceedings continues until its decrees and mandates are complied with and fully performed? The Public Service Commission (called a "board" in this statute) is directed to enter a judgment in accordance with the mandates of the Supreme Court. I hold that the cause is pending in that court, and that under section 720 R. S. U. S., above quoted, this court has no jurisdiction.

If this court had jurisdiction, I should decline the prayer of this petition. The Public Service Commission was constrained to remedy a dangerous condition at White River Junction, and in their efforts thus to do the Supreme Court has, in my opinion, protected the rights of this petitioner to the fullest extent. I concur with the court in its last decision that the present order of the Commission is a matter of regulation only as to an existing danger, a danger that the petitioner has permitted for many years and done nothing to remedy until it was taken in hand by the petitioners.

Let the petition be dismissed.

UNITED STATES v. GARDNER.

(District Court, E. D. Wisconsin. May 9, 1911.)

1. INDIANS (§ 1*)—MIXED BLOODS—FEDERAL LAW—"INDIAN."

Where defendant was a mixed blood Indian, who for many years had been enrolled as a member of the Stockbridge and Munsee Tribe in Wisconsin, had been recognized as such by the tribe and by the government, and as such was enrolled and became an allottee of land, and for many years lived within the limits of the reservation under the care of an Indian agent and policed by Indian police, he was an Indian, within Fed-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

eral Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1151 [U. S. Comp. St. Supp. 1909, p. 1487]) § 328, conferring jurisdiction on the federal courts of certain crimes committed by one Indian against another within the limits of an Indian reservation, though his father was a white man and his mother a part blood Indian who had never been enrolled.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 1; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 4, pp. 3544-3545; vol. 8, p. 7686.]

2. INDIANS (§ 31*)—FEDERAL CONTROL—RESIDENCE WITHIN INDIAN RESERVATION.

Though an Indian has become a full fledged citizen of the United States, and resides on land patented to a prior grantor in fee simple absolute, yet so long as he remains within the limits of an Indian reservation he is subject to the constitutional control of the federal government.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 23; Dec. Dig. § 31.*]

3. INDIANS (§ 12*)—INDIAN LANDS—RESERVATION.

Act Cong. Feb. 6, 1871, c. 38, 16 Stat. 404, provided for a severance of the two parties into which the Stockbridge and Munsee Indians had divided, for the sale of the land on which they were located, and for payment in cash to the so-called citizen party, and for a reservation for the other party. It was also directed that a roll of the members of the tribe should be prepared and a survey made and a subsequent allotment, to be returned to the Secretary of the Interior within one year; that the title to the reservation and of the lands described therein should be held by the United States in trust for the individual Indians and their heirs, and the surplus lands embraced in the reservation remaining after making such allotment be held by the United States in like manner subject to allotment to individuals of the tribe who may not have received any of the reservation, or to be disposed of for the common benefit of the tribe. *Held*, that the Indians having continued to occupy the remnant of the land as a reservation under the charge of an Indian agent, such remaining portion must be regarded as having been properly set aside as a reservation.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 27, 28; Dec. Dig. § 12.*]

4. INDIANS (§ 38*)—INDIAN LANDS—ALLOTMENT—STATUTES—EFFECT—INDIAN CRIMES—JURISDICTION.

Act Cong. June 21, 1906, c. 3504, 34 Stat. 382, provided for the allotment of all the land remaining in the Stockbridge and Munsee Reservation in Wisconsin to the several Indians of that tribe in fee simple without condition. Such allotments were approved by the Secretary of the Interior on January 1, 1910, and patents were delivered April 4th following. *Held* that, prior to the approval of the allotments and the delivery of patents to the allottees for the balance of such reservation, it continued subject to the jurisdiction of the federal courts with reference to crimes committed by one Indian against another thereon; the statute not constituting a grant in present, but only authority to break up the reservation by allotments and patents to be made in futuro.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 22; Dec. Dig. § 38.*]

Nelson Gardner, who for many years had lived within the limits of the Stockbridge and Munsee Reservation, enrolled as an Indian of that tribe, was indicted for rape committed within the limits of the reservation December 18, 1909, on the person of an Indian girl. He was indicted under Federal Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1151 [U. S. Comp. St. Supp. 1909, p. 1487]) § 328, conferring jurisdiction on the federal courts to punish certain specified crimes, in-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cluding rape, when committed by one Indian against another within the limits of an Indian reservation. On defendant's plea to the jurisdiction of the court. Overruled.

The facts in the case are for the most part admitted by the government as set forth in the abstract and brief submitted by defendant's counsel. Defendant sets out among other things that the penalty imposed by the federal statute for this crime is much more severe than that imposed by the state law.

Guy D. Goff and E. J. Henning, for the Government.
P. J. Winter, for defendant.

QUARLES, District Judge (after stating the facts as above).
[1] The first contention of the defendant is that he is not an Indian within the meaning of the statute; that his father was a white man, and that his mother was a part blood Indian who was never enrolled in the tribe. There is no virtue in this contention. The defendant is a mixed blood Indian who for many years has been enrolled as a member of the Stockbridge and Munsee tribe in Wisconsin, and recognized as such by the tribe and by the government. As such Indian, so enrolled, he became an allottee. For many years he had lived within the limits of the reservation which was under the care of an Indian agent and policed by the Indian police. The situation as to blood and enrollment was almost identical in *State v. Campbell*, 53 Minn. 354, 55 N. W. 553, 21 L. R. A. 169, and it was held that Belonge was an Indian within the meaning of the "crimes act," so called. Under these circumstances, the defendant cannot be heard to say that he is not an Indian within the meaning of the statute.

[2] Second. It is strenuously contended by the defendant that the piece of land upon which he resided, and where the crime is alleged to have been committed, was the subject of allotment and patent in fee simple absolute, to one Eli Williams from whom the defendant has acquired the title by certain mesne conveyances; that therefore he was entitled to be considered a citizen and became amenable to the state laws; that he paid taxes to the state authorities upon this piece of land for several years, and that he has voted at special and general elections in the town of Herman, county of Shawano, where his home is located; that therefore the government of the United States has no longer jurisdiction over him, because he became a full-fledged citizen of the state of Wisconsin.

This contention is completely met by the Supreme Court in *United States v. Celestine*, 215 U. S. 278, 30 Sup. Ct. 93, 54 L. Ed. 195, and *United States v. Sutton*, 215 U. S. 291, 30 Sup. Ct. 116, 54 L. Ed. 157, where it is held in substance that although it were conceded that the defendant was a full-fledged citizen of the United States, still he remained under the constitutional control of the federal government because, being an Indian, he lived within the limits of an Indian reservation.

I have not overlooked the fact that the Celestine Case differs from the case at bar in two important particulars. In that case only a part of the reservation had been allotted, and there remained a considerable

area which still constituted a reservation to all intents and purposes; and, second, the patents there awarded were trust patents, so called, excluding the power of alienation for 25 years. Yet the reasoning of the case is believed to reach the case at bar. Along the same line it is contended that the defendant became entitled to full citizenship pursuant to the act of 1887 (Act Feb. 8, 1887, c. 119, § 6, 24 Stat. 390), because he abandoned the habits and customs of the Indian and lived separate and apart from the tribe. It is matter of common knowledge that the Stockbridge and Munsee Indians have long since abandoned the blanket and the tepee, and have adopted the garments of the white man and abandoned the nomadic life. There is nothing to show that Gardner differed in this regard from any other member of the tribe. But we have seen that under the doctrine of the Supreme Court it would be immaterial whether the defendant was entitled to citizenship upon this ground, because he continued to live within the limits of the reservation.

[3] It is contended that there really never was any reservation formally set apart for this tribe of Indians; that after the government had sold most of the lands belonging to the tribe, there remained about 18 sections which was never formally set apart as a reservation. An examination of the statutes will show the error into which defendant has fallen. The act of 1871 (Act Feb. 6, 1871, c. 38, 16 Stat. 404) provided for a severance of the two parties into which the Stockbridge and Munsee Indians had divided. The sale of the land and payment in cash to the so-called citizen party was provided for, and provision made for a reservation for the other party. And it was directed that a roll should be prepared showing who are the members of such tribe and a survey made and a subsequent allotment, such allotment to be returned to the Secretary of the Interior within one year; that the title to such reservation and of the lands described therein shall be held by the United States in trust for the individual Indians and their heirs, the surplus lands embraced in such reservation, remaining after making such allotments, shall be held in like manner by the United States, subject to be allotted to individuals of said tribe who may not have received any portion of said reservation, or to be disposed of for the common benefit of said tribe. Pursuant to this enactment the Indians continued to occupy this remnant of land as a reservation, under the charge of an Indian agent. No further discussion of this proposition is therefore necessary.

[4] The next contention of the defense is more difficult as well as more important. It is strenuously insisted that, if the 18 sections not allotted were justly held to be a reservation, the same was abolished by virtue of the legislation of Congress to which reference will hereafter be made. The act of June 21, 1906 (Act June 21, 1906, c. 3504, 34 Stat. 382), provided for allotment of all the lands remaining in the Stockbridge and Munsee reservation to the several Indians of that tribe in fee simple without condition. Such allotments have now been made. They were approved by the Secretary of the Interior on the 1st of January, 1910, and patents were delivered on the 4th of April, 1910. The question is, What was the status of

this supposed reservation at the time of the alleged commission of the crime, December, 1909?

It is well settled that the government is not bound to continue its guardianship over the Indian indefinitely. It may renounce the same at any time. It may be conceded that when Congress had authorized the allotment in severalty and in fee simple of all the lands belonging to the tribe, and after the approval of such allotment and the actual delivery of the patents therefor, there remained no reservation, but that each allottee in fee simple had become thereby a citizen of the United States, and a citizen of the state in which he resides and amenable to the laws of said state.

In *Farrell v. United States*, 110 Fed. 942, 49 C. C. A. 183, the Circuit Court of Appeals of the Eighth Circuit, speaking through Judge Sanborn, lays down the rule that in ascertaining the tribal and other relations of Indians, courts generally follow the executive and legislative departments to which the determination of these relations has been specially entrusted.

It is contended by the government that the Department of the Interior through its Indian Office, has always maintained, and does now maintain, that the Stockbridge and Munsees were a tribe, and that the lands occupied by the tribe constituted a reservation within the meaning of the law, up to the time that the last remnant of land was distributed and conveyed. The precise question here presented, however, is what effect these several enactments of Congress had prior to the approval of the allotment by the government of the tribal lands.

In nearly every case involving the survival of federal jurisdiction after allotment that has been carried to the Supreme Court, there have been complications by way of treaties or agreements with the tribes to whom the lands have been allotted, or laws of the state within which the allotted land is situated, whereby federal jurisdiction over the allotted land and Indians survive the allotment. Such was the case in *Dick v. United States*, 208 U. S. 340, 28 Sup. Ct. 399, 52 L. Ed. 520; *United States v. 43 Gallons of Whisky*, 93 U. S. 188, 197, 23 L. Ed. 846; *United States v. Celestine*, supra; *United States v. Rickert*, 188 U. S. 432, 23 Sup. Ct. 478, 47 L. Ed. 532; *Couture v. United States*, 207 U. S. 581, 28 Sup. Ct. 259, 52 L. Ed. 350. This case was disposed of by per curiam opinion in the appellate court, and no opinion appears to have been written by the District Judge; but from an examination of the brief of the Attorney General it appears that two provisions of the old treaty of 1854 were brought over and incorporated into the patents in that case, whereby there was awarded to the government plenary police power over the sale and introduction of spirituous liquor as long as the President should think wise and proper after the allotment in severalty.

In *Bates v. Clark*, 95 U. S. 204, 208 (24 L. Ed. 471), the court say: "Indian lands ceased without any further act of Congress to be Indian country after the Indian title had been extinguished, unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case."

The instant case is peculiar in this: There is no treaty and no agreement with this tribe extending the jurisdiction of the federal government beyond the allotment in severalty. When the state of Wisconsin was organized there was no reservation by the government, in the enabling act or otherwise, of federal jurisdiction over the Indian reservations. On the other hand, the state had by its highest court, always claimed jurisdiction over persons and things everywhere within its territorial limits. *State v. Doxtater*, 47 Wis. 278, 2 N. W. 439; *State v. Morrin*, 136 Wis. 552, 117 N. W. 1006.

Here we have presented, then, the naked question whether the reservation survived the act of June 21, 1906, and upon that question hinges the jurisdiction of the federal court in this case. This jurisdiction simply rested either in the state or the federal government alone. It is quite impossible that both jurisdictions should attach at the same time over the same territory. *Re Heff*, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848. From necessity there can be no divided authority. *Kansas Indians*, 5 Wall. 737, 18 L. Ed. 667.

It is argued with some force that the title to land may pass by virtue of a treaty or an act of Congress, when such is clearly the intention of the government. *Francis v. Francis*, 203 U. S. 233, 27 Sup. Ct. 129, 51 L. Ed. 165, is cited in support of this proposition. In that case a grant was made by treaty to a particular reservee, by name, of 640 acres of land near a certain river located in the state of Michigan. Following a local rule of construction theretofore laid down by the Supreme Court of Michigan, which has become a rule of property in Michigan, the grant was held effectual to pass the fee to the reservee, and it remained only to define the limits and boundaries of the grant, which was accomplished by the patent. An examination of the act of June 21, 1906, will show that it was not within the contemplation of Congress by that act to vest any particular tract of land in any particular Indian. It was plainly nothing more than a general direction to proceed in the usual way to first determine who were entitled to grants, and then to issue patents therefor which would pass the title. This purpose is disclosed in the language of the act.

"All Indians who have not heretofore received patents for lands in their own right shall be given *allotments of land* and patents in fee simple."

This language clearly excludes the idea of a grant in præsentī. The body of Indians entitled to allotments in severalty is constantly changing. In no other way can the names of allottees entitled to specific pieces of land be ascertained. An allotment is practically a condition precedent to any grant under this act. In the meantime the status quo remains unchanged. The general rule upon the subject is defined by Congress in the act of May 8, 1906 (Act May 8, 1906, c. 2348, 34 Stat. 182):

"When the land shall have been conveyed to the Indian by patent in fee as provided by section 5 of this act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside."

In *Now-ge-zhuchi*, 69 Kan. 410, 76 Pac. 877, it is laid down that the change of status takes place "upon the completion of the allotments and conferring patents to each of the allottees."

The distinction that we have undertaken to draw between the treaty provisions in the *Francis Case*, *supra*, and the general enactment of June 21, 1906, is sustained in the following cases: *Blackfeather v. United States*, 190 U. S. 368, 379, 23 Sup. Ct. 772, 47 L. Ed. 1099; *Fleming v. McCurtain*, 215 U. S. 56, 30 Sup. Ct. 16, 54 L. Ed. 88; *Sac and Fox Indians of the Mississippi, in Iowa, v. Same in Oklahoma* (No. 614, October term, 1910), 220 U. S. 481, 31 Sup. Ct. 473, 55 L. Ed. 552.

Up to the time this crime is alleged to have been committed, the reservation remained as a physical and legal fact, notwithstanding the promise of Congress to grant patents in fee simple. There was no change of occupancy. The defendant still lived within the limits of the reservation under the charge of an Indian agent, and to a certain extent the tribal relations were continued. So that the relation between the defendant and the government would not seem to have been changed until the allotments had been approved, or perhaps until the patents had been actually issued. It is not necessary in this case to determine at which of these dates the reservation expired. It is true that Congress had given positive assurance that these remaining 18 sections of land should be held to belong to the Indians who were occupying them and that fee-simple patents would be forthcoming. But up to the time this crime is alleged to have been committed, nothing had been done to work any legal change in the title of the land or to impair the jurisdiction of the government. The defendant was still an Indian living within the reservation and therefore amenable to the jurisdiction of the United States for the crime charged.

For these reasons the plea must be overruled.

SOUTHERN PAC. CO. v. CAMPBELL et al.

(Circuit Court, D. Oregon. July 31, 1911.)

No. 3,370.

1. COMMERCE (§ 13*)—INTERSTATE COMMERCE—REGULATION—EFFECT.

Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), regulates interstate commerce only, and a state may regulate intrastate commerce.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. § 7; Dec. Dig. § 13.*]

2. COMMERCE (§ 58*)—INTERSTATE COMMERCE—REGULATION BY STATES.

Laws Or. 1907, p. 75, § 23, requiring all railroads at points of intersection with other railroads to unite therewith in establishing and maintaining suitable platforms and station houses for the convenience of passengers desiring to transfer from one road to the other, and for the transfer of passengers, baggage, and freight when the same shall be ordered by the Railroad Commission, etc., affords added facilities for all kinds of commerce over the routes of intersecting roads, and the require-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ment that such railroads shall connect their lines is not a regulation of interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 77-86; Dec. Dig. § 58.*]

3. COMMERCE (§ 61*)—INTERSTATE COMMERCE—REGULATION BY STATES.

Laws Or. 1907, p. 82, § 27, requiring all railroads to switch for a reasonable compensation, and to deliver without discrimination or unreasonable delay any freight or cars, loaded or empty, destined to any point on their tracks or connecting lines, includes interstate as well as intrastate commerce, and makes exchange of all kinds of freight mandatory on connecting railroads and is invalid as interfering with interstate commerce, and an order of the State Railroad Commission to enforce the provision is invalid.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 81-89; Dec. Dig. § 61.*]

Regulations as to transportation of property as interference with interstate commerce, see note to *Rupert v. United States*, 104 C. C. A. 259.]

4. STATUTES (§ 64*)—INVALIDITY IN PART—EFFECT.

Laws Or. 1907, p. 67, creating a railroad commission and regulating carriers, is not necessarily invalid merely because of the invalidity of section 27 because interfering with interstate commerce.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66; Dec. Dig. § 64.*]

Suit by the Southern Pacific Company against Thomas K. Campbell and others, as Railroad Commissioners of the State of Oregon, known collectively as the Railroad Commission of Oregon, and another. Temporary injunction continued.

W. D. Fenton, Ben C. Dey, and James E. Fenton, for complainant.
A. M. Crawford and Arthur C. Emmons, for defendants.

WOLVERTON, District Judge. This cause was submitted upon a hearing for a continuance of a temporary injunction previously issued by the court. Upon the petition of certain merchants, manufacturers, and shippers of freight, whose mills, factories, and places of business are situated along the tracks of the Yamhill Division of the Southern Pacific, the Railroad Commission of the state of Oregon made and entered an order directing and requiring said company to permit the United Railways Company to connect its tracks with the tracks of said Southern Pacific Company at or near the intersection of Water and Columbia streets, in the city of Portland, and, when said connection should be made, thereafter to transfer and switch for a reasonable compensation, and deliver without discrimination or any unreasonable delay, any freight or cars, loaded or empty, destined to any point on its tracks or the tracks of said United Railways Company.

The Southern Pacific Company, resisting the order, has entered suit against the Railroad Commission to enjoin the enforcement thereof. By its bill of complaint it is shown that the Southern Pacific Company is a common carrier of passengers and freight over its lines of railway in the states of Oregon and California, and other states and territories of the United States, and as such is engaged in both intrastate and interstate commerce, and that the United Railways Company is the owner of, and in possession and operating for hire, a street railway

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in the city of Portland, commencing at the intersection of Irving and Front streets, in said city, and running thence southerly on Front street to Jefferson street; thence easterly on Jefferson to Water street; thence a short distance on Water street; but that it has no station or terminal at either end of its said railway. It is the physical connection of these two roads near the terminus of the Southern Pacific Company's line at the foot of Jefferson street, and the exchange of freight, that is sought to be enforced by the order of the commission.

Counsel in their brief and argument attack the validity of the act of the legislative assembly of Oregon creating the Railroad Commission upon many grounds, but I am not disposed to examine these further than to say that after a very careful consideration of the act in general in a former case I was led to the firm conclusion that it was inimical neither to the fundamental law of the state nor to the commerce clause of the federal Constitution. *Oregon R. & Navigation Co. v. Campbell et al.* (C. C.) 173 Fed. 957.

Beyond these objections, however, it is especially urged that sections 23 and 27 of the Oregon act of 1907 (Laws 1907, pp. 75, 82), are obnoxious to the commerce clause of the national Constitution (article 1, § 8), and consequently that the order of the commission directed against the Southern Pacific Company as it respects both the requirement of physical connection between the two roads and the exchange of freight is likewise invalid and of no effect. I will examine this contention.

[1] Preliminarily I should say that it is argued that Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), is a legislation by Congress upon the same matter, and covers the whole subject, and that, Congress having occupied the field, the state is excluded from enacting legislation pertaining to the same subject-matter. This view, however, loses sight of the fact that Congress sought to regulate interstate commerce only, while the state legislation is in relation to intrastate commerce. Between the two subjects there is a well-recognized and clear distinction, so that the point is not well taken.

[2] Section 23 of the state commission act provides that:

"All railroads shall, at all points of connection crossings or intersection with the roads of other railroads, unite therewith in establishing and maintaining suitable platforms and station houses for the convenience of passengers desiring to transfer from one road to the other; and for the transfer of passengers, baggage or freight, whenever the same shall be ordered by the railroad commission; and shall, when ordered by it, keep such depot or passenger house warmed, lighted, and opened a reasonable time before the arrival, and until after the departure, of all trains carrying passengers; and said railroads shall stop all trains at said depots for the transfer of passengers, baggage and freight when so ordered by the commission. Such railroads whose roads so connect or intersect shall, when ordered by the commission, so unite and connect the tracks of the several roads as to permit the transfer of cars from the track of one to that of the other. The expense of constructing and maintaining such station houses, platforms and track connections, shall be paid by such railroads in such proportions as may be fixed by the commission, in the event such railroads do not agree between themselves as to the apportionment thereof." Laws 1907, p. 75.

And section 27 that:

"All railroads shall afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines for forwarding and delivering passengers and property, and shall transfer, switch for a reasonable compensation, and deliver without discrimination or unreasonable delay any freight or cars, loaded or empty, destined to any point on its track or any connection lines; provided, that precedence over other freight shall be given to live stock and perishable freight. The commission shall have control over private tracks in so far as the same are used by common carriers, in connection with any railroad for the transportation of freight, in all respects the same as though such tracks were a part of the track of said railroad." Laws 1907, p. 82.

As it pertains to section 23, Laws 1907, p. 75, it would seem that its operation and effect are in aid of interstate commerce. It manifestly affords added facilities for a less restrained and freer interchange of all kinds of commerce pursuing its course along the lines and over the routes of these two roads, whether it be denominated interstate or intrastate. So regarding the requirement that the two companies connect their lines of transportation, it is in no wise a regulation of commerce within the meaning of the Constitution. Such is the holding of the United States Supreme Court in an analogous case. *Wisconsin, etc., R. Co. v. Jacobson*, 179 U. S. 287, 295, 21 Sup. Ct. 115, 118, 45 L. Ed. 194. "A state," says the court, "may furnish such facilities or direct them to be furnished by persons or corporations within its limits without violating the federal Constitution." There can be no difficulty in the practical application of the requirements of the section.

[3] As much cannot be predicated of section 27. The requirement there is that all railroads shall switch for a reasonable compensation, and deliver without discrimination or unreasonable delay, any freight or cars, loaded or empty, destined to any point on its track or any connecting lines. The terms of the section are so broad in their scope as imperatively to include interstate as well as intrastate commerce, and the exchange of all kinds of freight is mandatory upon all connecting railroads. The order of the commission is amply as broad as the act.

The Constitution of Kentucky, § 213, requires that all railroad companies organized under the laws of that state or doing a railway business therein shall receive, transfer, deliver, and switch empty or loaded cars, and shall move, transport, receive, load, or unload, all the freight in car loads or less quantities, coming to or going from any railroad, transfer, or belt line, with equal promptness and dispatch, and without any discrimination; and shall so receive, deliver, transfer, and transport all freight as above set forth from and to any point where there is a physical connection between the tracks of said companies. This clause came under scrutiny of the federal court in *Central Stockyards Co. v. Louisville & N. R. Co.*, 118 Fed. 113, 55 C. C. A. 63, 63 L. R. A. 213, and it was held that a state is without power to compel a railroad company to transfer cars of live stock to a connecting road at a point of connection within the state, where the shipment was received in another state, which rendered it interstate commerce. Thus it was determined that, if the Constitution required the transfer and delivery from one railroad company to another within the state of articles or commodities of interstate commerce, it could not stand. On appeal to

the Supreme Court, that court passed over any construction of the Constitution, and disposed of the case on the ground that one railroad, having its own stockyards in a city, could not be required to accept live stock from other states for delivery at the stockyards of another railroad in the same city. *Central Stockyards v. Louisville, etc., Ry. Co.*, 192 U. S. 568, 24 Sup. Ct. 339, 48 L. Ed. 565. Another case came up between the same parties, based upon a like state of facts, in the state courts of Kentucky. It was there determined that it was not the purpose or intentment of the state Constitution to regulate commerce between the states, but that the requirement for the exchange and switching of cars and freight was a police regulation, perfectly valid and proper for exercise by state authority without encroachment upon national powers. The clause alluded to was further construed as not to require one railroad company to deliver its own cars to another for further transportation. *Louisville & N. R. Co. v. Central Stockyards Co.*, 133 Ky. 148, 97 S. W. 778. This case came under review of the Supreme Court on writ of error, and was reversed by that court, principally on the ground that the Constitution of Kentucky, as construed by the state court, requiring a delivery and transfer by a railroad company of its own cars was a taking of property without due process of law, and therefore contrary to the fourteenth amendment of the national Constitution. *Louisville, etc., R. R. Co. v. Stockyards Co.*, 212 U. S. 132, 29 Sup. Ct. 246, 53 L. Ed. 44. The court, however, expressed surprise that the state court should have decided that the judgment appealed from did not deal with commerce among the states, and further indicated that it should have to hold the provision in question of the state Constitution void, as applied, if it followed the construction given to it by the state court. While, therefore, not deciding that the clause was void and inoperative as requiring transfer and delivery of interstate commerce, the court left the strongest intimation that such would be the holding were it directly called upon to determine the question. So it is the sweeping requirement of section 27 in my opinion invades the domain of interstate commerce, and the order of the state commission under it is likewise obnoxious to the commerce clause of the federal Constitution.

It follows that the bill of complaint for an injunction states a good cause for such relief, and the temporary injunction heretofore issued should be continued. Such will be the order of the court.

[4] I am not to be understood as holding the entire act to be void and inoperative—very far from it—as the remainder of the act may stand as valid and operative without the provisions of section 27.

WILLIAMS v. MOLTHER et al.

(Circuit Court, N. D. New York. April 27, 1911.)

1. COMMERCE (§ 18*)—NAVIGABLE WATERS OF THE UNITED STATES.

The St. Lawrence river, Lake Ontario, Niagara river, Lake Erie and Detroit river are waters of the United States, and Congress has the constitutional power to regulate commerce thereon.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 18.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. PILOTS (§ 5*)—LICENSES—REGULATIONS—VALIDITY.

A rule of the board of supervising inspectors that no original license as pilot shall be issued to one who has not had 3 years' experience in the deck department of enumerated vessels adopted under Rev. St. U. S. § 4405, (U. S. Comp. St. 1901, p. 3017), authorizing the supervising inspectors to establish regulations to carry out the provisions of the statutes for the regulation of steam vessels, and approved by the Secretary of the Treasury, will be adjudged reasonable and enforceable, in the absence of any evidence that experience in the deck department of one or more of the vessels named is not a necessary qualification for a pilot.

[Ed. Note.—For other cases, see Pilots, Dec. Dig. § 5.*]

3. PILOTS (§ 5*)—REGULATION—LICENSES.

The right to a license as a pilot is not an inherent right in the citizen, but Congress may require that pilots in coastwise commerce shall have a license granted by the inspectors of the United States, and may provide that the board of supervising inspectors shall make rules which shall have the force of law when approved by the Secretary of the Treasury.

[Ed. Note.—For other cases, see Pilots, Dec. Dig. § 5.*]

Suit by Frank R. Williams against John Molther and another, local inspectors of steam vessels. Bill dismissed.

Frank R. Williams, in pro. per.

George B. Curtiss, for defendants.

RAY, District Judge. On the 28th day of December, 1908, the complainant, Williams, made written application to the defendants as inspectors for a license to act as pilot, master, etc., on vessels under 100 tons from Ogdensburg to Detroit on the St. Lawrence, Lake Ontario, Niagara river, Lake Erie, and Detroit river. In his application he set forth his qualifications as follows:

"I sailed my own large row and sail boat between Lake Ontario to below Alexandria Bay, 1875; sailed single handed, Steam Yacht 'Muriel,' Racine to Chicago, and about vicinity, 1880; greatest amount of single handling Steam Yacht 'Vixen' on Niagara River, Buffalo Harbor & Canals, 1894, Sometimes alone or with owners Farelady & lady friends, also with owner & friends, Taught Navigation & piloted their first trip over licensed route 2 freshly licensed pilots on above, Sailed Niagara River, Buffalo Harbor & Canals, several seasons on charter yachts as Engineer, 1892-8; Sailed Great Lakes as Engineer; Sailed 1000 Island District 6 seasons as Engineer on charter boats, 1898; One season Lesse & Master of charter Steam Yacht 'Little Mac' from Clayton, 1902; Have State Master & Pilot License for certain lakes and Rivers; Also U. S. Motor boat license 15 tons; Also U. S. Engineers license 14th issue, 1908; Sailed alone Motor Boat length Onondaga Lake, Piloted Motor boat Oswego Canal, Onelda River & Lake. Brought Motor Boat Albany via Cohoes to Syracuse."

This application failed to show that the said applicant for a license, Frank R. Williams, had had three years' experience in the deck department of a steam vessel, motor vessel, sail vessel, or barge consort, and on the trial of this action it is conceded by the complainant, Williams, that at the time he made such application he had not had the three years' experience required by sections 42 and 46 of rule 5 relating to licensed officers of the general rules and regulations prescribed by the board of supervising inspectors of the United States

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

made and adopted under section 4442 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3037).

Sections 42 and 46 of rule 5 read as follows:

"42. No original license as second-class pilot shall be issued to any person who has not had three years' experience in the deck department of a steam vessel, motor vessel, sail vessel, or barge consort. The local inspectors shall, before granting a license as second-class pilot, satisfy themselves that the applicant is qualified to steer; provided, that on the Mississippi and tributary rivers one year of such required experience must have been in the pilot house as steersman.

* * * * *

"46. No original license for pilot of any route shall be issued to any person, except for special license for steamers of 10 gross tons and under, who has not served at least three years in the deck department of a steamer, motor vessel, sail vessel, or barge consort, one year of which experience must have been obtained within the three years next preceding the date of application for license, which fact the inspectors may require, when practicable, to be verified by the certificate, in writing, of the licensed master or pilot under whom the applicant has served, such certificate to be filed with the application of the candidate."

The defendants refused to give said Williams an examination for a license or the license for the reason he had not had such experience, and based their action on said sections of rule 5 of the said regulations.

The complainant, Williams, concedes that such regulations had been made, but contends that as matter of law the said regulations required an arbitrary experience, and that such regulations are not authorized by the statute, and are invalid for the reasons that the same, in so far as they require such experience, are not warranted by the statute, and that such a regulation was not within the intent of Congress and hence is not the law, and that such regulation is not a necessary, useful, and appropriate regulation, and that the same is not applicable to such a person as the complainant having the qualifications set forth in his application, and that such regulation is a deprivation of citizen's rights and is unconstitutional.

Section 4405 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3017) "Title 52, Regulation of Steam Vessels. 1. Inspection," provides as follows:

"The supervising inspectors and the supervising inspector general shall assemble as a board once in each year, at the city of Washington, District of Columbia, on the third Wednesday in January, and at such other times as the Secretary of the Treasury shall prescribe, for joint consultation, and shall assign to each of the supervising inspectors the limits of territory within which he shall perform his duties. The board shall establish all necessary regulations required to carry out in the most effective manner the provisions of this title, and such regulations, when approved by the Secretary of the Treasury, shall have the force of law. The supervising inspector for the district embracing the Pacific coast shall not be under obligation to attend the meetings of the board oftener than once in two years; but when he does not attend such meetings he shall make his communications thereto, in the way of a report, in such manner as the board shall prescribe."

It is conceded that the supervising inspectors and the supervising inspector general assembled for consultation, etc., and established, among others, the regulations above quoted. This section of the Revised Statutes provides that such regulations when approved by the

Secretary of the Treasury "shall have the force of law." It is conceded that these regulations to which attention has been called were approved by the Secretary of the Treasury. As seen, title 52 of the Revised Statutes relates to the regulation of steam vessels, and chapter 1 relates to inspection. Chapter 2 of the same title relates to the transportation of passengers and merchandise. Section 4438 (page 3034) provides that the board of local inspectors shall license and classify the masters, chief mates, engineers, and pilots of all steam vessels, and that it shall be unlawful to employ any person or for any person to serve as pilot on any steamer who is not licensed by the inspectors, and section 4442 provides as follows:

"Whenever any person claiming to be a skillful pilot of steam vessels offers himself for a license, the inspectors shall make diligent inquiry as to his character and merits, and if satisfied, from personal examination of the applicant, with the proof that he offers that he possesses the requisite knowledge and skill, and is trustworthy and faithful, they shall grant him a license for the term of one year to pilot any such vessel within the limits prescribed in the license; but such license shall be suspended or revoked upon satisfactory evidence of negligence, unskillfulness, inattention to the duties of his station, or intemperance, or the willful violation of any provision of this title."

I do not see how it can be held that the regulations 42 and 46 are unconstitutional or unnecessary or inappropriate. Nor do I see how it can be held that the regulations operate to deprive a citizen of his rights.

[1] The waters mentioned by the complainant in his application for a license are waters of the United States which are common highways of commerce, and I do not think it can be denied that the Congress of the United States has the constitutional power to regulate commerce on such waters.

[2] The complainant does not deny that Congress may enact a law requiring the pilots to be licensed before acting as such. He concedes this power by applying for a license. What he does deny is that a duly constituted board of officers may fix an arbitrary term of service in a particular line of duty as a qualification. The board of supervising inspectors has determined that to carry out the provisions of title 52—that is, the regulation of steam vessels navigating the waters of the United States, which are common highways of commerce—in the most effective manner, and in licensing pilots of steam vessels on such waters, it is necessary that the pilots licensed have certain qualifications. Among the qualifications required are requisite knowledge and skill, trustworthiness, and faithfulness. Section 4442 says that the inspectors shall inquire as to the character and merits of the applicant, and that they are to be satisfied that he possesses the requisite knowledge and skill. Under the provisions of section 4405 the board of supervising inspectors has said that "requisite knowledge and skill" includes experience in the deck department of a steam vessel, motor vessel, sail vessel, or barge consort. That board has also said that in its judgment three years' experience is necessary to give the requisite knowledge and skill to a pilot on the waters in question. Can it be doubted that Congress itself might have determined by law that no license should be granted a pilot on a steam vessel navigating the waters of

the United States unless he had had three years' experience in the deck department of a steam vessel, motor vessel, sail vessel, or barge consort? The power and duty of determining what experience and qualifications a pilot shall have has been conferred upon these inspectors. May they say that an applicant for a pilot's license must have had three weeks' or three months' experience in the deck department of the vessels named? If so, why may they not say three years' experience is essential? Is a court better able to determine the qualifications of a pilot than these inspectors?

It is not one of the constitutional rights of the citizen to have a license granted him to act as pilot, master, and mate correspondingly of a steam vessel, or in either capacity on the navigable waters of the United States, unless he possesses the requisite knowledge and skill. The position of pilot is one of great power and responsibility. The licensed pilot has many lives and large property interests in his hands, and I see nothing unreasonable in fixing a standard of qualifications up to which the applicant must measure as a condition of receiving a license. It would have been the duty of the inspectors to grant an examination to the applicant, Williams, had it not appeared as he now admits that he does not possess the knowledge and skill required by the board of supervising inspectors. The rules and regulations adopted say that the pilot, before being licensed, must have the knowledge and skill gained by three years' experience in the deck department of a steam vessel, motor vessel, sail vessel or barge consort. This applies to first-class pilots, second-class and special pilots. Sections 41 and 42, rule 5.

Who is to determine the knowledge and skill required of a pilot if not the inspectors, and how are they to determine whether or not he possesses it if they have no standard? Under our civil service laws we have standards up to which the applicant for public position must measure. In our school affairs we have standards of acquirement and experience in teaching up to which the candidate must measure before being licensed to teach in certain positions. The granting of licenses to practice law have been made conditional on two or three years' actual experience in the law office of a practicing attorney. Congress itself has not prescribed the qualifications of a pilot, but has committed the power and duty of prescribing such qualifications and determining whether or not an applicant for a license possesses them to the inspectors.

In *Olsen v. Smith*, 195 U. S. 332, 344, 25 Sup. Ct. 52, 55 (49 L. Ed. 224), the Supreme Court of the United States said:

"It remains only to consider the contention based upon the fourteenth amendment and the anti-trust laws of Congress. The argument is that the right of a person who is competent to perform pilotage services to render them is an inherent right guaranteed by the fourteenth amendment, and that therefore all state regulations providing for the appointment of pilots and restricting the right to pilot to those duly appointed are repugnant to the fourteenth amendment. But this proposition in its essence simply denies that pilotage is subject to governmental control, and therefore is foreclosed by the adjudications to which we have previously referred. The contention that because the commissioned pilots have a monopoly of the business, and by combination among themselves exclude all others from

rendering pilotage services, is also but a denial of the authority of the state to regulate, since if the state has the power to regulate, and in so doing to appoint and commission, those who are to perform pilotage services, it must follow that no monopoly or combination in a legal sense can arise from the fact that the duly authorized agents of the state are alone allowed to perform the duties devolving upon them by law. When the propositions just referred to are considered in their ultimate aspect they amount simply to the contention, not that the Texas laws are void for want of power, but that they are unwise. If an analysis of those laws justified such conclusion—which we do not at all imply is the case—the remedy is in Congress, in whom the ultimate authority on the subject is vested, and cannot be judicially afforded by denying the power of the state to exercise its authority over a subject concerning which it has plenary power until Congress has seen fit to act in the premises.”

[3] This, of course, settles the proposition that the right to a license as pilot is not an inherent right in the citizen. Here Congress has acted and has required that pilots in the coastwise commerce of the United States shall have a license granted by the inspectors of the United States, and has also provided that the board of supervising inspectors are to make rules and regulations which shall have the force of law when approved by the Secretary of the Treasury. The rules and regulations referred to have been established, and so far as complained of relate to the qualifications of pilots. It appears from the application of the complainant that he has an engineer's license, and has had some experience as an engineer and some experience in running a yacht and motor boat, etc. I do not think a court should or can in the face of this congressional action say that the regulations referred to are unwarranted by the statute. No amount of experience as engineer on a steam vessel navigating the Great Lakes and River St. Lawrence would qualify a man to act as pilot on those waters. No amount of experience in running a rowboat or vessel of light draught or small sail vessels on the river and lakes mentioned would qualify a person to act as pilot on one of the larger steam vessels navigating those waters.

In *Atlee v. Packet Company*, 21 Wall. 389, 22 L. Ed. 619, it was said:

“(5) A constant and familiar acquaintance with the towns, banks, trees, etc., and the relation of the channel to them, and of the snags, sand bars, sunken barges, and other dangers of the river as they may arise, is essential to the character of a pilot on the navigable rivers of the interior; this class of pilots being selected, examined, and licensed for their knowledge of the topography of the streams on which they are employed and not like ocean pilots, chiefly for their knowledge of navigation and of charts, and for their capacity to understand and follow the compass, take reckonings, make observations, etc.

“(6) Hence a pilot, who, though engaged for many years in navigating a part of the Mississippi, had not made a trip over that part for fifteen months previously to one which he was now making, and from ignorance of its existence ran his vessel against a pier which had been built in the river since he had last gone up or down it, was held to be in fault for want of knowledge of the pier. He was also held in fault for hugging, in a dark night, the shore near where he knew the mill and boom of a riparian owner were, and against a pier connected with which he struck, when the current of the river would have carried him into safe and deep water further out.”

It is well known that navigation of the St. Lawrence river and the Great Lakes is difficult and dangerous. The pilot in these waters, especially, as in all coastwise navigation, should possess a thorough familiarity with headlands, points, lights, rocks, channels, towns, depth of water, etc., and the regulations adopted require actual service for three years in the deck department where a practical knowledge of these things may be acquired before a license as pilot will be granted. I think the regulation and requirement not only wise, but necessary and reasonable, as well as lawful. It would be an arbitrary rule or regulation to say that no license as pilot shall be granted to a deaf or dumb or blind person, but who shall say that because arbitrary the supervising board of inspectors has no power to adopt it? So a regulation stating that no person shall be licensed as a pilot until he has reached the age of 21 years, or 25 years, would be arbitrary, but will a court intervene and say that such a regulation is unlawful and beyond the power of the board of inspectors to make and enforce? So long as experience in the deck department gives knowledge and skill, and so long as pilots are required to possess knowledge and skill, it seems to me that in determining whether or not an applicant for a pilot's license possesses the requisite knowledge and skill, the board of inspectors has the right to say that three years' experience in the deck department is necessary, and that no court has the right to say the requirement is unreasonable or unnecessary. I do not think the inspectors are bound to actually examine all comers. They have the right to prescribe preliminary experience and qualifications so long as they act reasonably and fairly. If, before a general examination is had, the applicant admits that he has not had the necessary experience, such general examination is unnecessary, as the required knowledge and skill is wanting. I think the application itself is to be considered as a part of the examination.

No evidence has been offered in this case showing or tending to show that experience in the deck department of one or more of the vessels named in the rules mentioned and complained of is not a necessary qualification for a pilot.

There will be appropriate findings and a decree dismissing the bill of complaint, but without costs.

THE MINNESOTA. THE SIDRA.

(District Court, S. D. New York. February 28, 1911.)

COLLISION (§ 81*)—STEAM VESSELS MEETING IN FOG—STEAMER WITHOUT WHISTLE.

The steamship Minnesota, when proceeding down the New Jersey coast from New York in a dense fog, came into collision with the steamship Sidra on the opposite course. When the Minnesota left port her steam whistle was so out of repair that it could not be used, and she was compelled to use a fog horn, which was sounded about every minute. She was proceeding at half speed, which was 7 miles an hour, when she heard the fog signals of the Sidra ahead and stopped her engines, but did not reverse. The Sidra on hearing a single blast of the fog horn of the Min-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

nesota ahead, which, under article 15 (c) of the International Rules (Act Aug. 19, 1890, c. 802, 26 Stat. 320 [U. S. Comp. St. 1901, p. 2868]) should have indicated a sailing vessel on the starboard tack moving toward the eastward, stopped, but after waiting a minute and hearing no further signal proceeded at slow speed, but on again hearing the fog horn reversed, and gave alarm signals, the collision following almost at once. *Held*, that the Minnesota was unseaworthy at the commencement of the voyage for want of an efficient whistle, which fault, together with her failure to reverse at once on hearing the Sidra's signal ahead, rendered her liable for the collision; that the Sidra was not clearly chargeable with contributory fault in not reversing sooner, having been misled by the signal of the Minnesota.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 157-166; Dec. Dig. § 81.*

Signals of meeting vessels, see note to The New York, 30 C. C. A. 630.]

In Admiralty. Suit by Alexander Jaggs, as master of the steamship Minnesota, against the steamship Sidra, and cross-libel against the Minnesota. Decree against the Minnesota.

Harrington, Bigham & Englar (Howard S. Harrington, advocate), for the Sidra.

Wallace, Butler & Brown (James K. Symmers, advocate), for the Minnesota.

HOLT, District Judge. These are two actions, upon a libel and cross-libel, to recover damages for a collision between the steamers Sidra and Minnesota, at a point off the coast of New Jersey about 27 miles south by west from the Scotland Lightship, on March 1, 1910. The Sidra is a British vessel of 2,033 registered net tons, 322 feet long. The Minnesota is a Norwegian vessel of 813 registered net tons, 230 feet long. The Sidra was proceeding on a voyage from Matanzas to New York, and the Minnesota on a voyage from New York to Port Antonio. The collision occurred in a dense fog. The witnesses put the distance at which an object could be seen in it at from 300 to 600 feet. The vessels were on opposite courses, the Sidra heading north by east, and the Minnesota south by west. The collision occurred at 3:20 p. m. by the Minnesota's time, and at 2:53 p. m. by the Sidra's time. The Minnesota had left her pier in Brooklyn that morning at 10:30 a. m. While going down the bay, it was observed that her steam whistle was out of order. This is admitted by the captain and officers of the Minnesota. Capt. Egmond, master of the Dutch steamer Surinam, which happened to be at anchor near the West Bank Light in the lower bay when the Minnesota passed out, testified that as she passed he heard the Minnesota try her whistle six or seven times, and then noticed that it was broken, that it made a little hissing sound, which he said could be heard only a little over a ship's length. After leaving the Scotland Lightship, and before the fog shut in, the captain of the Minnesota told the mate to tell the engineer to take down the whistle and see what was the matter with it, and to have the fog horn up on the bridge ready in case there should be fog. The fog horn was accordingly brought up on the bridge. At 2:45 p. m., according to the Minnesota's time, the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fog settled in thick. They tried the fog whistle, and found that it was broken so that they could not use it, and from that time on the Minnesota proceeded at half speed, sounding one blast on the fog horn at intervals of about a minute. The full speed of the Minnesota was about $11\frac{3}{4}$ knots an hour. Her half-speed was about 7 knots an hour. The Minnesota, at 3:15 p. m., according to her own time, heard the fog signals of a steamer apparently dead ahead. She stopped her engines and kept them stopped, while those in charge of her, including her lookout stationed on the forecastle head, listened for repetitions of the signal, which was heard twice again, also directly ahead. At 3:19 the Sidra came into sight, not over 300 feet away. The engines of the Minnesota were then reversed at full speed, her helm put hard aport, and three blasts of the fog horn blown. The collision happened in about three-quarters of a minute, about as near head and head as possible, the stem of the Minnesota meeting the Sidra a little to the port of the latter's stem.

The evidence for the Sidra shows that she encountered thick fog that day at a few minutes after 8 a. m. She thereupon proceeded at a speed not exceeding $3\frac{1}{2}$ knots an hour. She was approaching the New Jersey shore, and during the day frequently stopped to take soundings. Her fog whistle was blown about every 45 seconds. A competent lookout was stationed on the forecastle head. Her engines were making about 20 or 22 revolutions per minute, as against 56 at her full speed of 9 knots. While thus proceeding, a single blast of a foghorn was heard ahead. The Sidra's engines were immediately stopped. The captain assumed that the single blast of the foghorn indicated a sailing vessel on the starboard tack, in accordance with the requirements of article 15, subd. "c," of the International Rules. The wind was east or southeast, and one blast of the fog horn indicated a sailing vessel crossing the Sidra's course from port to starboard. The captain waited, with his engines stopped, a full minute without hearing any repetition of the supposed sailing vessel's signal. He concluded that she had passed across his course to starboard out of earshot, and started ahead again, proceeding at slow speed. About a minute later, the master of the Sidra heard another blast of the fog horn close ahead. He immediately ordered his helm hard aport, and his engines put at full speed astern, and sounded three blasts to indicate that he was backing. Practically simultaneously with his hearing the second fog horn blast, the Minnesota loomed out of the fog, and shortly afterwards the collision occurred.

I think it entirely clear upon these facts that the Minnesota was at fault for the collision. Before she left the harbor of New York, it was apparent to all on board that her steam whistle was unfit for use. She was therefore unseaworthy when she left port. A steam whistle in perfect order, capable of giving the signals required by the rules of navigation, is one of the most important articles of a steamer's equipment. It is as important as a compass or an anchor. In foggy weather, it is the only means permitted by the rules for giving information of a vessel's presence or of its approach to other vessels. The rules require that a steam vessel under way in a fog

shall sound at intervals of not more than two minutes a prolonged blast on her whistle. The only occasion on which a steam vessel can properly use a fog horn is stated in rule 15, subd. "c," that is, when she is towing, or is a vessel employed in laying or picking up a telegraph cable, or is unable to get out of the way of an approaching vessel through being not under command or unable to maneuver as required by the rules. A fog horn is ordinarily used exclusively by sailing vessels. If the Minnesota's steam whistle had been in order, and the men in charge of the navigation of the Sidra had heard its blast ahead, they would have had warning of a steam vessel approaching. Hearing one blast of a fog horn ahead, they had a right to infer that it was a sailing vessel on the starboard tack, crossing the Sidra's course from port to starboard. The Minnesota was clearly at fault for having put to sea with her steam whistle out of order, when her officers knew before leaving port that it was out of order. The use of the fog horn instead of the whistle was, in my opinion, the immediate cause of the collision.

I think that the Minnesota was also at fault for not reversing when she first heard the whistle of the Sidra ahead. The evidence is that when she heard the first whistle she stopped her engines, but she did not reverse or do anything further to stop the steamer. She had been going at half speed—about 7 knots an hour. She subsequently heard the whistle twice more without doing anything to stop the steamer, and it was not until she heard it the third time that she reversed her engines. As soon as she heard the first blast of a steam whistle directly ahead, in a dense fog, article 16 of the International Rules required that she stop her engines, and then navigate with caution until danger of collision was over. In my opinion, she was not navigating with caution when she simply stopped her engines and drifted on directly towards the steamer sounding the whistle ahead. As her own whistle was out of order, she had no means of notifying the Sidra that she was a steamer; and although her engines were stopped, she was under a headway on 7 knots an hour when they were stopped, and went drifting right on towards the coming steamer. I think she should have reversed as soon as she heard the first blast ahead.

I can see no ground for criticising the navigation of the Sidra except upon the single point that, after she had once stopped her engines on hearing the fog horn ahead, and they had remained stopped for a minute, she started ahead again. The language of the rule is:

"A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

In the opinion of the United States Supreme Court, in the case of *The Umbria*, 166 U. S. 404, 417, 17 Sup. Ct. 610, 615 (41 L. Ed. 1053) it is stated as follows:

"The general consensus of opinion in this country is to the effect that a steamer is bound to use only such precautions as will enable her to stop in time to avoid a collision after the approaching vessel comes in sight,

provided such approaching vessel is herself going at the moderate speed required by law. In a dense fog this might require both vessels to come to a standstill until the course of each was definitely ascertained. In a lighter fog it might authorize them to keep their engines in sufficient motion to preserve their steerage way."

The rule undoubtedly does not state that the vessel must be stopped. It states that the engines must be stopped, but undoubtedly, if the subsequent navigation with caution required by the rule necessitates that the vessels should come to a standstill until the course of each is definitely ascertained, that must be done. Judging in the light of the result, it would undoubtedly have been better for the captain of the *Sidra* to have waited some time longer before starting ahead, although, in my opinion, it is doubtful whether even that would have averted the collision, since the *Minnesota*, coming on at a speed of about 7 knots an hour, did not stop her engines until she heard the *Sidra* ahead, and did not reverse until the *Sidra* came in sight. But I think that it was natural for the captain of the *Sidra*, having waited a full minute, and hearing no further blast from the fog horn ahead, to assume that the schooner had passed to starboard. At all events, the fundamental faults of the *Minnesota* are so marked, and the question whether the *Sidra* was in fault in starting ahead after stopping for a minute is so doubtful, that the entire blame for the collision should be placed upon the *Minnesota*.

My conclusion is that there should be a decree for the libelant in the suit by the master of the *Sidra*, and a decree dismissing the cross-libel in the suit by the master of the *Minnesota*, with the usual reference to compute the damage.

ELECTRIC SMELTING & ALUMINUM CO. v. CARBORUNDUM CO.

(Circuit Court, W. D. Pennsylvania. November 24, 1900.)

No. 10.

1. PATENTS (§ 317*)—SUM FOR INFRINGEMENT—INJUNCTION.

In a suit for infringement of a patent, although infringement is found and an accounting ordered, the court has power to refuse an injunction if the facts are such that it would be inequitable to grant it.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 559-565; Dec. Dig. § 317.*]

2. PATENTS (§ 317*)—SUIT FOR INFRINGEMENT—INJUNCTION—DISCRETION OF COURT.

Defendants were the sole manufacturers of carborundum, having built up an extensive business, and having a large and expensive plant with machinery built for that special work. Their product was also protected by a patent, but in its manufacture they used a process of smelting by electric current which was held to infringe complainant's patent, and without the use of such process their plant could not be operated. Their use of it was entered into in good faith, and without knowledge that it was an infringement. *Held* that, while complainant was entitled to a decree for an injunction and an accounting, inasmuch as it was not in competition with defendant as a manufacturer and could be fully compen-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sated in damages, the injunction would be withheld on the giving of a bond by defendant to secure the payment of such profits and damages as complainant might recover.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 559-565; Dec. Dig. § 317.*

Grounds for denial of preliminary injunctions in patent infringement suits, see note to *Johnson v. Foos Mfg. Co.*, 72 C. C. A. 123.]

In Equity. Suit by the Electric Smelting & Aluminum Company against the Carborundum Company. On settlement of decree for complainant.

C. M. Vorce, for complainant.

Thomas W. Bakewell and George H. Christy, for defendant.

BUFFINGTON, District (now Circuit) Judge. In this case the Circuit Court of Appeals, reversing the lower court, held the respondent infringed claims 1, 2, and 4 of the process patent of Cowles, No. 319,795, but had not infringed either claim 1 or 2 of the apparatus patent in suit. 102 Fed. 618, 42 C. C. A. 537. That court further said:

"The decree of the Circuit Court is reversed, with directions to enter a decree for the complainant in accordance with this opinion, but without costs heretofore incurred to either party."

It is now moved to enter a decree, and varying forms of proper decrees have been submitted by counsel. Apart from the instructions of the court above as to decreeing the validity of the patent in question, the infringement of its recited claims and the disposition of the costs, I am of opinion that the duty of passing on and determining the form of the decree in other respects is one which the higher court impliedly relegated to this court. So regarding it, I now proceed to its settlement.

[1] Ordinarily such decree is for an accounting, and an injunction follows as matter of course, unless there are cogent reasons for departing from such course. That an injunction may be refused, even when there is a decree for an accounting, and the patent is still in life, the adjudicated cases in this circuit settle. In entering a final decree in *Rumford v. Hecker*, Fed. Cas. No. 12,134, 2 Ban. & A. 386, where an injunction was ordered, Judge Nixon stated the general rule thus:

"Courts have the power to withhold it (the injunction), and usually will do so, in those cases where by granting the injunction, there seems to be more danger of producing an irreparable injury to the defendant, than of preventing it on the part of the complainant."

On final hearing in *Dorsey v. Marsh*, Fed. Cas. No. 4,014, 6 Fish. 387, it was held that, while complainant was entitled to a decree, it should be so framed as not to subject the respondent to any avoidable loss. In that case, to which reference is made hereafter, an injunction was refused, conditioned if security was entered. Other cases in this circuit showing the exercise of this power, under the

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peculiar facts of each case, are *Sanders v. Logan*, Fed. Cas. No. 12,295, 2 Fish. Pat. Cas. 167 (Mr. Justice Greir); *McCrary v. Pennsylvania Canal Co.* (C. C.) 5 Fed. 367; *Ballard v. City of Pittsburgh* (C. C.) 12 Fed. 783. "We think these cases," says Mr. Justice Brown, then District Judge, in *Consolidated Roller Mill Co. v. Coombs* (C. C.) 39 Fed. 805, "may be regarded as establishing a rule in the Third circuit somewhat at variance with those existing in most of the others." The power of withholding an injunction in a proper case being assured, we next inquire whether the facts of this case justify its present exercise.

[2] After very thoughtful consideration and with a due regard, as I view it, to the rights of all parties, I have reached the conclusion that while a decree should be entered for an accounting and an injunction, the latter should be a conditional one. The facts of this case are exceptional and are therefore a law unto themselves. The respondent has a large plant built and adapted for the manufacture of carborundum. The machinery and apparatus were likewise built for that special work. It is respondent's sole business, and in that article and its various applications they have built up a large trade and extensive use. In building up its business and in constructing its plant they have expended between \$400,000 and \$500,000. They are the sole makers of carborundum, the complainant never having embarked in that business. Carborundum has come into extensive use as an abrasive in different industries—many of the large railroad systems, the two large air-brake companies, and is almost exclusively used in the granite polishing of this country and Scotland. It is manufactured under a patent of the United States which will not expire for some 10 years. In that patent, record page 765, the respondent's assignor was granted a claim for "the within described product being silicide of carbon, SiC ," which is the chemical name of carborundum. In smelting silica and carbon to produce carborundum the respondent, by the decision of the court, have used a smelting process invented by Cowles and infringed the recited claims of his patent. The case therefore presents the exceptional condition that the respondent can only run its plant to make carborundum by using the Cowles process, and Cowles cannot, so long as the carborundum patent stands as an exclusive grant, which is its present position, smelt silica and carbon to produce carborundum. The result, therefore, of a stoppage of these works is the sudden cutting off of the supply of carborundum to many industries. This result, while important in itself, is not, however, the impelling one with us. It is its effect on the two parties to this litigation. An injunction would bring no gain to the complainant, would not transfer to it the benefit of the business now built up in carborundum, would not relieve it from competition, for, as we have seen, it is not engaged in its manufacture. On the other hand, such injunction would disintegrate and destroy an existing business, built up at the cost of time and large expenditure, would render idle and practically valueless a large plant of specialized machinery and equipment and throw out of employment a hundred and fifty men for whom there is no other carborundum works in which to

seek employment. Moreover, it is alleged, and we are convinced such is the case, that the stoppage of these works by injunction means financial ruin to the respondent company. Indeed, if the course now urged by the complainant be adopted, it would seem not alone that no benefit would be conferred on it, but that the source from which alone it could expect to recover its decree in accounting would be swept away. The reasons adduced for the exercise of this strong arm of the court's power are stated in the complainant's brief as follows:

"It is also asserted that an injunction will not benefit the complainant, but this is pure assumption. In point of fact an injunction is of great value and indeed of supreme importance to the complainant. Business reasons forbid the spreading upon record all the facts which make an injunction of prime importance to the complainant; some of them were disclosed in the oral argument, but many other weighty reasons exist which could be stated if circumstances permitted."

The reasons advanced at the argument were that respondent's refusal to come under license encouraged others to contest the Cowles patent and made licensees unwilling to pay royalties. Whatever may have been the effect of the respondent's contesting of this patent heretofore, I fail to see how the issue of a conditional instead of an unconditional injunction in this case could now affect other users of the process. The patent has been sustained, and its validity and the fact of its infringement are now being decreed by this court. The special form of relief applicable to the facts of this particular case cannot affect the relations of other alleged infringers or licensees. Moreover, the fact that there are other licensees under this patent would seem to minimize the difficulty that often arises in these cases, viz., where the patentee has retained the entire monopoly of his patent. Then, too, regard is to be had in this case to the fact that the respondents, while they have been decreed infringers, do not stand before this court in the light of wanton, reckless ones. They had a patent for a new article of manufacture, the art of commercial electric smelting was comparatively new. It was an intricate one, and its subtleties were such as to render possible wide divergencies of view, as to its precise limits and methods, while this litigation was in progress. In the meanwhile the respondent has manufactured its patented article, has secured its use in many arts and industries, and has built up a large trade. In so doing it has entered a field no one else was occupying. It is not therefore the case of a willful and deliberate entry by an infringer into competition with an established business and introducing competition against a patentee entitled to a monopoly in such business field, but it is the use in good faith of the Cowles process in a branch of industry which the patentee was not then and has not since occupied. By the decision of the court it now transpires that such use was unlawful. In such case if full compensation and reparation can be afforded the patentee by a money equivalent, why should it not be done instead of resorting to the grave alternative of closing the plant by injunction with all its needlessly ruinous results? If the question of which were the wiser course were new, I would incline to the former as better for both complainant and respondent. But the question, as I view it, is not new.

Changing the names and business of the parties I find an insistent precedent in the strikingly similar case of *Dorsey v. Marsh*, supra, decided by Judge McKennan than whom few men were the equal in a wise and just disposition of questions of discretion. I follow his language in disposing of this motion:

"The complainant is entitled to a decree; but it ought to be so framed as not to subject the defendant to any avoidable loss or injury. The complainant is not a manufacturer of carborundum, so far as appears, and will be adequately protected by the payment of a just compensation for the use of the Cowles invention. The defendants have an extensive establishment, and a large capital in it for the manufacture of carborundum, and seem to have conducted their business under the impression that it was no invasion of the rights of others. A sudden stoppage of it would be disastrous to them, and would not benefit the complainant.

"A decree will therefore be entered for an injunction and an accounting; but no injunction will issue until the further order of this court if the defendant, within ——— days from the date of this decree, file a bond in such sum and amount as this court may approve, to secure to the complainant the profits and damages which it may ultimately be decreed to pay."

LOEWE et al. v. CALIFORNIA STATE FEDERATION OF LABOR et al.
(Circuit Court, N. D. California. July 25, 1911.)

No. 13,764.

1. INJUNCTION (§ 191*)—PERPETUATION.

Complainants are entitled to have a temporary injunction made perpetual, where the evidence on final hearing sustains the showing made to obtain the temporary injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 410; Dec. Dig. § 191.*]

2. COURTS (§ 365*)—FEDERAL COURTS—JURISDICTION.

In administering their equitable jurisdiction, federal courts do not administer the laws of the state in which they sit, except so far as local statutes apply; decisions of the state courts being only persuasive.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 950-971; Dec. Dig. § 365.*]

3. INJUNCTION (§ 101*)—BOYCOTTS—CONSPIRACY—INDIVIDUAL RESPONSIBILITY.

It is no defense to suit to restrain a boycott that defendants acted strictly under the rules of their trade union.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 174, 175; Dec. Dig. § 101.*]

In Equity. Bill by Dietrich E. Loewe and others against the California State Federation of Labor and others. Decree directed.

Francis J. Heney and John A. Wright, for complainants.

James G. McGuire and E. T. Barrett, for respondents.

VAN FLEET, District Judge. This is a bill in equity to restrain the respondents from the further prosecution of an unlawful conspiracy to destroy the trade and business of the complainants through the instrumentality of a boycott. The facts of the case, as disclosed by the bill and affidavits of the parties, will be found very

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r indexes

fully and elaborately stated in an opinion filed by Judge Morrow on motion for an injunction pendente lite (139 Fed. 71) and need not be here repeated.

[1] A careful review of the record submitted on final hearing discloses that the facts as there stated are in all material respects fully sustained by the evidence taken before the master; and, under those circumstances, it must be held, as contended by complainants, that the principles announced in that opinion as the basis of the order granting the preliminary injunction become the law of the case in this court, and fix the right of the complainants to have the injunction made perpetual. That ruling was not, as claimed by respondents, a purely tentative one, like an *ex parte* order granting a temporary restraining order. It was a ruling made in response to an order to show cause, and after a full hearing of the *prima facie* case made by the sworn bill and the affidavits of both parties; and, the showing then made being fully sustained by the evidence on the final hearing, the ruling becomes conclusive, excepting only on review by an appellate court.

[2] The proposition, now for the first time advanced by respondents, that under the facts stated in the bill this court never had jurisdiction to enjoin the respondents, is based upon an erroneous conception of the law. That proposition is, in substance, that while the case was properly brought in this court, by reason of diversity of citizenship of the parties, no federal question is involved or stated, and that the court is therefore simply administering the laws of the state; that under the decisions of the Supreme Court of this state the acts for which respondents are sought to be enjoined are held to be within the legal rights of labor organizations, and are not subject to be restrained by the courts; and, consequently, that the temporary injunction issued herein was without right and void from the beginning.

Assuming that this objection can be said, in any proper sense, to raise a question of jurisdiction, and without conceding that the decisions of the state court are to the effect stated, the fallacy of respondents' proposition lies in the fact that in the administration of their equitable jurisdiction the federal courts are not, as assumed, excepting so far as affected by local statutes, administering the laws of the state in which they sit, but are administering the law as applicable to all the states. And in applying the general principles of equity, such as alone are involved in this controversy, they determine for themselves what those principles are, untrammelled by differing decisions of the state tribunals. While the reasoning of a state court in determining such a question is always to be regarded with respect, and will be followed, if persuasive of a correct statement of the law, it is in no sense conclusive or binding upon a federal court.

The opinion of Judge Morrow in granting the preliminary injunction in this case will be found to be fully in accord, in so far as pertinent, with the principles announced by the Supreme Court in the case of *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, a case originating out of the same labor controversy which gave rise to the present suit, and involving largely the same essential facts; the bill in fact being almost an exact replica of the one filed in this case.

While that was an action, in form, to invoke the protection of the anti-trust act of July 2, 1890, c. 647 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), known as the "Sherman Act," many of the general considerations there stated have application to the present case; and it is conceded in respondents' brief that, if the court has jurisdiction here, the language of that case is broad enough to cover the acts here involved.

[3] Lastly, if the suggestions of counsel at the oral argument were intended to advance the idea that the individual defendants are protected from the consequences of their acts by the fact that they were acting strictly within the rules and regulations of their organization, the obvious answer is that the Constitution and laws of the country are still paramount to the rules of any private aggregation of men, and it is to those laws that we must look in determining whether the rights of one citizen have been violated by the acts of another.

It follows, from these considerations, that the complainant is entitled to a final decree making the temporary injunction heretofore granted permanent; and a decree to that effect may be prepared, granting a perpetual injunction against the defendants included within the preliminary writ.

GRETSCHMANN v. FIX et al.

(District Court, W. D. New York. June 1, 1911.)

1. ADMIRALTY (§ 21*)—DEATH—STATE LAW.

In proceedings in admiralty for causing death by negligence, the remedy is derived from the state statute giving the right of action to the next of kin.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. § 218; Dec. Dig. § 21.*]

2. ADMIRALTY (§ 31*)—DEATH—CONTRIBUTORY NEGLIGENCE.

In a libel in admiralty for the death of a passenger, contributory negligence is a valid defense.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 301-305; Dec. Dig. § 31.*]

3. SHIPPING (§ 166*)—WRONGFUL DEATH—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

In a libel in admiralty for the wrongful death of a passenger, libellant must affirmatively prove that the owners of the vessel were negligent, whereby their decedent was killed, and also that decedent was free from contributory negligence.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 166.*]

4. SHIPPING (§ 166*)—DEATH OF PASSENGER—PROXIMATE CAUSE—CONTRIBUTORY NEGLIGENCE.

A steamer left her dock with a barge in tow to which was attached a yawl made fast to the stern of the barge by a five-foot line. A deck hand remained seated in the yawl until the boat arrived at an island where he left the yawl and stood on the barge near the line. Subsequently he went forward on the barge to get water, and, while doing so, decedent, who was intoxicated, hauled the yawl to the stern of the barge and boarded her, without knowledge of the master. The deck hand, on returning, ordered decedent out of the yawl, and, in his attempt to do so, decedent slipped or

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

stumbled and was precipitated into the river. His companion, also in the yawl, grabbed him, but could not retain his hold, and, in spite of prompt efforts at a rescue, he was drowned. *Held*, that decedent's contributory negligence was the proximate cause of his death, and not the failure of the steamer to comply with Inspector's Rule 8, § 4, providing that every barge carrying passengers in tow, and engaged in excursions, shall be supplied with two yawl boats one of which must be manned and towed in such a manner as to best afford prompt relief in case of accident or disaster, and that the owners of the steamer were therefore not liable for decedent's death.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 551; Dec. Dig. § 166.*]

Libel in personam by Wilhelmina Gretschnann, as administratrix of the estate of Fred L. Gretschnann, deceased, against Frank F. Fix and another. Dismissed.

Farrington & Farrington, for libellant.
White & Stanley, for respondents.

HAZEL, District Judge. This is a proceeding in personam to recover damages for negligently causing the death of libellant's intestate. The proofs show that the decedent, Fred L. Gretschnann, was drowned on August 8, 1909, in consequence of his fall into Niagara river from a yawl boat made fast to the stern of the barge Lottie Koerber, which was lashed alongside and in tow of the steamer Henry Koerber, Jr. The barge and steamer, of which respondents are the owners, had on board a large number of excursionists bound on a pleasure outing, and the decedent, a youth, was of the party. The lifeboat was attached to the barge by a five-foot line, and at the time the vessels started on the trip she was manned by a deckhand named Finn, who remained seated in her until the arrival at Grand Island, where he left his position on account of the heat of the sun and stood on the barge near the line of the yawl boat. Subsequently he went forward on the barge to get a drink of water, and, while doing so, the decedent voluntarily hauled the lifeboat to the stern of the barge and boarded her. Another excursionist had preceded him and taken a seat in the lifeboat. The steamer was proceeding at the rate of eight miles an hour. Neither the entry of the men into the lifeboat nor their presence therein was known to the master of the steamer. Immediately upon the return of the deckhand Finn, who had been absent four or five minutes, he and several members of the excursion party called to the men to come out of the lifeboat, and in his attempt to do so the decedent slipped or stumbled and was precipitated into the river. His associate in the lifeboat quickly grasped him, but was unable to retain his hold, and the decedent, in spite of prompt efforts to effect a rescue, was carried away by the current in the river and was drowned. The decedent was intoxicated. There were no defects in the construction of the lifeboat or the oarlocks, or the manner in which such boat was fastened to the stern of the barge.

The libellant predicates liability upon the owners of the barge and steamer on the ground principally that the vessels failed to comply with the provisions of section 4, rule 8, of the rules and regulations

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the Board of Supervising Inspectors, which, omitting immaterial parts, reads as follows:

"Every barge * * * carrying passengers in tow and engaged in excursions shall be supplied with two yawl boats, * * * one of which boats must be manned and towed in such manner as to best afford prompt relief in case of accident or disaster."

[1, 2] In proceedings in admiralty for causing death by negligence the remedy is derived from the state statute which gives the right of action to the next of kin, and concededly the common-law doctrine of contributory negligence has application to the facts under consideration.

[3] Hence it must be affirmatively shown that the respondents, owners of the vessels, were negligent as a result of which the injury was sustained, and, furthermore, that the decedent was free from contributory negligence. *Robinson v. Detroit & C. Navigation Co.*, 73 Fed. 883, 20 C. C. A. 86; *The A. W. Thompson* (D. C.) 39 Fed. 115; *The City of Norwalk* (D. C.) 55 Fed. 98.

[4] Giving force and effect to this rule it is difficult to perceive how the libellant may be permitted to recover herein. It is impossible to say that the decedent would not have entered the lifeboat if it had been properly manned. It is idle to indulge in any speculation as to what would have occurred if the deckhand Finn had remained on the life boat or if the decedent's associate had not first taken a seat therein. It is thought impossible to determine that the fatality was due to any other cause than the voluntary and obviously negligent act of the decedent in placing himself in the lifeboat—a dangerous place. He clearly had no right or license to enter it even though it was unattended. His stumbling or slipping while in the act of leaving the boat, as a result of which he fell into the river, was the consequence of his initial negligent act. The asserted negligence of the respondents in failing to have a man in the lifeboat at the precise time the decedent boarded her was not the direct cause of the drowning. The absence from his post of the man appointed to man the yawl boat was not the approximate cause of the regrettable occurrence. His absence was not an invitation to the decedent to draw the boat to the stern of the barge and seat himself in her, as she obviously was not provided for such use. Neither the master of the steamer nor any one in charge of the barge had warning of the decedent's intentions, and they could not be expected to have anticipated them. The Supervising Inspectors' rule was not designed to prevent passengers from negligently entering the yawl boat; its primary purpose is to assist in relieving or rescuing passengers who might fall overboard and to give relief in case of other accident or danger to those on board. It is quite true that in the exercise of proper precaution the lifeboat should have been hauled alongside the barge to have permitted the decedent to alight, but the evidence does not show that the master knew of the intoxicated condition of the decedent, or knew of his presence in the life boat, or of the temporary absence of the man charged with the duty of manning her. Upon the return of Finn to the stern of the barge, members of the committee in charge of the excursion, and who had nothing to do

with the navigation of the vessels, were directing and urging the decedent and his associate to leave the yawl boat, and it was upon compliance to such requests that the casualty occurred. The master of the steamer promptly reversed the steamer's engines and as quickly as possible brought the lifeboat into service. The suddenness of the accident may well have disconcerted those in charge of the steamer and barge, and allowance must be made for any delay or errors in judgment which are apt to occur in such a situation. The law does not require the same calmness, self-possession or control when immediate danger confronts us as is expected when the occasion is more normal. *Lowery v. Manhattan Railway Co.*, 99 N. Y. 158, 1 N. E. 608, 52 Am. Rep. 12. It is quite believable that if the man whose duty it was to remain in the lifeboat had remained there he would not have permitted the decedent to come aboard, but, in view of the facts showing that the direct cause of the accident was attributable to the deceased, any such omission is wholly insufficient to charge the respondents with liability. If the negligence of the decedent had had nothing to do with the subsequent mishap a question similar to that in *Haley v. Earle*, 30 N. Y. 208 would be presented for decision. As it is, I feel bound to hold that the respondents were not negligent.

The libel is dismissed.

JAMES v. STANDARD OIL CO. OF NEW YORK.

(District Court, S. D. New York. June 5, 1911.)

SHIPPING (§ 132*)—CARRIAGE OF GOODS—SHORT DELIVERY—EVIDENCE.

While the statement in a bill of lading of the quantity of cargo received is strong prima facie evidence of such receipt, it is not conclusive on the vessel owner; and where it is clearly shown that all that was received was delivered, the owner cannot be held liable for a shortage because of an erroneous statement in the bill of lading given by the master.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 479-482; Dec. Dig. § 132.*]

In Admiralty. Suit by Leonard F. James, as master of the steamship Erroll, against the Standard Oil Company of New York. Decree for libellant.

Convers & Kirlin (Charles R. Hickox, of counsel), for libellant.

Burlingham, Montgomery & Beecher (Charles C. Burlingham and Robinson Leech, of counsel), for respondent.

HOLT, District Judge. This is a libel filed by the master of the steamship Erroll to recover from the charterer an amount deducted from the freight, amounting to \$760.71. The Erroll was chartered to the respondent for a voyage from the port of New York, first to Saigon, and then to Bangkok, for the carriage of a cargo of refined petroleum in cases, at the rate of 17 cents a case delivered. The bill of lading acknowledged the receipt of 145,229 cases of petroleum.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The evidence shows that 80,000 cases were delivered at Saigon, and 64,565 cases at Bangkok, making a total of 144,565 cases delivered at both ports. The charterer deducted from the freight the value of 664 cases, the difference between the 145,229 cases stated in the bill of lading and the 144,565 delivered, on the ground that 145,229 cases were put on the vessel, 664 of which were not delivered.

The proof satisfies me that a correct tally was taken of the number of cases delivered, both at Saigon and at Bangkok. The tally was taken by officers of the ship, and the delivery was made to lighters. The ship did not discharge at any wharf, and there was not any opportunity for any theft during the discharge. The proof also satisfies me that there was not any opportunity for the abstraction of any of the cases during the voyage, and the evidence is clear that all the cases that remained in the ship, after the 80,000 were delivered at Saigon, were delivered at Bangkok. It follows, therefore, that the number of cases that was taken on board was the same as the number of cases delivered; that is, 144,565. The deduction from freight is based on the claim that there were 145,229 cases received on board. This is the number stated in the bill of lading, and the statement in the bill of lading of the number of cases received is strong prima facie evidence of such receipt; but it is not conclusive. The steamer was obliged to deliver only what it actually received, and her master had no power, under the federal authorities, to bind the owners by giving a bill of lading which contained an erroneous recital of the number of cases received.

It follows, therefore, that the assumption of the respondent that the recital in the bill of lading was correct is erroneous, that it therefore had no right to deduct from the freight the sum of \$760.71, and that the libellant is entitled to recover that amount, with interest and costs.

O'FIELD v. ST. LOUIS, I. M. & S. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. August 21, 1911.)

No. 3,500.

CARRIERS (§§ 320, 347*)—ACTION FOR INJURY TO PASSENGER—CONDITION OF PREMISES—QUESTION FOR JURY.

While plaintiff was waiting for a train in a station on defendant's railroad in the evening, she had occasion to visit the water-closet, which was 150 feet from the station and reached over a platform extending along the track and beyond the building. Having been shown the way by another passenger, plaintiff was passing along such platform, when she fell off and was injured. *Held*, that evidence that the night was very dark, and that the platform was inadequately lighted, if at all, was sufficient to require the submission to the jury of the question of defendant's negligence and breach of duty, and of plaintiff's contributory negligence, especially in view of a state regulation requiring such places to be well lighted, where required by the convenience of passengers.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. §§ 320, 347.*]

In Error to the Circuit Court of the United States for the Eastern District of Oklahoma.

Action at law by Eliza O'Field against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

J. Wood Glass and W. H. Kornegay, for plaintiff in error.

W. E. Hemingway, Lovick P. Miles, and Thos. B. Pryor, for defendant in error.

Before ADAMS and SMITH, Circuit Judges, and REED, District Judge.

ADAMS, Circuit Judge. Mrs. O'Field purchased a ticket of the agent of defendant company at Claremore, Okl., for a short trip on the railroad. While waiting for the train at the station on the evening of November 22, 1908, she had occasion to resort to a water-closet, and, not knowing where it was located, inquired of a woman who was also waiting for a train. The latter undertook to show her. The station was on the west side of the tracks of the road fronting thereon 108 feet. The closet was about 150 feet further south, and its only approach from the waiting room for white passengers was over the platform of the station, between it and the tracks. Plaintiff and her companion started out from the waiting room, went south over the platform as far as the depot extended, and then, while on her way over the other 150 feet to the closet, at a point immediately south of the depot, where local freight was usually loaded into and unloaded from wagons which backed up there, she fell off the platform and hurt herself. For injuries alleged to have been received by her resulting from this fall, she sued the company. A verdict was rendered for the defendant by order of the court, and plaintiff prosecutes error.

Two acts of negligence are charged in the complaint: That the company failed to have the way to the closet over the platform lighted,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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and failed to have a guard rail along the platform where she fell. The trial court held that the evidence supported neither charge. Claremore was a town of about 2,500 inhabitants, and defendant maintained a depot there of considerable pretensions. Its common-law liability to keep its approaches and places to which passengers are invited in a reasonably safe condition was emphasized by a regulation of the Corporation Commission of the state of Oklahoma requiring all buildings to be well lighted within waiting rooms and outside, where the convenience of passengers required it, and that all closets and toilet rooms, either in the depot building or outside, should be kept well lighted. The closet in question in this case was a convenience provided by the defendant company, to which passengers were impliedly invited to resort, and on well-recognized principles it was the duty of the company to exercise ordinary care that it and the approaches to it should be maintained in a reasonably safe condition.

Did it discharge this duty, or, rather, was there any substantial evidence that it did not discharge it? Without entering upon any detailed analysis of the testimony, it suffices our present purpose to say that there was substantial evidence to the effect that the night in question was very dark; that the platform leading from the waiting room to the closet was inadequately lighted, if at all; and that the plaintiff was unable to see any considerable distance before her as she tried to find her way to the closet. This, we think, was entirely sufficient to have warranted a submission to the jury of the question whether the defendant exercised ordinary care for the safety of its patrons. Whether there was any negligence in not maintaining a railing along the side of the platform where plaintiff fell is more doubtful. The desirability of loading local freight into and out of wagons without embarrassment, and the general practice of other roads not to maintain such railings at stations along their lines similarly situated, would tend to negative any negligence in this particular. Certainly, if the platform had been adequately lighted, the plaintiff would readily have observed the way to her destination, and it would have been manifest carelessness on her part if she had strayed so far out of the way as to have fallen where she did.

Our conclusion is there was substantial evidence tending to show that the only proximate cause of plaintiff's injury was the failure to properly light the platform. Some contention is made that plaintiff was guilty of contributory negligence, but the facts already stated disclose that there was ample evidence to go to the jury on that issue.

The judgment is reversed, and the cause remanded for a new trial.

THOMPSON v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. July 27, 1911.)

No. 3,577.

1. CARRIERS (§ 320*)—ACTION FOR INJURY TO PASSENGER—QUESTIONS FOR JURY.

Evidence considered, in an action by a passenger to recover from a railroad company for an injury received by falling when leaving a car in the night, alleged to have been due to an accumulation of snow and ice on the platform and steps, and *held* sufficient to require the submission to the jury of the questions whether there was such accumulation, and also whether, if so, it was due to the negligence of the company.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 320.*]

2. CARRIERS (§ 347*)—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE.

That a passenger, injured by falling on the icy steps of a car from which he was alighting in the night, was carrying a grip in each hand, belonging to ladies in his charge, instead of holding to the railing with one hand, cannot be said to constitute contributory negligence as matter of law.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1346-1397; Dec. Dig. § 347.*]

3. NEGLIGENCE (§ 1*)—DEFINITION.

Negligence consists in the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4743-4763; vol. 8, pp. 7729-7731.]

In Error to the Circuit Court of the United States for the District of Minnesota.

Action at law by Charles W. Thompson against the Chicago, Milwaukee & St. Paul Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Wm. H. Hallam, for plaintiff in error.

F. W. Root and Nelson J. Wilcox, for defendant in error.

Before SANBORN and SMITH, Circuit Judges, and WM. H. MUNGER, District Judge.

WM. H. MUNGER, District Judge. Plaintiff was a passenger on one of the defendant's trains, which left Minneapolis at 6:05 on the evening of February 15, 1910. He rode upon the train to Farmington, where it was necessary for him to leave the train and await a later train from St. Paul through Farmington to Mapleton, plaintiff's destination. He arrived at Farmington some time between 7 and 8 o'clock in the evening on the train which left Minneapolis. The train from St. Paul, though due to leave St. Paul at 6:20, did not arrive at Farmington until about midnight. He boarded this train at Farmington, and upon reaching Mapleton, in attempting to leave the car, slipped and fell, and alleges that he received certain injuries from

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

such fall. The cause of the fall is alleged to be the slippery condition of the platform and steps of the car, upon which snow and ice had accumulated. Upon the trial, at the close of all the evidence, the court directed a verdict for the defendant, basing the ruling upon the fact that, from the undisputed evidence, plaintiff was guilty of contributory negligence. Plaintiff brings the case here by writ of error.

The correctness of the ruling of the court, directing a verdict for the defendant, depends upon the consideration of two questions: (1) Under the evidence, could it properly be said, as a matter of law, that defendant was not guilty of negligence? (2) Under the facts, was plaintiff, as a matter of law, guilty of contributory negligence?

[1] The alleged negligence upon the part of the defendant was permitting the platform and steps of the car to be in a slippery condition by reason of the accumulation of snow and ice, thus rendering it dangerous for passengers in leaving the car. The testimony discloses that, during the afternoon of the 15th of February, before the train left Minneapolis for Farmington, it snowed, turning into sleet, but had ceased storming and was growing very cold, at the time the train left Minneapolis. It does not appear to have been storming at Farmington, while plaintiff was there awaiting the train from St. Paul which he was to take for Mapleton. The testimony of plaintiff and several witnesses was that there was, at the time of the arrival of the train at Mapleton, an accumulation of snow and ice upon the platform and steps of the car; that he slipped and fell while attempting to descend the steps in leaving the car. The testimony of the conductor of the train, as a witness on behalf of defendant, was that the platform and steps were free from snow and ice. The car in which plaintiff rode was a vestibule car, and the end at which the passengers left the car was coupled to an ordinary smoking car, which was not vestibuled. The conductor, however, testified that the vestibule was always kept closed while the train was in motion, and that snow could not very well drift into the vestibule from the open end of the smoker.

It was for the jury to determine, from the conflicting evidence, whether there was, upon the platform and steps of the car, an accumulation of snow and ice which rendered it slippery and dangerous to passengers in alighting from the car. From the evidence it appears that Farmington was 26 miles from St. Paul; that the train which plaintiff took from Farmington to Mapleton was due to leave St. Paul at 6:20 in the evening, but did not arrive at Farmington until about midnight. It was a passenger train, consisting of three cars, a baggage car, smoking car, and the vestibule coach upon which plaintiff rode. While it does not appear from the evidence what the schedule running time over the 26 miles between St. Paul and Farmington was, from the well-known operation of passenger trains, we are justified in assuming that it was not from 6:20 in the evening until midnight, but that this train either did not leave St. Paul on time or was delayed for some reason on the way. If there was an accumulation of snow and ice upon the platform and steps of the vestibule coach, as the jury would be justified in finding, and if, as

the conductor says, the vestibule doors were always kept closed while the train was moving, and that snow and rain could not well drift in from the open end of the smoking car, then it is apparent that such accumulation of snow and ice upon the platform was the result of the vestibule doors being left open before the train started from St. Paul, or at some point intermediate between St. Paul and Farmington, where the train was delayed. The circumstances in this respect were within the knowledge of the defendant company, and no attempt was made to explain them. We think the evidence was sufficient to submit the question to the jury, not only as to whether or not the platform and steps contained an accumulation of snow and ice, but whether such accumulation of snow and ice upon the platform and steps was due to the negligence of the defendant company.

[2] It appears that the plaintiff on this trip was accompanied by his wife and the wife of his business partner. The train arrived at Mapleton about half past 2 o'clock in the morning. It was a dark night and plaintiff took the two grips belonging to the ladies, one in each hand, and started to leave the car, and just as he was leaving the platform, to descend by way of the steps, he slipped and fell. When the doors of the vestibule car are open, a rod is let down by the side of the door, to keep it open, and this rod also may be used as a handrail by passengers. It is urged that plaintiff was guilty of contributory negligence in attempting to descend from the car with a grip in each hand, knowing the slippery condition of the platform and steps.

[3] Negligence, as defined by the Supreme Court, consists in "the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done." *Railroad Co. v. Jones*, 95 U. S. 439, 24 L. Ed. 506. It cannot be said, as a matter of law, that an ordinarily prudent person would not do as plaintiff did—attempt to leave the car with a grip in each hand, instead of making two trips over the slippery platform and steps.

We think the evidence such that the question of negligence on the part of the defendant, and contributory negligence upon the part of plaintiff, should have been submitted to the jury, and that the court erred in directing a verdict for the defendant.

The judgment is reversed, with directions to grant a new trial.

MINOT et al. v. SNAVELY.

(Circuit Court of Appeals, Eighth Circuit. August 21, 1911.)

No. 3,512.

CARRIERS (§ 318*)—ACTION FOR NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

Evidence held to sustain a verdict finding that the death of a passenger in an elevator in defendant's building was caused by the negligence of the operator in starting the elevator when deceased was stepping out.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 318.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Error to the Circuit Court of the United States for the Western District of Missouri.

Action at law by Elizabeth R. Snavelly against Lawrence Minot and Charles Francis Adams, 2d, as trustees. Judgment for plaintiff, and defendants bring error. Affirmed.

Cyrus Crane (O. W. Pratt and Lathrop, Morrow, Fox & Moore, on the brief), for plaintiffs in error.

M. A. Fyke (James H. Richardson and E. L. Snider, on the brief), for defendant in error.

Before ADAMS and SMITH, Circuit Judges, and REED, District Judge.

ADAMS, Circuit Judge. This was an action by the defendant in error, a widow, to recover damages for the death of her husband, alleged to have been occasioned by the wrongful act or negligence of the defendants. They were the owners of an office building in Kansas City, Mo., in which they operated elevators for the convenience of their tenants and others having business with them. In 1908 plaintiff's husband was descending in one of these elevators, and in attempting to alight therefrom at a certain floor was caught in the doorway and crushed and killed. The particular act of negligence relied on by plaintiff was that while the door of the elevator was open, and while her husband was stepping out, the operator in charge started or permitted the elevator to start suddenly downward, and that the deceased, without fault on his part, was caught and crushed.

The plaintiff produced evidence tending to sustain the issue tendered by her, and the defendants produced evidence tending to show that the deceased attempted to push back the door after it had been nearly closed by the operator, and undertook to leave the car while it was in motion. At the close of all the evidence the defendants' counsel requested the court to instruct the jury to find a verdict in behalf of the defendants. This request was denied, and the jury found a verdict for the plaintiff. The only assignment of error is that the trial court erred in not giving the instruction requested.

It is not denied that there was evidence of at least one witness tending to establish the contention of the plaintiff; but we are asked to critically dissect this testimony and compare it with that given by others, and as a result to say that it was incredible. This we cannot do. Such is the peculiar province of a jury. By reason, however, of the earnest contention of defendants' counsel, we have made a patient and careful examination of all the evidence in the case, with a view of ascertaining whether there was either any substantial evidence of negligence on the part of the defendants' agent in charge of the elevator or whether there was conclusive evidence of contributory negligence on the part of the plaintiff's husband. No good can come in attempting an analysis of this testimony. Suffice it to say we have reached the conclusion that the testimony of all the witnesses, the physical facts of the case, and the inferences fairly deducible therefrom reasonably warranted the verdict as rendered.

There was neither such conclusive evidence of proper care by defendants nor such conclusive evidence of want of proper care by the deceased as warranted the withdrawal of the case from the jury.

The judgment is affirmed.

NATIONAL ELECTRIC SIGNALING CO. v. UNITED WIRELESS
TELEGRAPH CO.

(Circuit Court, D. Maine. September 21, 1911.)

No. 643.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—WIRELESS TELEGRAPH SYSTEM.

The Fessenden patent, No. 706,736, for a system of transmission of energy by electromagnetic waves, with a closed circuit tuned to the frequency of the transmitted impulses and a current-operated wave-responsive device, discloses patentable invention in view of the prior state of the art of wireless telegraphy, and is not anticipated by the device employing a coherer or circuit closer with a system of tuning, the object of which was to secure precision between the transmitter and a single receiver, and to enable the operator to adjust the transmitter to receivers at different stations, nor by certain publications; also, *held* infringed, as to claims 6, 9-12, 14, 19-21, 27-30, 32, 33, and 35.

2. PATENTS (§ 69*)—ANTICIPATION—PUBLICATION—SUFFICIENCY.

For a publication to constitute an anticipation of a patent, it must describe the invention in such full, clear, and intelligent terms as to enable persons skilled in the art to reproduce the process or article without assistance from the patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 84; Dec. Dig. § 69.*]

In Equity. Suit by the National Electric Signaling Company against the United Wireless Telegraph Company. Decree for complainant for injunction and accounting as to certain claims, and dismissing the bill as to others.

Francis W. H. Clay and Melville Church, for complainant.

Philip Farnsworth and Verrill, Hale & Booth, for respondent.

Woodman & Whitehouse, for receivers of respondent company.

HALE, District Judge. This suit in equity brings in question the validity and the infringement by defendant of complainant's United States patent, No. 706,736, applied for December 15, 1899, and granted to Reginald A. Fessenden August 12, 1902, for inventions in wireless telegraphy.

Nearly all that the world knows about wireless telegraphy has been found out within the last 10 years. Its present knowledge is small; but the method of operation commonly employed in the art is simple. The sending station consists of a wire high up in the air on a tall mast. It is like an insect's feeler, and is called an "antenna." It is electrically charged and discharged by an electric spark. Explosive waves then radiate in all directions through the all-pervading substance called ether, just as light is radiated from the sun. These

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

waves proceed through space with the enormous speed of light, approximately 186,000 miles per second. As they proceed through the ether, they strike a receiving antenna raised up in the air like a feeler causing impulses to run down the wire to the earth. An instrument, interposed in this wire, causes an indicator to operate whenever an impulse passes, giving a signal by indicating dots and dashes. The device which responds to the waves striking the receiving antenna is called a "receiver." It gives information that a wave has arrived. It includes also a "detector," a device by which the electromagnetic waves cause the indicator to respond. Without such detector these waves cannot be seen nor heard nor felt.

In *Marconi Wireless Telegraph Company v. De Forest Wireless Telegraph Company* (C. C.) 138 Fed. 657, in 1905, Judge Townsend has described the Marconi invention, and has given the history of the art up to that time. One of the complainant's witnesses, Dr. Kennelly, professor of electrical engineering at Harvard University, an authority on the subject of wireless telegraphy, sets out in an interesting way the condition of the art at the time of application for the patent in suit:

"These invisible electromagnetic waves, upon which modern wireless telegraphy depends, move off through free space with the enormous speed of light; and this speed is hardly diminished by the presence of the atmosphere. They present, however, many analogies to these more familiar waves of sound which are carried by the air, and which depend upon the presence of the air for their transmission. Thus, the electromagnetic waves have a certain pitch or rate of vibration, like sound waves. A vertical wire of given dimensions and tension has, like a harp string, a natural pitch, or rate of vibration corresponding to its musical note. A sending mast wire at a wireless station has similarly a certain natural pitch or rate of vibration depending upon the length of the wire, the dimensions and distribution of the conducting surface, and the distribution of any other conductors, such as coils, which may be inserted in the path of the wire. The electrical pitch of such a sending mast wire is commonly very high, and it will emit hundreds of thousands or millions of electrical vibrations per second; whereas, a harp string will ordinarily only emit hundreds or thousands of sound vibrations per second. The operation of electrifying the mast wire and then suddenly discharging it to ground by a spark across the gap corresponds electrically to plucking the harp string. It sets it into vibration."

He proceeds further to describe the receiving arrangements of the wireless telegraph system, as it existed at the date of the Fessenden application. From his description it appears that the mast may be at any place within the sphere of influence of the sending station. This mast supports a wire insulated at the top where it may connect with the metallic surface, and is connected to the conducting surface of the ground at the foot of the mast. In the receiving mast wire is inserted a wave detector, sometimes called a circuit closer or sensitive tube. At the time of the application for this patent it was more commonly called a coherer, and its uses are fully pointed out by Prof. Kennelly:

"This detector, as described in the Marconi specifications, was essentially a gap or discontinuity in the electrical conducting path of the receiving mast wire; but which was capable, on the passage of an electromagnetic wave of 'closing the circuit' of a local voltaic battery, and a telegraph receiving instrument, connected to the tube by the branch wires. Prior to the passage

of an electromagnetic wave this detector, sensitive tube, coherer, or circuit closer would make a gap or open circuit, both in the path of the receiving mast wire to the ground, and in the local circuit of the voltaic battery, the telegraph receiving instrument, and the wires. Consequently, the telegraphic receiving instrument would not respond, or would give no signal, because the local battery had its current cut off at the coherer. When, however, an electromagnetic wave passed by the mast and mast wire, it set up an electric impulse in the mast wire, tending to make a discharge from the latter to ground. This discharge would be prevented by the gap in the coherer. This gap contained loose particles of metallic powder lying in imperfect electrical contact with each other. The electric impulse in the receiving mast wire would, however, in trying to force its way to ground through the coherer, build up an electric pressure or voltage at the gap containing the powder. If this electric pressure or voltage was strong enough, it burst its way through the powder, and caused the particles of metal in the same to cohere, so as to form a good conducting path, and automatically 'close the circuit' of the voltaic battery and telegraph instrument locally connected therewith; so that the telegraph instrument would indicate a signal. If, on the other hand, the electric impulse generated in the receiving mast wire on the passage of the electric wave was not strong enough to burst through the powder and break down the electric discontinuity in the coherer, then the telegraph receiving instrument in the local circuit failed to respond, and the wave went by undetected. In order to restore the coherer to its original sensitive condition and disconnected state, after the telegraphic instrument recorded a signal, automatic means are shown and described in the Marconi patent for agitating the coherer at the same moment that the telegraph instrument gives its click of signal reception."

The electric waves referred to are often called "Hertz waves" or "Hertz oscillations," from the name of their discoverer, Heinrich Hertz. Judge Townsend describes the operation of these waves, and thus refers to the action of the coherer:

"The powder in the tube, when in its normal condition, offers such an amount of resistance that the local-battery current will not pass through it. But when the high-frequency oscillations or waves fall upon it, and surge up and down the elevated conductors, they effect such a transposition in the arrangement of the grains of powder, in a manner not entirely understood, as to weld them together, as it were; the result of which is that the grains resolve themselves into conductive paths, and the current passing through them attracts the vertical arm of the relay, which, contacting with the two points below, permits the current to pass around through the battery, to the telegraph instrument, which records the dash or dot as transmitted and received from the transmitting station. In order to prepare the powder in the tube for the transmission of another signal, the filling must be shaken back into its nonconducting state. This is accomplished by the trembler, which taps the tube, and causes the grains of powder to separate and return to their normal state of high resistance."

It will be seen that it is only when high-frequency waves fall upon the powder in the tube while in its normal condition, and surge up and down the conductor, that the grains of powder in the tube are affected. The learned counsel for the complainant speaks of this action upon the coherer as "knocking down a door." He epitomizes the first idea relating to radiant wave telegraphy in the statement that a wave, snapped off from a vertical wire at one station, struck a similar wire at the receiving station and in passing to ground knocked down an obstruction normally interposed therein and also in a battery circuit, and allowed the battery current to produce a signal.

The testimony indicates that the use of wireless telegraphy began

in the spring of 1897 when Marconi had shown how to get the greatest effect of the explosive wave, and how to quickly restore the coherer after it had been broken down. He made the high potential wave as high as possible, and devised automatic means to replace the stopper, the door in the path of the wave, and battery current, after the wave had knocked it down. Sir Oliver Lodge had also described the use of the coherer. Its action was such that the wave either gave a strong indication, or it did not give any. There was no way of measuring the strength of the wave. If it was sufficient to knock down the door, it registered; if not, it did not register.

So far as has been pointed out, at the time of the application for this patent in 1899 there were in the Patent Office classification of inventions only four United States patents on wireless telegraphy, namely: the Marconi patents, Nos. 586,193, 624,516, and 627,650, and the Lodge patent, No. 609,154.

Marconi refers generally to his apparatus thus:

"According to this invention, electrical signals, actions, or manifestations are transmitted (through the air, earth, or water) by means of oscillations of high frequency, such as have been called 'Hertz waves' or 'Hertz oscillations.' All line wires may be dispensed with."

At another time he further refers to other inventions in the same art, and says:

"Nor am I aware that prior to my invention any practical form of self-recovering, imperfect-contact instrument has been described."

Such instrument was at the foundation of his invention. In referring to it he says that the all-important condition is that in its sensitive state its resistance should appear to be infinite when measured in the manner described by him. By its use, and by his improvements on the work of his predecessors, he succeeded in making distinct and definite signals, and in reducing the art to a system.

Fessenden, the patentee of the patent in suit, distinguishes his invention from that of Marconi, whose receiver he characterizes as a "voltage operated device"; whereas, his own is a "current-operated, wave-responsive device." In his specification he thus compares his invention with the old methods:

"In the methods heretofore employed the electromagnetic waves generated at the receiving station produce voltages in the receiving circuit. These voltages or currents being impressed upon a suitable material normally non-conductive render the same conductive, and thereby permit the passage of a current through a circuit in which said material, usually termed a 'coherer,' is included. After the passage of the voltages produced by each series of electromagnetic waves generated at the sending station, the coherer must be operated in some way to restore it to normal or nonconductive condition. The object of the present invention is to provide for the generation by currents produced by electromagnetic waves of induced currents in a second element or circuit and by the reaction of the current in this second element or circuit on the field formed or produced by the currents in the receiving conductor to produce motion which is directly or indirectly observable."

He refers to the various terms which he uses; inasmuch as there has been some contention in reference to his meaning, I quote fully the description, of his manner of employing technical words:

"The terms 'sending conductor' and 'receiving conductor' are employed herein as indicating all of the circuits from top to ground, if grounded, or, if not grounded, from one extreme end to the other extreme end, including all apparatus in series with the circuits, while the term 'radiating portion' indicates all of sending conductor from top or extreme end of same to point of junction with the apparatus for effecting the oscillatory charging and discharging thereof, such as sparking terminals, transformer coils, armature windings, etc. By 'electromagnetic waves' as used herein is meant waves of a wave length long in comparison with the wave length of what are commonly called 'heat waves' or 'radiant heat.' By 'grounded conductor' is meant a conductor grounded either directly or through a capacity, an inductance, or a resistance, so that the current in the conductor flows from the conductor to ground, and vice versa, when electromagnetic waves are generated. The terms 'tuned' and 'resonant' are used herein as one including the other. By the term 'current-operated wave-responsive device' as used herein and by me generally is meant wave-responsive devices having all their contacts good contacts and operated by currents produced by electromagnetic waves. They are hence to be distinguished from wave-responsive devices depending for operation upon varying contact resistance."

He further distinguishes his method from the prior art:

"It is characteristic of the method shown that the receiving mechanisms are actuated by currents produced by electromagnetic waves and not by voltages, as in the case of the coherer. Hence when the receiving mechanisms described herein are used in connection with a secondary circuit said circuit is controlled by the currents generated by electromagnetic waves and not by voltages. It is also characteristic that when a secondary circuit is used in connection with the type of wave-responsive device shown in Figs. 3, 4, and 5 that a portion of the secondary circuit is traversed and controlled by currents produced by electromagnetic waves. It is further characteristic of my improved system that the indications produced by the receiving mechanism herein described are dependent upon the total amount of energy emitted to form a signal, and is not, as in the case of the coherer, dependent upon the maximum of the voltage. It is also characteristic of the combination of closed tuned circuits with current-operated wave-responsive devices that the effect on the wave-responsive device is cumulative, i. e., dependent on the total or integral activity of the circuit, and not on the maximum activity or voltage. * * * Since in the arrangement herein described the receiver is constantly receptive, i. e., is always capable of being affected by the waves, and not, as in the case of the coherer, rendered incapable of response to the waves for a portion of the time, the speed of signaling will be increased."

The claims of the patent in suit to which the attention of the court is especially directed are as follows:

"6. In a system of transmission of energy by means of electromagnetic waves, a receiving system including in combination a receiving conductor and a wave-responsive device, the portion of the receiving system containing said wave-responsive device constituting a closed circuit tuned to the frequency of the transmitter, substantially as set forth."

"9. In a receiving system for transmission of energy by electromagnetic waves, a closed circuit tuned to the frequency of the transmitted impulses and a current-operated wave-responsive device, substantially as set forth."

"10. In a system of transmission of energy by electromagnetic waves, a transmitter system including a tuned circuit, said system being adjusted to radiate trains of electromagnetic waves in which a single frequency is predominant, in combination with a receiver system including a closed circuit tuned to said predominant frequency, substantially as set forth."

"11. In a system of transmission of energy by electromagnetic waves, a transmitter system including a closed tuned circuit, said system being adapted to radiate trains of electromagnetic waves in which a single frequency is predominant, and a receiver system including a closed circuit tuned to said predominant frequency, substantially as set forth."

"12. In a system of transmission of energy by electromagnetic waves, the combination of a generator, a grounded sending conductor, a receiving conductor, means for translating the energy of currents produced at the receiving station by electromagnetic waves radiated from the sending conductor into the energy of motion and means for observing or recording such motion, substantially as set forth."

"14. In a system of transmission of signals by electromagnetic waves, the combination of means for generating and radiating, electromagnetic waves at a sending station, a receiving circuit at the receiving station tuned to the sending circuit, and a current-actuated wave-responsive device included in said receiving circuit, substantially as set forth."

"19. In a system of signaling by electromagnetic waves, the combination of a receiving conductor, a secondary circuit, and a current-actuated wave-responsive device controlling the secondary circuit, substantially as set forth."

"20. In a system of signaling by electromagnetic waves, the combination of a receiving conductor, a secondary circuit, and a self-restoring current-actuated wave-responsive device controlling the secondary circuit, substantially as set forth."

"21. A system for signaling by electromagnetic waves having in combination therewith a current-actuated wave-responsive device operative in a closed circuit, tuned to the frequency of the electromagnetic waves to which it is desired to respond, substantially as set forth."

"23. In a plant for the transmission of electrical energy without the use of wires, the combination of means located at the sending station for the generation of electromagnetic waves, and a low-resistance receiving mechanism at the other station operative by the currents generated by the electromagnetic waves, substantially as set forth."

"27. In a system of signaling by electromagnetic waves, the combination at the sending station of a generator, a grounded conductor, a spark-gap, and a condenser connected across the spark-gap so that the condenser and its connecting wires form a local and parallel circuit in resonance to the sending-conductor."

"28. In a receiving system for transmission of energy by electromagnetic waves, a closed circuit of low resistance tuned to the frequency of the transmitted impulses and a current-actuated wave-responsive device, substantially as set forth."

"29. In a system of signaling by electromagnetic waves, the combination at the receiving station of a closed tuned circuit and a current-operated wave-responsive device adapted to give indications proportioned to the total activity of the receiving circuit, substantially as set forth."

"30. In a system of wireless transmission of energy by electromotive waves, an apparatus for utilizing the energy of said waves, said apparatus including in combination a conductor constructed and arranged to cause the energy of each wave to develop electric-current flow, means for rendering said current flow persistent and for co-ordinating the currents developed by successive waves to cause them to act cumulatively upon each other to produce an increased or reinforced resultant current flow, and means operated by said resultant current flow to produce a sensible effect or indication, substantially as set forth."

"31. A system of signaling by electromotive waves, having at the receiving station a current-operated, constantly-receptive, wave-responsive device."

"32. A system of signaling by electromotive waves, having at the receiving station a current-operated, self-restoring, constantly-receptive, wave-responsive device."

"33. A system of signaling by electromotive waves, having at the receiving station a current-operated, constantly-receptive, wave-responsive device, in combination with a closed tuned circuit."

"35. A system of signaling by electromotive waves, having in combination a closed tuned circuit, a current-operated, constantly-receptive, wave-responsive device at the receiving station and a source of persistent radiation at the sending station."

The complainant asserts that the above claims have been infringed by the defendant. The defendant says that the patent is wholly invalid by reason of anticipation; that it does not disclose invention; that it does disclose an inoperative device; and that it has not been infringed.

[1] 1. Does the patent disclose invention?

If there is any invention in the patent it consists chiefly in the fact that a current-operated, wave-responsive device is produced; whereas, the prior art shows a voltage operated device. Marconi represented the ultimate point to which wireless telegraphy had attained. His inventive idea was confined to the use of the coherer. His results were attained by the imperfect electrical contact. Fessenden found the art as Marconi and his predecessors had made it. His idea was to discard the method of operation by the imperfect contact, to use a current-operating wave-responsive device, operating through a good circuit contact, and in this way to make use of all the waves. His purpose was not to use the big waves to knock down the detector, but to have an open door through which every wave could flow, and by which he could have a constantly receptive receiver, affected by all the waves all the time, assuring economy and speed in signaling. It serves no good purpose to discuss the whole field of inventions in the prior art; it seems plain that we may adopt what Judge Townsend has said of Marconi's invention as embodying the last step in wireless telegraphy at the time Fessenden made his invention.

In a large sense every operation by electricity is by current; but the patentee does not leave us to this general use of the word "current." He does not leave us in any doubt as to what he means by "current-operated." He makes his meaning clear in the specification, wherein he clearly draws the distinction between the coherer, the imperfect electric contact of the prior art, and his method of operating by a constantly flowing current. It is urged by the learned counsel for defendant that, inasmuch as all use of electricity is by currents, it did not involve invention to substitute a constant current for Marconi's method of using the gap or imperfect connection; that such change of method was nothing more than would have occurred to the mechanic skilled in the electrical art. But I think the inventor is entitled to the benefit of his own definition of current operation, and to the distinction he has drawn between his method and the imperfect contact of the prior art.

Whatever has been done by Fessenden and by others in improving the instrumentalities relating to wireless telegraphy serves to magnify Marconi's inventive thought. He created a system of definite signals without wires. Judge Townsend thus briefly characterized Marconi's achievement:

"The exact contribution of Marconi to the art of *spark telegraphy* may be stated as follows: Maxwell and Crookes promulgated the theory of electrical oscillations by means of a disruptive discharge. Hertz produced these oscillations, and described their characteristics. Lodge and Popoff devised apparatus limited to lecture or local experiments, or to such impracticable purposes as the observation of thunderstorms. Marconi discovered the possibility of making these disclosures available by transforming these oscilla-

tions into definite signals, and, availing himself of the means then at hand, combined the abandoned and laboratory apparatus, and, by successive experiments, reorganized and adapted and developed them into a complete system, capable of commercially utilizing his discovery."

Prof. Lodge has referred to Marconi's work as building up the art from its early difficult and capricious state to compass great distances and attain comparative dependableness. In doing this, he was the pioneer. His method of operation was by the imperfect electrical contact, the coherer. It does not appear that any other instrumentality within its province had ever been used or thought of by electricians. By it the great waves were detected and translated; the smaller waves were undetected and were not used. After his invention, whoever operated in this art followed Marconi. Fessenden appears to have been the first to undertake by a constant current to obtain the results which had formerly been attained by the imperfect electrical contact; and to make those results more effective. By this new instrumentality he was able to make use of all the oscillations or Hertz waves. It cannot be said that his invention was as broad as the invention of Marconi; but it seems clear to me that it required something far more than mere mechanical skill, even of the skillful electrician, to make use of the constant flowing wave-responsive current instead of the methods of the old coherer. While his invention is not entitled to be pronounced as important an invention as that of Marconi, I think it must be held to be a pioneer invention. He made a new instrumentality in the art, different in conception from the instrumentality which Marconi employed. He took a distinct step. The whole progress in wireless telegraphy up to this time had been through the coherer. Every imitator had assumed that by it alone he could attain results in that mysterious art. Every inventor had directed his inventive thought along its lines. Fessenden found the loose, imperfect-contact, coherer, with its incapacity for economy or of measurement; he substituted for it the current-operated wave-responsive receiver, effecting an unobstructed path, a summing up of all the waves however small, a constantly receptive avenue, an unbroken circuit. He gave a new direction to the progress of the art. In my opinion his inventive thought of transmitting electricity by current waves, and not by voltage, involved patentable novelty of broad design. In making the invention as he has described it, he is entitled to be held a pioneer within his field.

The defendant also contends that, so far as the tuning device is concerned, no invention is found in the patent. It is true that Marconi employed tuning. In his patent, passed upon by Judge Townsend Marconi says:

"When transmitting signals through the earth, I connect one end of the oscillation producer and one end of the circuit closer to earth and the other ends to similar plates, preferably electrically tuned with each other in the air and insulated from earth."

In this tuning he was adjusting his sending and receiving conductors, antenna to antenna. It is claimed by complainant that the tuning of Fessenden's invention is totally and typically different in

purpose and in operation. It is urged that Fessenden employs a four-circuit tuning which syntonizes the generating circuit, the radiating antenna circuit, the receiving antenna circuit, and the closed circuit associated with the detector; and that by such quadruple tuning he develops an increased and cumulative current. Upon the subject of tuning Dr. Kennelly testifies:

"It was the practice in wireless telegraphy * * * to adjust the sending and receiving mast wires to each other for maximum mutual effect, i. e., to tune them, prior to the date of the application for the patent in suit; but, so far as I am aware, this tuning was necessarily of a crude and imperfect character, owing to the erratic and variable electrical conditions of the coherer or loose-contact receiving device. The best adjustment or tuning suited to the condition of open circuit at the coherer was necessarily different from the best adjustment suited to the condition of closed circuit in the coherer. Consequently, precise adjustment for a maximum effect, or precise tuning, never was attainable in the coherer days of the prior art. Moreover, the utility of tuning between the sending and receiving mast wires with the coherer was considerably lessened, because of the noncumulative current action of the device; there was no appreciable current until the detector responded, and then no amount of current impulses in the same wave train produced any more effect in that signal. The introduction of current-operated wave-responsive devices, with uniform open-door conditions in the detector, have not only made tuning much more effective than before in increasing the strength of received signals, by reason of the cumulative current action of the device; but they have also considerably increased the degree of precision with which tuning could be effected between the sending and receiving stations, owing to the steadiness of electrical conditions with good-contact wave detectors, as against loose-contact coherers.

"So far as I am aware, the patent in suit is the first disclosure in the art of wireless telegraphy of a wireless telegraph system in which the sending and receiving apparatus is adjusted to its mutual maximum effect, not merely with the adjustment of mast wire to mast wire, as in the prior art, but with the reinforcement due to the additional effect of a tuned local circuit, including the spark-gap at the sending station and a tuned local circuit, including the detector at the receiving station. A fortiori, I believe it to be the first disclosure in the art of wireless telegraphy of the above conditions in conjunction with a current-operated wave detector."

Dr. Kennelly further points out that the presence of the coherer is inconsistent with the complete tuning which is had under a current-operated wave-responsive device.

It must be remembered that the imperfect electrical contact was at the basis of electric space telegraphy. Until Fessenden made his invention there had never been a wireless telegraph system except such as employed the voltage operated coherer. Current did not affect this system; no tuning whatever could be had in it except to get the two antennæ into resonance with each other. This could have no reference to tuning for the purpose of accumulating current effect on the receiver. In order to do this the coherer must be taken out of the road upon which the current had to travel.

In his work on "Signaling Through Space," Sir Oliver Lodge said:

"For the most distant signaling the single pulse or whip-crack is the best, and this is what in practice has hitherto always been employed; but with it tuning is of course impossible."

The coherer involved a gap in the circuit. What was wanted in that system was to have all the energy of the train of waves

bunched into one wave, so as to knock down the obstruction of the detector—to “weld” it into a good contact, and let the current through it. Fessenden’s purpose was the exact opposite. He sought to augment the current effect, so that he would get the sum total of all the energy received. Marconi’s idea was to tune for the purpose of getting a big wave. Fessenden’s was to make a current out of all the waves. In his system, as the complainant points out, the current-operated wave-responsive device is always in the circuit that is to be tuned, is a part of that circuit, and is of constant resistance. The current of the circuit passes through it all the time. With the presence of the coherer all the tuning that could be done was from mast to mast. Complete tuning was possible only in such a system as that of Fessenden. I am of the opinion that the tuning of the prior art was essentially and typically different from the tuning involved in Fessenden’s invention. I am of the opinion that the claims in the patent which present and describe tuning involve invention, and must be sustained as valid claims.

[2] 2. Is the patent in suit void by reason of anticipation?

The defendant urges that the inventive idea of the patentee was anticipated by Marconi, and also by Lodge, both in his United States patent and in his British patent. Each one of these patents shows a device employing a coherer or circuit closer. I have already referred to Fessenden’s definition of terms wherein he says that by “current-operated wave-responsive device” he means “wave-responsive devices having all their contacts good contacts, and operated by currents produced by electro-magnetic waves”; he distinctly says that they are to be distinguished from wave-responsive devices depending for operation upon varying contact resistance. The Lodge and Marconi patents employed the circuit closer. If their devices were ever at any time wave responsive, they depended for their operation upon varying contact resistance. For certain purposes Sir Oliver Lodge removed the coherer from the path of the receiving circuit and placed it in a derivative circuit into which there could be an overflow of the energy accumulated in the receiving circuit. In respect to tuning, his object was to secure precision of tuning between the transmitter and a single receiver, and also to enable the operator to adjust the transmitter to various receivers at different receiving stations, thus securing what he called “selectivity”; but I cannot find that he ever discarded the coherer, or that he effected the tuning of the various circuits by a complete syntonizing of the whole system which was the inventive thought of Fessenden, and to which I shall hereafter refer. I have been greatly interested in what Prof. Pierce has said of the work of Lodge; but, from the study I have been able to give it, I am not satisfied that he achieved anything which is anticipatory of the patent in suit. The learned counsel for the defendant have brought to our attention other instances of alleged anticipation in the prior art which, in my opinion, need not be discussed in detail. I think it is enough to say of them that they all present varying contact resistance, and are not anticipatory of the Fessenden device. It seems

clear that nothing pointed out to me in the prior patented art should be held to anticipate the patent in suit.

Outside the patented art, the defendant relies upon certain publications as anticipatory of this invention. It cites a printed article by Northrup and Pierce, which appeared in the *Electrical World* in two installments, beginning in December, 1897. It is not contended that there had been any prior use of the patented invention by Northrup and Pierce; they have testified merely to anticipation by certain publications. Giving Northrup and Pierce the whole benefit of their testimony, I think they fail to show any anticipation of wireless telegraphy. It is not necessary to enter upon a detailed description of the alleged anticipations. So far as anticipation consists in printed articles, it is sufficient to say that those articles do not meet the recognized test clearly set out in *Badische Anilin & Soda Fabrik v. Kalle et al.* (C. C.) 94 Fed. 163, where it was held by Judge Coxe that:

"A description which is insufficient to support a patent cannot be relied upon as an anticipation. Unless the prior publication describes the invention in such full, clear, and intelligent terms as to enable persons skilled in the art to comprehend it, and reproduce the process or article claimed, without assistance from the patent, such publication is insufficient as an anticipation."

See, also, *Cohn v. U. S. Corset Co.*, 93 U. S. 366, 23 L. Ed. 907.

From a careful study of the record, I am persuaded that the defendant has not met the burden of showing that the patent is void by reason of anticipation.

3. Has the patent in suit been infringed by the defendant?

Several forms of defendant's apparatus are exhibited in court. It has been pointed out that in one of them the form of receiver shows an open door for all incoming electromagnetic wave trains by the closed receiving circuit extending from the antennæ to the ground. The coil is interposed in the grounded primary receiving circuit. It forms also part of the secondary circuit which includes a condenser and a detector. Only the lower half of the coil—the part below the contact—is included in the primary circuit; while not only the lower half, but a part of the upper half of the coil, namely, the part between the contact and the similar contact on the opposite side of the coil, are included in the secondary circuit. It results that, when oscillatory currents are surging in the primary circuit, a part of the coil that is in the primary circuit affects inductively the upper part of such coil which is in the secondary circuit only, thus producing induced oscillatory currents in the secondary circuit, including the detector. The complainant properly claims, I think, that we have oscillatory currents resulting from all, and not from some only, of the waves of the train of electromagnetic waves admitted through the open door, and surging back and forth in the primary circuit, and also similar corresponding induced oscillatory currents surging back and forth in the secondary circuit, including the good contact detector. A careful examination of the record leads me to believe that the learned counsel for the defendant is hardly justified by the

testimony in making the claim that, owing to the physical properties of carborundum, this oscillatory current in secondary circuits can pass through the detector only in one direction, and not in the other. Certain evidence in behalf of the defendant confirms the statement that this detector allows a feeble current to pass in both directions, although more easily in one direction than in the other.

The learned counsel for the defendant have not distinctly pointed out to me how far defendant's apparatus is based upon patents, and how far such apparatus is unpatented. They make the broad claim that, whether patented or unpatented, the forms of the apparatus which are shown to me do not infringe the patent in suit. From a careful study of the record I cannot sustain this contention. It seems to me that every element of the invention of the patent is found in defendant's apparatus. I think the testimony sustains the contention of the complainant that the grounded primary, oscillatory-current circuit presents the open door to all incoming waves. The induced oscillatory circuit through the detector is always closed for the passage of currents corresponding to those produced in the primary circuit, and not normally open as in the coherer. It is therefore constantly receptive. As the receiver is susceptible to the action of every current, large or small, and is not dependent for action upon high voltages, it is current-operated, and not voltage-operated. It responds to the action of all the waves of a train, instead of only to some of them; and so it is wave-responsive. It enables the effect of all the waves to be added together; and so it is cumulative. In regard to the defendant's infringement as shown by the apparatus exhibited in court, Dr. Kennelly testifies:

"I find that the defendant's apparatus complained of employs current-operated wave detectors. These detectors, in the physical exhibits in evidence, are so-called crystal detectors; that is to say, they consist of lumps of material, usually crystalline in character, tightly gripped between appropriate contacts. From a structural standpoint, these wave detectors differ from the detectors set forth in the patent in suit, which are not lumps of crystalline material, but coils of wire of certain form and dimensions. Nevertheless, the defendant's detectors are current-operated detectors and belong to the same class as that disclosed in the patent in suit, since they do not change their electric conducting properties from wave to wave, but behave to one wave in a group as impartially as they behave to another, having good contacts instead of poor, shaky, or powder contacts. Moreover, they translate the energy of received waves cumulatively into energy of motion of such a character as to be recognized by the senses, i. e., by the ear, listening to the sounds of signals in the telephone. I agree with defendant's expert, Dr. Northrup, in so far as he speaks of the defendant's wave detectors in the following terms: * * *

"Defendant's apparatus, however, differs from these disclosures, in that the detector is a perfectly passive piece of material which suffers no change of resistance or physical character like the coherer, and is a detector which will operate to give good signals even though no local battery be used, showing that its valve action is such as to enable the incoming energy of the radiation itself, to be the source of the signal. The coherer might be termed a trigger which the radiation touches off, but defendant's rectifier is not of this character, being a passive converter of the form of the received energy such that this received energy will itself operate a 'phone.'

"In the above statement I concur, and I consider that it is in conformity with the disclosures of the claims of the patent in suit in so far as relates to the nature of a wave detector per se. At the date of the application for

the patent in suit, the coherer was in universal use, I believe, in wireless telegraphy, and I believe the patent in suit is the first disclosure in the art of an announcement that the art was on the wrong track, and that current-operated wave detectors should be used, together with examples of such current-operated wave detectors."

It is contended by the defendant that the detector shown in its apparatus is a high-resistance detector, and that, in some of the claims of his patent, Fessenden described a low resistance receiving mechanism, and that therefore defendant's high-resistance detector does not infringe those claims of the patent which call for a low-resistance mechanism. It appears in fact that some of the claims in Fessenden's patent are confined to a low-resistance mechanism, while some are unlimited as to resistance and cover high as well as low resistance. Beyond this, I think, the term "low resistance" as used by the patentee is intended to mean "low," as compared with the infinitely high resistance of the coherer, the resistance upon which Judge Townsend commented in the passage to which I have already referred. Language is to be interpreted from its association. The patentee was talking about the coherer and its infinite resistance, and spoke of low resistance in contradistinction to the infinite resistance of the Marconi coherer. I think it must be said that, following out the clear intention of the patentee, all the resistance the apparatus shows is "low resistance," according to the fair interpretation of language. In general terms it may be said that the defendant asserts his apparatus not to be a current-actuated wave-responsive device. It is clear that there is involved in voltage operation the idea that the potential current is used to knock down an obstruction; in other words, to create a condition that will allow flow of the current; or, as the complainant puts it, "to make a bridge for the current to flow." From a careful study of the record it seems clear that in the defendant's detectors such bridge is already made and traveled upon. It appears that defendant's receiver is current-operated, and differs from the coherer of the prior art. Marconi and his predecessors treated the coherer as a circuit closer. Examination of the evidence before me leads to the conclusion that in the defendant's device, as in Fessenden's, there is no circuit closer; for the circuit is never broken. I think it clear that the defendant's devices, under whatever patent they are claimed, are not based upon the principle of the coherer. They are current-operated wave-responsive devices like the complainant's; as such, in my opinion, they infringe claims 12, 19, 20, 30, and 32 of the patent in suit.

The defendant says, in any event, that it cannot be held to infringe Fessenden's system of tuning. "Tuning" is a term taken from the musical art. I follow the definition given by the learned counsel for the complainant. He says that it implies the equalization of frequencies of vibration of wave lengths. Its advantage in wireless transmission is that the current in a circuit, having a natural frequency of oscillation, grows in strength if the successive impulses received from the outside are tuned exactly to its natural frequency. Every oscillatory current that flows has a natural frequency of oscillation peculiar to itself. As the learned counsel for complainant

suggests, its oscillations may be weak, but they are there; and if we bring into sympathetic relation with the weak oscillatory current a stronger oscillatory current, of the same frequency, we necessarily increase the amplitude of the oscillations of the weak current; or, in other words, we make those oscillations stronger and their power more marked.

I have already pointed out that attempts at tuning in the prior art were merely to make the receiving conductor resonant to the sending conductor. Marconi's idea in tuning appeared to be to prevent interference between such stations as were not intended to co-operate. Sir Oliver Lodge effected certain precision of tuning between stations, but his inventive thought did not go to the extent of Fessenden's in effecting the quadruple tuning that is pointed out as a part of the system of the patent in suit. Fessenden went much further than anything in the prior art. His purpose was to put every part of his system into touch with every other part; he desired to tune so as to call or receive communications from any desired station in or out of tune with a given station at the time. He sought to properly adjust his tuning apparatus to effect these results. Dr. Pierce and other experts have admirably set forth the work of Prof. Lodge in this regard; but their statements fail to convince me that the tuning of Prof. Lodge was in type or in purpose the complete tuning of the patent in suit. Dr. Kennelly has well summed up the important elements of the patentee's tuning. He points out that the tuning of the patent is the adjustment not only of mast wire to mast wire, but that there is added to it the additional effect of a tuned local circuit, including the spark-gap at the sending station, and the detector at the receiving station. He says that the tuning of the patent was never attainable in the coherer days of the prior art. The defendant contends that it avoids infringement of the Fessenden system of tuning by not having a tuned closed local receiving circuit in which its detector is located; but the testimony leads me to the conclusion that the defendant's apparatus does in fact contain a closed local circuit. I do not think it necessary to discuss with particularity the evidence which leads me to this conclusion. The defendant undertakes to make the point that the resistance of the crystal detector in the local circuit is in each case so great that the circuit is practically open. It is sufficient to say that, on a careful examination of all the testimony, I am satisfied that this contention cannot be sustained. From the whole evidence I am of the opinion that the defendant's tuning is not simply the crude tuning of Marconi and his predecessors, but is substantially the tuning of the complainant's patent as covered by claims 6, 9, 10, 11, 14, 21, 27, 28, 29, 33, and 35.

It cannot be said that the invention of Fessenden presents a solution of all the great problems of electric telegraphy without wires. It does not bring a realization of all that the great workers in electrical science have dreamed. The books of Pierce, Kennelly, Fahie, and others have been brought to my attention in the study of this case. I have read them with great interest. They are full of suggestion. They open avenues for thought and investigation. No man

can now tell what future students may produce. It cannot be claimed that this patent does more than to open a little wider the door of invention in the art of wireless telegraphy.

After a full examination and study of the record and of the elaborate and enlightening briefs of learned counsel, I come to the conclusion that the patent in suit is an operative patent, disclosing invention; that it is not void by reason of anticipation; and that claims 6, 9, 10, 11, 12, 14, 19, 20, 21, 27, 28, 29, 30, 32, 33, and 35 have been infringed by the defendant.

A decree may be entered for the complainant upon the above claims, for an injunction, and for an accounting, and dismissing the bill as to claims 1, 2, 3, 4, 5, 7, 8, 13, 15, 16, 17, 18, 22, 23, 24, 25, 26, 31, and 34. The complainant may recover its costs.

WILLIAM B. MERSHON & CO. v. BAY CITY BOX
& LUMBER CO.

(Circuit Court, E. D. Michigan, N. D. July 19, 1910. Supplemental Opinion,
December 28, 1910.)

No. 64.

1. PATENTS (§ 328*)—INFRINGEMENT—RESAWING MACHINE.

The Gilbert patent, No 537,526, for a resawing machine, construed with the limitations required to avoid anticipation by the prior art, *held* not infringed.

2. PATENTS (§ 56*)—ANTICIPATION.

Old mechanism, fully capable of a use not then observed, anticipates a later patent for the application of that means to that use. Patentability cannot rest on the observation in a given device of a usefulness not before noticed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 56.*]

3. PATENTS (§ 27*)—INVENTION—TRANSFER OF MECHANISM FROM ANALOGOUS ART.

Resawing machines and hub mortising machines are so nearly alike in their mechanism for moving and handling the wood operated on that a mere transfer of such mechanism from one machine to the other does not involve invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 31, 32; Dec. Dig. § 27.*]

4. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—RESAWING MACHINE.

The Mershon patent, No. 538,688, for a resawing machine, one of the chief features of which is mechanism by which it performs the so-called function of "discrimination" by automatically changing the board operated on from a slabbing position to a self-centering position when it is of a predetermined thickness, was anticipated as to claim 1, but as to claims 3, 4, 5, and 15 was not anticipated, nor is it void for prior public use, but is valid. Also *held* infringed.

5. PATENTS (§ 76*)—SALE BEFORE APPLICATION—"ON SALE TWO YEARS."

A machine put out for trial, under a "sale or return" contract, does not constitute a being on sale two years before the patent application, unless the trial period expired, or unless there was actual acceptance more than two years before the application.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 92-98; Dec. Dig. § 76.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

6. PATENTS (§ 165*)—FUNCTIONAL CLAIM.

A claim to "means" is not necessarily functional.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 165.*]

7. PATENTS (§ 323*)—INFRINGEMENT—RESAWING MACHINE.

The Mershon patent, No. 547,796, for mechanism for the manual adjustment of the roll carrying slides of a resawing machine, must be limited to substantially the mechanism described, and, as so limited, *held not* infringed.

8. PATENTS (§ 313*)—SUIT FOR INFRINGEMENT—ISSUES—RIGHT OF COMPLAINANT TO DISMISS.

A complainant in a suit for infringement of a patent, where infringement of a number of claims is alleged, and issue is taken on their validity, cannot dismiss as to one claim only as matter of right after proofs have been taken, but the defendant has the right to an adjudication upon the validity of such claim.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 313.*]

9. PATENTS (§ 316*)—SUIT FOR INFRINGEMENT—EFFECT OF DECISION OF PARTIAL INVALIDITY.

Where the Circuit Court in a suit for infringement of a patent has held certain of its claims invalid, but found others valid and infringed, and an appeal is probable, it should, by its decree, dismiss the bill as to the invalid claims, and grant the usual relief as to the others by interlocutory or final decree as the case may require, leaving for subsequent proceedings the question of the necessary disclaimer of the invalid claims.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 316.*]

10. PATENTS (§ 323*)—SUIT FOR INFRINGEMENT—DECREE.

Where, in a suit for infringement of a patent, the court adjudges certain of the claims invalid, and others valid and infringed, it is proper that its decree should recite the finding of invalidity.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 323.*]

In Equity. Suit by William B. Mershon & Co. against the Bay City Box & Lumber Company. Decree in part for complainant, and in part for defendant.

Edward Rector, for complainant.

Charles C. Linthicum and James L. Whittemore, for defendant.

DENISON, District Judge (sitting by designation). A resawing machine is for subdividing the board or timber produced by the original sawing. It may be located in the sawmill for producing thinner market forms of lumber than it is desired to cut from the log, or in the secondary plant for producing thin box lumber, heavy veneer or the like. It consists, essentially, in a slitting saw, circular or band, cutting on a vertical line, and opposing feed and pressure rolls, usually in sets, for gripping the board and feeding it as it travels on its edge along a table to the saw. Each of these opposing feed rolls is carried upon a slide, moving laterally of the table, and adjustable, so that the two opposite sets of rolls may approach toward, and recede from, each other, and each slide is connected to a weight or spring pushing it toward the center, thus giving to the rolls an elastic pressure on the board.

Earlier than any of the patents in suit, it was common to give to these machines capacity for three functions: First, slitting a board through

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the center to make two equal parts. As the boards vary in thickness, or may vary, as they come to the saw, the machine must automatically present to the saw the center line of the board. This was accomplished by connecting the slides to each other by some equalizing device so that they and their respective rolls must move to or from the line of cut simultaneously and equally. This operation was called "self-centering." Second, taking from one side of the board a cut of a predetermined, standard thickness. This was done by disconnecting the equalizer, adjusting the right-hand slide and roll by a gauge at the fixed distance from the line of cut, and allowing the weight-pressed, left-hand rolls alone to exert the feeding pressure. With the machine thus set, the board could be run through several times, leaving, in the last cut, the deficiency, if any, under the maximum thickness. This operation was called "slabbing." Third, dividing the board on a line diagonal to its sides so that the right-hand board, for example, would be thick at the top and thin at the bottom and the left-hand board would be thick at the bottom and thin at the top, thus producing a standard weatherboarding or siding. This was accomplished by tilting both sets of rolls slightly away from the vertical position, so that the sides of the board, as presented to the slitting saw, were not parallel with the saw.

[1] The first patent in suit, being No. 537,526, issued April 16, 1895, upon the application of H. J. Gilbert, filed October 22, 1894, involves the combination of the first and third of these functions. Claims 1, 2, 5, 6, and 13 are relied upon. The mechanism is most generally described in claims like claim 2, and most specifically identified in claim 13. Those two claims are as follows:

"2. In a resawing machine, the combination with the saw, mounted in a substantially fixed position, of the set of feed rolls adjustable toward and from the same in the cutting plane thereof, and means for moving the rolls toward and from the saw and inclining them to the plane thereof, substantially as described."

"13. In a resawing machine, the combination of a base casting or frame-work having a concave seat, a feed roll supporting frame composed of a substantially cylindrical portion resting in said seat, and adapted to slide back and forth and tilt therein, and a transverse horizontal portion carried by the cylindrical portion, a pair of slides transversely adjustable upon said horizontal portion of the frame, a set of feed rolls carried by the slides, and means for adjusting said slides upon the frame and for moving the latter back and forth in its seat and tilting it, substantially as described."

Obviously, "fore and aft" adjustment of the feed rolls to and from the saw was desirable to accommodate the different problems presented by special forms of stock; and whenever the stock was very thin, or was warped, the rolls should be as close as possible to the saw, while, with thicker stuff, or for convenience of access either to saw or rolls, it might be desirable to increase the distance between them. It was, accordingly, entirely common to provide adjusting means by which the roll-carrying slides could be adjusted to and from the saw, or by which the saw could be similarly adjusted to or from the rolls. It was also common to provide means for tilting the rolls; and before tilting the rolls, it would be advisable to withdraw them from the saw, if they were too close for the tilting operation. Gilbert devised simple and

efficient means for this withdrawing and this tilting. By his construction, the frame supporting the roll carrying slides, was carried on a cylindrical body projecting beyond the opposite sides of the frame, forward and back, and resting in concave seats in the bed frame. These concave seats were longer than the cylinder ends resting therein, and thus the latter had a longitudinal play, permitting the whole frame to have a sliding movement to and from the saw. It is also obvious that a tilting or rocking capacity was thus given to the sliding frame. The concave seat was provided with a slot, which, in its forward part, was located at the bottom of the seat and was parallel with the line of cut, and, at its rear portion, was curved to one side. The cylinder end was provided with a bolt depending vertically into this curved slot; hence, as the frame was withdrawn from the saw, this bolt and slot connection compelled the tilting of the rolls, and, as it was returned toward the saw, compelled the rolls to take their vertical position. While in the forward position, the device could not be used for making siding, and while in the withdrawn position, it could not be used for ordinary resawing. This construction seems to have been novel and useful, and is the express basis of several claims in the patent, but complainant's counsel say is not called for by the claims in suit.

The defendant's structure is provided with somewhat similar, passive means for permitting the frame to slide and rock, the cylinder with its ends sliding in a concave seat having become pins or trunnions rocking and sliding in their boxes. The sliding and tilting, however, are accomplished by an adjustment of set screws at the sides of the frame and by a worm and segment. When it is desired to withdraw and tilt the mechanism, it is first completely withdrawn by a manipulation of set screws, and it is then tilted, as much or as little as is desired, by a wholly independent adjustment. There is no bolt and slot connection whatever.

It will be noticed that the claims in suit do not call, separately, for "means for moving" the rolls toward or from the saw, *and* for "means for inclining" the rolls, but call, in a unitary or combination way, for "means for sliding and inclining" the rolls. It might well be said that this language was fairly limited to the unitary or combination idea shown by the patent for concurrently accomplishing these two things, either result automatically accompanying the other; but on this construction of the claims, there would be no infringement.

If the claims in suit are capable of a construction broad enough to cover a device where the means for sliding and the means for tilting are substantially independent and where the two operations are successive and not coacting, but each is complete in itself, and if this can be considered a true combination, then they are anticipated by the Cooper machine. The use of this machine at a much earlier date than Gilbert's application is conclusively shown. It is not disputed that the frame and rolls of this machine could be moved to and from the saw, and could be tilted, the tilting by means substantially the same as in the case of defendant's structure, and the withdrawal by sliding contact between another part of the frame and the base. The argument to avoid anticipation is that the stated necessity for withdrawal before

tilting does not exist unless the rolls are so close to the saw as partly to embrace it and thus to strike it or come within dangerous proximity when they are tilted across its edge; that this situation arises only with the band saw, and not with the circular, and that the saw in the Cooper machine was circular; and that in the Cooper machine the saw slot in the table was at least one inch removed from the plane of the nearest face of the rolls when adjusted in their closest position, and hence, the rolls, if there tilted, would not have interfered with the saw. It is also said that while, in the Cooper machine, the slide and roll carrying frame was capable of tilting, the machine was so set up that this adjustment never did take place. It is then argued that, since this withdrawal for the purpose of tilting was not necessary with the Cooper construction and never did take place, Cooper did not have the essential idea of the Gilbert invention.

[2] I cannot accept this conclusion. Gilbert's essential idea, in the broad scope now claimed for it, was to provide a mechanism by which the rolls could be advanced close to the saw, and then, if it was desirable to tilt them, they could be withdrawn from the saw before the tilting. Cooper provided substantially the same mechanism, with these capacities, which the defendant uses. That he did not in fact use his mechanism for the particular purpose of Gilbert, or even that he did not foresee that such purpose would be a useful one, is not material. The claims in suit (except 13) as complainant now construes them, read on the Cooper machine, and, if granted to Cooper, Gilbert would infringe.

From a slightly different point of view, it may be said that if the slot in the table, through which the saw passed in the Gilbert machine, had been one inch longer than it was, so that the slide carrying frame, which, from its extreme withdrawn position, was capable of adjustment (for example) two inches towards the saw, had been capable of adjustment three inches toward the saw, Cooper would have been a perfect anticipation in every detail. Patentability cannot rest on such a distinction, where it does not pertain to function, but only to usefulness.

The Gas Burner Case (*Clough v. Gilbert & B. Mfg. Co.*) 106 U. S. 166, 1 Sup. Ct. 188, 27 L. Ed. 134, and the Carriage Spring Case (*Topliff v. Topliff*) 145 U. S. 156, 7 Sup. Ct. 1057, 30 L. Ed. 1110, are cited to the effect that the earlier device is not an anticipation if the idea was not present and if any modification, or even readjustment of parts, is necessary to bring out the new idea. This principle is not applicable here, for the idea was present in the Cooper machine, viz., the idea of providing means for tilting and means for fore and aft motion. When the mechanism was transferred from a circular to a band saw, it was seen that the fore and aft motion had additional utility, but the observation of the new usefulness was not invention.

[3] It is also said that claim 13 is distinguishable from Cooper, and, as distinguished, is infringed. If the feature which is thought to make this claim patentable over Cooper, is Gilbert's form of cylinder and concave seat, then there is no infringement; but if reliance is had upon the broad idea of mounting the stock-holding mechanism upon a

trunnion carried frame, so that the frame could both slide and rock, this idea is disclosed by the earlier hub mortisers. Shaping wood with a saw or shaping it with a chisel, cutting a slit for the whole length or a slot for a part of the length, are operations very possibly carried on side by side in a wood-working factory, and are not so remote from each other that it is invention to make a mere transfer.

[4] The second patent in suit is that issued to E. C. Mershon May 7, 1895, upon application filed May 8, 1894, the serial number of the patent being 538,688. The claims relied upon are 3, 4, 5, and 15. Claim 15 is the most specific, and claim 3, perhaps, the broadest of these selected claims. They are as follows:

"3. In a resawing machine, the combination with slides and feeding rollers mounted thereon, of self-centering or equalizing mechanism therefor tending to advance said rollers toward the line of cut, a stop by which the rollers or set of rollers at one side of said line may be halted at a pre-determined distance from the line of cut, and means of continuing the advance of the opposing roller or set of rollers."

"15. In a re-sawing machine, the combination with the slides, of a set of feeding rolls fixed upon one slide, an opposing set of feeding rolls mounted upon the other slide and spring-pressed toward said first mentioned rolls, means for adjusting said slides and their feeding rolls relatively to each other and to the line of cut, self-centering mechanism for said rolls, and means for limiting the action of the self-centering mechanism at a pre-determined point without preventing the advance of the spring-pressed rolls."

These claims express, in apt words, the mechanical construction devised by Mershon suitable for the exercise of the first and second functions described above, i. e., self-centering and slabbing, and for automatic shifting from one function to the other. It may be assumed that it is desired to produce, by this machine, boards one-half inch in thickness. In such case, a slight surplus thickness will do no harm, but any deficiency in the minimum thickness may make the board worthless for the desired purpose. It may further be assumed that the boards, coming to the device while it is set for self-centering, are of the standard thickness of one inch, but that, occasionally, a board either overruns or underruns. If it overruns, it will, by the self-centering operation, make two boards, each slightly overrunning, but in the other case, it will make two boards, each below the required minimum, and so will spoil both. If adjusted to the "slabbing" position, the machine will take off one board of the required thickness, and only the remainder will be rejected. Where the general character of the material fed to the machine changes, the operator can stop the machine, and, by hand, adjust it from the self-centering position to the slabbing position, and vice versa, and means for this shifting were common in earlier machines. Such stoppage and manual adjustment take time and are quite impracticable with reference to a continuous feed of boards of varying thickness. This Mershon machine was the first one shown by the record which had the capacity, automatically, to shift itself from the self-centering position to the slabbing position and vice versa, to meet the varying thicknesses of successive boards. This capacity has been called, by counsel, "discrimination."

In the normal working of the self-centering operation, as the board

entered between the two sets of rolls and as the spring or weight pressed both slides toward the center, the board instantly began to force them apart and instantly to put into operation the equalizer connecting the slides, whereby both slides and both sets of rolls were forced to withdraw equally from the predetermined center. Mershon provided that the rolls upon the right side should be set by a gauge, as for slabbing, but that the rolls on the left side should yield a short distance against an independent spring or equivalent pressure, so that only when they were retracted a short distance from the center and encountered a stop connected with their slide did the thickness of the board begin to have any effect upon the slides, and, therefore, upon the equalizer; and, hence, until this point was reached, the self-centering function was not called into play. The other, or comparatively fixed, set of rolls would remain at the determined distance from the line of cut, while the independently spring-pressed rolls, within the limitation provided by their stop connection with their slide, would be only pressure rolls, holding the board against the fixed rolls and causing slabbing instead of self-centering to take place; while just as soon as they received a board of the necessary double thickness, the independently spring-pressed rolls would be thrown back against their stops, the slides and the equalizer would be affected, and self-centering would result.

The essential invention here was, therefore, the superimposing upon the existing and common self-centering mechanism of a supplementary and independent yielding or spring action between one set of rolls and their carrying slide, whereby they could retreat upon the slide a short distance before making rigid and operative connection with it. Mershon accomplished this result by placing, back of these rolls, a spring of such power, as compared with the force required to operate the equalizing means, that the spring would yield, without affecting the slide or equalizer, until its free end made contact with a stop connected to its slide, and thereby rigid connection in that direction was set up and further yielding must be by the slide. The fifteenth claim and also the fifth claim specify this spring pressure. The other claims in suit do not; but I think the patent, within the limitations of the invention as above stated, is entitled to a fairly broad range of equivalents, and that all the claims in suit cover this independent yielding adjustment, whether produced by spring pressure or by equivalent weight pressure.

The defendant's device accomplishes this same result of discrimination and in substantially the same way. The main structural differences are two:

First. In defendant's device, the two slides are not directly connected by an equalizer, but each slide superficially appears to be independent of the other. The equalizing connection, however, exists, although less immediate. Each slide is connected by rack and pinion to a shaft, each shaft has a hand wheel with a peripheral gear, and these gears are connected by a worm so that when one wheel is rotated in one direction, the other wheel is, automatically, to the same extent, rotated in the opposite direction. This is, for the purpose of this inquiry, a full equivalent of Mershon's more simple and direct equalizer.

Second. The defendant's left-hand roll has no supplementary spring

directly interposed between it and a stop upon its carrying slide. It is, however, connected to an independent weight hung upon an appropriate lever, which weight presses this roll forward against the thin board to be slabbed, and the roll is then a pressure roll only; and as the thickness of the board increases, this roller retracts from the line of cut, overcoming and raising only this independent, supplementary weight. The weight lever thus connected to the left-hand, independently yielding roll, thereupon, as it rises, comes in contact with a stop upon the main weighted lever which draws the slides together, and so the left-hand roll cannot retreat further without lifting the main weight, accomplishing a stop connection with its slides and so throwing into action the self-centering mechanism. In the Mershon construction, the yielding roll yields against independent spring pressure until it makes contact with a stop upon the roll standard immediately carried by the slide. In the defendant's construction, the independently weight-pressed roll yields until its weight lever makes contact with a stop immediately carried by the slide. The yielding action is substantially the same; the stop contact is substantially the same; and the result, calling into action the self-centering mechanism, is the same. I think one is the equivalent of the other.

[5] The main defenses against this Mershon patent, aside from noninfringement, are two: It is said that, more than two years prior to his application date, Mershon sold, for use, a machine constructed in accordance with his patent, this being the machine sold to the Bohn Company, of Minneapolis. I am not satisfied that this was a complete sale, so as to amount to the statutory bar, two years before the application, viz., before May 8, 1892. The machine in question was shipped by Mershon, to the Bohn Company, in March, 1892. It was not an absolute sale, nor, technically, a conditional sale, but it was a sale on trial, a "sale or return." It was, by express agreement, shipped "to let you test it." It did not become a complete sale, so as to pass title, until accepted, expressly or impliedly, by the purchaser. As late as April 12, the purchaser wrote that it had not been tried sufficiently. The next thing shown by the record is that it was paid for on June 11th. This falls short of the necessary proof to show before May 8th a complete sale, as distinguished from a shipment on trial, essentially experimental.

Further, I do not think the Bohn machine was, in the respect now under consideration, the same as the patented machine. Mershon testifies that this faculty of discrimination was not discovered by him, nor did he build any machine intended to have that capacity, until nearly two years later. In order to have this function, it was necessary that the independent springs should yield readily until they met their stop, and it would be fatal to make the springs so stiff and unyielding that their resistance would bring the self-centering mechanism into play before the stop was encountered. The springs, put in evidence as duplicates of the springs in the Bohn machine, appear to have this stiff and unyielding character. The evidence as to the machine in Detroit, also of early construction and with similar springs, seems to show that it did not, in fact, have this capacity. Certainly, the record

falls far short of showing with the necessary conclusiveness that the Bohn machine did have the function in question; it rather indicates the contrary.

The other chief defense against this patent is found in the proposition that it was anticipated by the Connell & Dengler patent, No. 243,692, of July 5, 1881, and by machines made thereunder. The Connell & Dengler machine unquestionably had the self-centering capacity, and undoubtedly could be, and was, manually set or adjusted so that it did not self-center but would slab. Its left-hand rolls, however, were not capable of a yielding retreat from the board followed by automatic, rigid engagement with their slides, thus producing, upon further pressure, the equalized motion of both slides. The rolls lack this feature or its equivalent. It is sought to find this equivalent in a spring-pressed jaw or clamp, not connected with the rolls, and located close up to the face of the saw. It is true that with a thin board, this spring jaw would hold it over against the right-hand rolls, in position for slabbing, and the board would be wholly out of contact with the left-hand rolls, and that then, whenever this board or a following board became thick enough to make contact with the left-hand rolls, the self-centering operation would take place; but this spring jaw was wholly independent of the left-hand rolls and slides, did not make contact with any stop upon the slide, and did not automatically put the slide into motion. It only held the board in a slabbing position, with possible or very doubtful efficiency, when the board was wholly out of contact with the left-hand rolls. It was not intended for this discriminating function, but rather for the purpose of gripping the end of the board after it left the rolls so that it might not split but might be sawed to the very end; and it did not, in fact, have this function in any appreciable degree. This is evident not only from the construction, but from the testimony as to the actual operation and history of the machine. So far as known, it never, in its commercial operation, had performed this discrimination. It was only when specially operated by defendant's expert in the preparation of testimony in this case and upon special and peculiar stock, that it was made to display the discriminating function in a slight and unsatisfactory degree, a degree not sufficient for practical and ordinary uses.

[6] In further defense to this patent, it is urged that the decision of the Court of Appeals in *Tyden v. Ohio Table Co.* et al., 152 Fed. 183, 81 C. C. A. 425, holds that a claim generally to "means" is functional and invalid. I do not so understand Judge Lurton's opinion. In that case, the means shown were so ordinary and common, and the device so lacking in invention, except (possibly) in the result or function disclosed, as to compel the conclusion that the patentee intended to claim the result, by whatever means accomplished. Other defenses seem less pertinent than these which have been considered.

[7] The third patent involved is that applied for July 1, 1895, by Mershon, and issued to him October 15, 1895, as No. 547,796. This invention has to do with the manual adjustment of the roll-carrying slides to and from each other. Such adjustment had been by means of screws and was necessarily somewhat slow. If the rolls were set

for one-inch lumber and a much thicker piece, as, for example, a three-inch piece, came along, the rolls would not automatically open far enough to receive this piece, and they must be readjusted. It was desirable, also, that they should be adjustable so quickly that the operator need not stop appreciably, if at all, the progress of lumber through the machine. Mershon therefore provided a lever so connected with a quadrant that, by moving the lever to the desired point on the quadrant, the rolls would be set at the indicated width, and being so set, could exercise their self-centering or slabbing functions within the limits appropriate to that setting. He provided, also, a spring detent by which the shifting lever would be locked at the selected point on the quadrant. He accomplished this result by using a long and a short lever pivoted together at the end of the short lever. The short arm of the long lever was pivoted to slide No. 1 and fulcrumed on the pivot connecting the two levers, while the short lever was fulcrumed on slide No. 2. The two levers thus became an equalizer between the two slides, to be operated by moving the handle ends of the levers to and from each other. He then interposed between the two levers, and also pivoted on their common point, a plate or bar having its outer end attached to the frame of the machine and carrying notches with which the spring detents on the lever arms engaged. This interposed plate, he called an idle lever.

The claims in suit are 1, 2, 3, 4, 6, 9, and 12. These claims vary in expression, but so far as the questions herein involved are concerned, claim 1, reading as follows, is typical:

"1. The combination with the feeding rolls automatically movable toward the line of cut, of means for adjusting each roll or set of rolls independently of the other, and mechanism for instantaneously and accurately adjusting said rolls at any time, and independently of the automatic action thereof."

If this claim is confined to the form of devices shown in the Mershon patent, or to anything visually resembling those forms, there is no infringement; it is only by giving to the words "mechanism" and "means" the broadest construction and by allowing to the patentee an extremely liberal range of equivalents that infringement can be found.

The defendant uses no pivoted levers, constituting an equalizer, and has no idle lever or interposed plate. In its device, the hand wheel at the outer end of the pinion-carrying shaft connected with the rack upon each slide, carries, upon the edge of its rim, a graduated scale, which, in connection with a pointer, shows the exact distance which that slide is set away from the line of cut. The two wheels may be connected together so as to operate simultaneously in reverse direction or may be manually disconnected.

In the Mershon device, when the operator wishes to set for a given thickness, he takes both levers, one in each hand, disengages the spring detents from the idle lever, and thereby disconnects both levers from the frame and destroys the automatic, self-centering function. He then adjusts both levers at the proper respective notches on the quadrant, and allows them to be there locked by the spring detents, and thus again establishes connection with the frame and makes the self-center-

ing function operative. If the phrases "instantaneously and accurately adjusting" and "instantaneously shifting" are capable of any intelligible definition, they refer to this very quick motion by which one practically continuous movement of the operator's arm and fingers disconnects, adjusts, and reconnects, the adjustment and reconnection being, in part, automatic, by the action of the spring detent which will make the locking connection at exactly the right point, if the parts are brought approximately to that point, or will automatically lock as the lever passes over that point.

In defendant's device, the operator must first, by movement of his foot, disconnect the two hand wheels. He must then adjust one of them to the desired point on the scale and without the aid of any spring detent. He must then adjust the other in the same way to the corresponding, desired point, and must then re-engage the wheels by another motion of the foot. This re-engagement may or may not be possible at exactly the selected point, and if not, there must be a further, careful, manual adjustment. Further, while the idle lever is expressly made an element only of claims 4 and 9, I think it must be considered as practically an element of every claim sued upon, being indicated by the word "means" or by the word "mechanism"; and it is not found in defendant's device. True, this device has parts which bring about, in a general way, the same result accomplished by the Mershon idle lever, but they certainly do not resemble it in form, and I think they do not embody it in substance.

If Mershon had been the first to solve the problems of an approximate but quick "to and from" adjustment in a pair of grip devices, followed, if necessary, by an independent, accurate adjustment, he might have been entitled to the broad construction claimed; but this general result was well known. The record shows several instances of its application, and it is sufficient to refer to the several gang edgers. An edger and a resawing machine are of the same general type and class. Each is for the purpose of slitting a board lengthwise into two pieces, and the gang edger simply makes, at one cutting, more than two pieces. Adjusting the saws of a gang edger to and from each other on their common shaft, and adjusting the rolls of a re-sawing machine to and from each other on their common table, present practically the same problem in the same art. An inspection of the Holmes machine shows the same general association of the two pivoted levers, each with a notched quadrant and a spring detent, for rapidly adjusting the width of the opening between the edging saws. The Rowley & Hermance machine shows a very close approximation to the two levers provided with spring detents and having an interposed, notched quadrant approximately of the same shape as the Mershon idle lever. The Smith edger and the Williamsport gang ripping machine show the same construction. There was nothing generically new in Mershon's idea, and he is not entitled to a construction which will include the defendant's device.

It follows that the bill will be dismissed, as to the Gilbert patent and the second Mershon patent, and that the usual decree for injunction and accounting will be made as to claims 3, 4, 5, and 15

of the first Mershon patent. Inasmuch as the first claim of the first Mershon patent was insisted upon during the taking of a large part of the proofs and was then withdrawn, and is, upon this record, anticipated, it follows that neither party should recover costs so far as the record pertains to this patent. It is approximately true that one-half of the record pertains to this second Mershon patent and one-half the record to the other two patents, as to which the finding is for the defendant. The defendant will, therefore, upon the entire record, recover one-half of its total, taxable costs.

Supplemental Opinion.

The opinion found that claim 1 of the Mershon patent was anticipated, and accordingly indicated that no costs would be awarded as to this patent, although, as to other claims, complainant prevailed. Upon settlement of decree, complainant asks reconsideration of this conclusion, because mistaken on the merits and because the claim was withdrawn before hearing; while defendant asks that, because of the presence of this invalid claim, the bill be dismissed absolutely.

On complainant's prima facie case, its expert included this claim among those pronounced to be infringed. Defendant's expert stated and explained the facts said to make the claim invalid. While briefs were in preparation for the hearing, complainant's counsel notified defendant's counsel that no decree would be asked upon this claim.

[8] In a suit at law, plaintiff may usually discontinue at any moment before submission. Complainant, in an equity suit, has, as a general rule, a similar right. Just how far this right is modified in patent cases by the nature of the controversy, the public interests, etc., is not clear. Some courts have denied the right in the later stages of the case. Whatever the true rule may be in this respect, it does not necessarily apply to the withdrawal of part of the claims sued upon. Where several patents are joined in one case, they are still, in a sense, several suits, and the rule of discontinuance may well apply separately; but the several claims sued upon of one patent are parts of a unit. Upon the filing of the bill specifying what claims are sued upon, or supplemented by later specification, and by the answer, the issue is made up. The complainant may perhaps dismiss the suit as to one several cause of action, but he cannot continue to prosecute that cause of action and at the same time change the issue thereunder, without the consent of the other party or leave of court. I think defendant, in such a case as this, has a right to the opinion and decree of the court upon the issue as it was first declared or interpreted by complainant and accepted by defendant. The validity of claim 1 therefore, remained for decision. I adhere to the conclusion that the claim is invalid, because, in the broad sense in which it was intended, it is anticipated by several of the old machines and patents in the record, and because of public use or sale by Mershon; but in view of the highly technical character of claims and the difficulty of determining what they mean, Mershon cannot be said to have acted fraudulently in inserting or permitting his solicitor to insert this claim, so that he forfeited the right to disclaim.

[9] We are confronted, then, by the rule that the patent was invalid, unless this claim is seasonably disclaimed in the Patent Office. It would seem that complainant ought not to have any decree whatever on a patent which is *prima facie* invalid; but if this apparently logical rule was enforced and if complainant was required to disclaim a certain claim as a condition of having a favorable decree upon other claims, he would be obliged to accept the judgment of the trial court upon the claim found invalid, as final, and must file his disclaimer and lose his right of appeal upon that subject, or else, he must refuse to file the disclaimer, whereupon the entire bill must be dismissed; and while complainant could appeal from that decree, yet if the appellate court found that the action of the court below in requiring the disclaimer was right, the decree would be affirmed without considering the claims found valid below, and so complainant would lose the benefit of the valid claims. For these considerations, it seems to me clear that in such a case the usual interlocutory decree for injunction and accounting should be entered upon the valid claims and dismissing the bill as to the invalid claims, upon the theory that the failure to disclaim cannot be unreasonable until complainant has had an opportunity to litigate the validity of that claim to the court of last resort. This rule has been definitely adopted and announced by the Court of Appeals in the Second Circuit (*Page v. Dow*, 168 Fed. 703, 94 C. C. A. 209), and so far as I am aware, has been customarily followed in this circuit (*Plecker v. Poorman*, 147 Fed. 528, *Thompson, J.*).

The difficulty cannot be met, in an interlocutory decree of this character, by providing that the complainant must, in the alternative, within the time limited, file disclaimer or take his appeal from that part of the decree dismissing the bill as to the invalid claim, because the complainant cannot appeal from that portion of such a decree. In *re National Enameling & Stamping Co.*, 201 U. S. 156, 26 Sup. Ct. 404, 50 L. Ed. 707.

This conclusion does not cover the present case, because complainant has waived profits and damages and any accounting therefor, and asks the entry of a final decree. The Court of Appeals of this circuit, in *Morgan Engineering Co. v. Alliance Co.*, 176 Fed. 101, 100 C. C. A. 30, directed that a final decree, in the Circuit Court, in favor of complainant, upon the valid claims, should not be entered unless a disclaimer was filed; but when we undertake to apply this general rule to a case in the present situation of this case, we meet the same difficulty above noted with reference to an interlocutory decree. Complainant could not, in this case, comply with such requirement without losing the right to take the opinion of the Court of Appeals on claim 1 and it does not seem unreasonable for him to delay his disclaimer until he has had that opportunity. In the *Morgan Engineering Company Case*, the Court of Appeals had considered and decided the merits of the invalid claim, and so there was no injustice in considering the patentee's reasonable opportunity as having expired and compelling a disclaimer. An inspection of the printed briefs in the *Morgan Engineering Company Case* shows that the considerations stated in *Page v. Dow* were not thought important, and

that case and those considerations were not brought to the attention of the Court of Appeals deciding the Morgan Engineering Company Case. I do not think this last case was intended to lay down a rule applicable to the circumstances of this case.

The difficulty here cannot be met by requiring, in the alternative, a disclaimer or an appeal by complainant within a limited time, because any provision along that line, fully worked out, would tend to affect the finality of the decree, and might destroy complainant's right of appeal.

I see no way of preserving all rights except to proceed upon the assumption that the complainant is reasonably entitled to appeal, and that he will appeal, and that the eventual mandate of the Court of Appeals will properly dispose of the disclaimer question, leaving it with no present effect upon the decree of this court, except as to costs. If this assumption proves to be erroneous, and if the complainant rests content without an appeal or does not prosecute the appeal, the further action of this court upon that situation can be invoked by petition for rehearing, or review, or some proceeding of that general character.

[10] Complainant also objects to reciting in the decree the finding that this claim 1 is invalid. Such recitals may not be customary, but it is customary to make a finding and distinct adjudication that certain claims are good and valid as a basis for injunction, and I do not see why a corresponding recital and finding should not be made when the opposite result is reached.

ELECTRIC RENOVATOR MFG. CO. v. VACUUM CLEANER CO. et al.†

(Circuit Court, W. D. Pennsylvania. August 5, 1911.)

No. 96.

INJUNCTION (§ 99*)—GROUNDS—UNFAIR COMPETITION IN BUSINESS—THREATENING SUITS.

A defendant, who, after claiming that complainant was manufacturing articles infringing its patent, and being requested to bring suit to determine the question, instead of doing so, persistently and for nearly two years continued to send threatening letters and circulars to complainant's customers and persons who might become customers, but without bringing suit against any, is chargeable with bad faith and unfair business methods, which entitle complainant to an injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 172; Dec. Dig. § 99.*]

In Equity. Suit by the Electric Renovator Manufacturing Company against the Vacuum Cleaner Company and another. On motion to vacate preliminary injunction. Denied.

Watterson & Reid, for plaintiff.

Hillary C. Messimer and James Negley Cooke, for defendants.

ORR, District Judge. This matter comes before the court upon a motion on the part of the defendants to dissolve and vacate a pre-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† For opinion on rehearing, see 189 Fed. 1023.

liminary injunction heretofore granted. The preliminary injunction was granted upon bill and affidavits after notice to the defendants. The bill contains all the proper jurisdictional averments, and, in addition thereto, sets forth that the complainant is a manufacturer, and has been since April of 1907, of apparatus designed to renovate house furnishings, and that its apparatus and machines are well known to the public under the trade-name of "Invincible"; that its business has been steadily increasing, and that its gross receipts for the year 1910 were over \$300,000, and that its gross receipts for the first four months of the current year were in excess of \$143,000; that its business has extended generally throughout the United States; and that the complainant is solvent, is earning a fair profit, and is able to respond in damages and for profits, should it be determined that it is infringing certain letters patent granted to one Kenney March 19, 1907, and numbered 847,947.

The bill further sets forth that on the 21st of June, 1909, the defendant the Vacuum Cleaner Company threatened the complainant with suit for the infringement of said letters patent, stating in its communication that, in default of compliance with the said defendant's wishes, "we shall institute suit against you in the United States Circuit Court in order to obtain an injunction against the further marketing of vacuum cleaning machinery by you"; that on June 28, 1909, complainant replied through its attorneys that they did not consider that the complainant was infringing the said patent, and suggesting that the said defendant should bring its action, and at the same time the said counsel for the complainant notified the said defendant that the said defendant would be held strictly accountable for damages that may result from threatening letters and warning said defendant that, unless defendant made good its threats in a proper way in accordance with law, they would ask that the said defendant be restrained from attempting to intimidate users of complainant's machine; that notwithstanding such correspondence the said Vacuum Cleaner Company, without bringing suit which would enable complainant to attack the validity of said letters patent and have the question of infringement properly determined, continued to issue extensively false and malicious notices and threats of suit against the complainant's customers and intending customers. A number of letters are attached signed by the defendant the Vacuum Cleaner Company, in each of which there is notice to the person addressed that the "Invincible" vacuum cleaner plant is an infringement of the said patent, which is stated to be fundamental in character and of such scope as to completely dominate and control the art of vacuum cleaning. In each the person to whom the letter is addressed is requested to discontinue the use of the plant and account to said defendant for profits realized and for damages suffered, and each contains the following clause:

"We will at once institute suit in the United States Circuit Courts against all manufacturers and sellers of vacuum cleaning machinery. In due course we shall institute suit against you in order to obtain an injunction against the use of said plant and for damages for past use."

If the person to whom the letter was addressed desired further information relative to the matter, he is referred to the counsel for the said Vacuum Cleaner Company. The bill further avers that in the month of May, 1910, nearly a year after complainant's first communication with the said defendant the Vacuum Cleaner Company, the complainant by its attorneys wrote to the said defendant the Vacuum Cleaner Company, as follows:

"We have been informed by the Electric Cleaner Co., agents for our clients, the Electric Renovator Mfg. Co., of Pittsburgh, Penna., that you have been writing threatening letters to users of the Invincible Renovating Machines, notifying them that they are infringing upon your patents, and demanding that they discontinue the use of their machines and account to you for damages.

"You resorted to these same unfair tactics some time ago, and under date of June 28, 1909, we notified you on behalf of our clients that we had investigated your patents and had reached the conclusion that they were not being infringed by them, and at the same time we invited you to bring your action for infringement stating that we stood ready to defend our clients.

"Instead of acting in the proper legal way open to you (if you consider that your patents are being infringed), you have seen fit to harass and attempt to intimidate our client's patrons, which action on your part, we characterize as unfair and legally indefensible. We now take this opportunity to again inform you, as we informed you about a year ago, that we do not propose to submit to the tactics to which you are resorting in your attempts to secure business, and we shall hold you strictly accountable for damages that have resulted from your method of pursuing our client's patrons. If you are honest in your belief that our clients are invading upon whatever patent rights you may have, your counsel will doubtless inform you as to the proper course to pursue in order to protect your alleged rights. On behalf of our clients we simply wish to inform you that they do not propose to submit to the unfair methods you are now employing, and failing a discontinuance of these methods we shall seek relief in the courts for damages as well as a restraining order.

"We have made a personal canvass of the situation in New York, and are thoroughly informed as to your actions and methods, and are being kept advised as to the situation. We simply wish to say that unless you change your tactics immediately, you will have an opportunity to explain to the court why you should not be restrained and held accountable in damages."

The bill further charges that in or about June of 1910 the other defendant, the McCrum-Howell Company, claiming to be the owner by grant from its codefendant of the exclusive right to manufacture stationary vacuum cleaning apparatus under said letters patent, conspired with its licensor to commence, and did put into execution, a system of malicious persecution of the complainant by charging that the complainant and its agents, and the purchasers and users of its machines generally, were infringing the said letters patent, and threatening them with suits for infringement, and, for the purpose of intimidating complainant's agents, purchasers, and intending purchasers, asserted in circulars and otherwise that the complainant was financially unable to protect its agents and users, and attached to the bill is a copy of a circular addressed to manufacturers, dealers, and users of vacuum cleaning apparatus, entitled "Warning," and containing the following:

"Our patents have been acknowledged and settlements made, suits have been withdrawn and licenses issued by us to the following concerns: McCrum-Howell Company of New York (Purchasers of American Air Cleaning

Co. of Milwaukee, Wis.) Duntley Manufacturing Company of Chicago, Keller Manufacturing Company of Philadelphia. Any dealer or user buying apparatus from these firms is within his rights and will not be disturbed. All others may expect trouble until they comply with the law and obtain proper authority from us under our patents."

On April 19, 1911, a letter was sent out by the Vacuum Cleaner Company, in which the latter uses this language:

"You may suggest that your contract with the manufacturers protects you from any ultimate damages that we might claim. We only ask you to look into the standing of the people from whom you are buying. We think you will find that 90% of all of the unlicensed manufacturers are not strong enough to afford any real protection."

On April 11, 1911, the defendants jointly, by their counsel, wrote to the chairman of the board of trustees of the First Baptist Church of Pittsburgh, threatening suit against it because they had placed an order with the plaintiff company, and in that letter occurs this language:

"If I do not hear from you I will presume that you are satisfied with the usual two-year bond which you have secured from the infringing manufacturer to save you harmless in case of patent suits, but I caution you that while the injunction will probably be issued within that period of time, the judgment for money damages may not be entered until after the bond has expired, and that in any event you are involving yourself in the trouble and annoyance of a lawsuit."

The bill further avers that by reason of the threats and notices the complainant has been damaged in its business and has lost customers. To support the want of good faith charged against the defendants, the complainant in its bill calls attention to the averments in some of the communications issued by the defendants that the latter "had been most active" in prosecuting suits for infringement of said patent, whereas the fact is charged that the defendants have shunned an adjudication of the validity of the patent, and mention is made of different proceedings instituted by the said Vacuum Cleaning Company against users of vacuum cleaning apparatus, three of which were instituted in the Southern district of New York as early as the 10th of June, 1909, and in none of which has the case been brought to final hearing.

Inasmuch as the allegations of the bill were supported by affidavits, the court upon proof of notice to the defendants of the application for a preliminary injunction, being satisfied that unfair business methods had been resorted to and were being resorted to by the defendants, and adopting the views of the Circuit Court of Appeals of this Circuit in *Farquhar Co., Ltd., v. National Harrow Co.*, 102 Fed. 714, 42 C. C. A. 600, 49 L. R. A. 755, and the views of the Court of Appeals for the Second Circuit in *Adriance, Platt & Co. v. National Harrow Co.*, 121 Fed. 827, 58 C. C. A. 163, issued an order "restraining the defendants, and each of them, their officers, agents and employés from further in any manner issuing or making any notice, warning, threat or statement charging the complainant, its officers, agents or employés, or any one engaged in selling or using vacuum cleaning apparatus manufactured by complainant, with infringement,"

of said letters patent, giving leave to the defendants to apply within ten days for a modification of said order. Subsequently, on May 19, 1911, the defendants moved for an order dissolving and vacating the preliminary injunction. There is nothing in the averments contained in the affidavits in support of the motion to amend the order which indicates that the defendants or either of them were acting in good faith in sending out the notices and warnings complained of in the bill. At that time no bill had been filed by the defendants against the complainant alleging the infringement of the Kenney patent. One had been prepared to be filed against the First Baptist Church of Pittsburgh, but on the argument of the motion to amend the order of injunction the court intimated strongly the view that until an action at law or in equity was brought against the complainant in the bill in this case for infringement of the patents claimed to be owned by the defendants the injunction would not be disturbed. It appears in the defendants' affidavits that many people have taken licenses under the defendant. This may have resulted from the campaign carried on by the defendants against users to the neglect of proceedings against manufacturers, although demanded by the latter.

It is not necessary to allude to all matters which indicate that the defendants were not desirous of having an adjudication of the Kenney patent. The following is sworn to by one of the counsel for the defendants:

"In April, 1909, a bill of complaint was filed against the American Vacuum Cleaner Company, of Newark, N. J., and for a long time this was the most active case involving the patent and might properly be considered the test case. While that suit was pending, however, the defendant company became bankrupt, and the trustee in bankruptcy was substituted as defendant and conducted the defense of the litigation. A large amount of testimony was taken, including something over a thousand printed pages of testimony relating to the so-called Westman prior use, which is considered one of the important defenses of the patent. This case is still pending, but for some time it has not been actively prosecuted, largely because the trustee in bankruptcy has sold the manufacturing plant which has been closed down for over a year. Obviously there is nothing left in this case but the question of damages which might be recovered against a bankrupt concern."

It appears the testimony in the case referred to in that affidavit was printed to the extent of over 1,000 pages. It appears the trustee in bankruptcy was substituted and conducted the defense, and it appears that the case is still pending. The excuse for not proceeding with it to have an adjudication as to the validity of the patent is not good. With respect to apparatus so widely popular as the proceedings show vacuum cleaning apparatus to have become, the question of the validity of what the defendants in this suit call the basic or fundamental patent was far more important than the question of any damages that could be recovered from the bankrupt estate.

A matter has arisen since the application for a modification of the preliminary injunction was made which throws some further light upon the defendants' bad faith in adopting the methods which are complained of in the bill. A motion was made to adjudge the de-

fendants in contempt for violation of the injunction, and there was produced a circular letter signed by the defendant the McCrum-Howell Company under date of June 7, 1911, admittedly genuine, in which occurs this sentence, "We must protect our property from trespass. This we will do even though it becomes necessary to ask the courts to punish trespassers or infringers." A threat of punishment is intimidation and is unfair in the business world.

A preliminary injunction was properly issued; but, since the defendants have filed their bill against the complainant to have the question of the validity of the Kenney patent determined, the injunction will be somewhat modified, so as to read that:

"The defendants, and each of them, their officers, agents and employes, be, and they are hereby, enjoined, until the further order of this court, from further in any manner issuing or making any warning, threat, improper notice, or improper statement charging the complainant, its officers, agents, or employes, or any one engaged in selling or using vacuum cleaning apparatus manufactured by the complainant, with infringement of the letters patent of the United States granted on the application of David T. Kenney."

BYERLEY et al. v. STANDARD ASPHALT & RUBBER CO.

(Circuit Court, D. New Jersey. June 7, 1911.)

1. PATENTS (§ 303*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

A court will not ordinarily on a motion for a preliminary injunction to restrain infringement of a patent determine the scope and validity of a subsequent patent under which defendant is operating, the presumption being, until overcome by proof, that it substantially differs from the earlier patent, and that defendant is acting within his rights.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 496-498; Dec. Dig. § 303.*]

2. PATENTS (§ 301*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

A preliminary injunction to restrain infringement of a patent denied where defendant had for 15 years been engaged in manufacturing the alleged infringing product under later product and process patents, and had an extensive business with a large investment and outstanding contracts, and where the question of infringement was doubtful on the showing made.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 489-495; Dec. Dig. § 301.*]

Grounds for denial of preliminary injunctions in patent infringement suits, see note to *Johnson v. Foos Mfg. Co.*, 72 C. C. A. 123.]

In Equity. Suit by Francis A. Byerley, executor, and others against the Standard Asphalt & Rubber Company. On motion for preliminary injunction. Denied.

W. K. Richardson and Harrison F. Lyman, for complainants.
Charles K. Offield and Frank L. Belknap, for defendant.

CROSS, District Judge. The bill of complaint in this case is founded upon patent No. 524,130, issued to one Francis X. Byerley August 7, 1894. It has been sustained by the Circuit Court for the Western District of Pennsylvania (181 Fed. 138), and by the Circuit

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Court of Appeals of this circuit (184 Fed. 455, 106 C. C. A. 537). The matter, as now presented, is upon a motion for a preliminary injunction, based upon ex parte affidavits.

The claims relied upon herein are 1, 2, 3, 6, 7, 8, 9, and 10, some of which cover the process and others the product of the manufacture of asphalt from petroleum.

The defendant is operating under two subsequent patents issued October 24, 1899, to George F. Culmer and George C. K. Culmer, known as Nos. 635,429, and 635,430, one covering the process of making asphaltic fluxes and the other the product. It has been engaged, under said patents, in the manufacture of said product since it was organized in 1895, and has invested in its plant, which covers 70 acres, and is unincumbered approximately \$1,000,000. It employs several hundred hands. Its business extends over the United States, into Canada, South America, and over the continent of Europe, and it has outstanding at the present time contracts representing in value \$250,000, some of which are with the United States government. The business of the complainant is relatively small; and, while it is true that that fact does not offer any reason why he should not be given all the protection to which he is entitled, it does nevertheless furnish adequate reason for scanning the situation closely and carefully, in order to ascertain what, if any, equitable relief he is entitled to at this time.

It appears in the case, furthermore, that there is now pending in the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, a suit instituted prior to this by the defendant against the complainant herein, in which the complainant is charged with infringement of the Culmer patents above mentioned; also, that the patentee (now deceased) of the patent in suit knew of the manufacture of the product called for by the Culmer patents between 1898 and 1901, but did not claim that his patent was thereby infringed. There is other testimony tending in the same direction, some of which, however, is denied. But, laying that aside, and turning to the patent in suit, it will be found to be essentially a distillation process. This appears not only from an inspection of the patent itself, but from the opinions of both of the courts of this circuit which have construed the patent. On behalf of the defendant there are three or four affidavits made by as many different experts who swear that there is absolutely no distillation in the Culmer process; furthermore, that the Culmer process and product are, both of them, essentially and radically different from those of Byerley. This impliedly follows from the grant of the Culmer patents. The file-wrappers of those patents are not in evidence, so that it cannot now be determined what, if any, reference was made by the examiner in the Patent Office to the Byerley patent, but the fact of their issue is presumptive evidence of their validity.

Infringement must be shown by clear and convincing testimony, and the burden of proving it rests throughout upon the complainant. Without by anything said herein intending to forestall in any way the ultimate decision of this case, it can nevertheless be emphatically held

at this time that the complainant has not sustained such burden. Doubts that now exist may or may not be resolved when the witnesses shall have been submitted to cross-examination, but, however that may be, it would be rash indeed for the court to overthrow the evidence of defendant's experts by force as it were, follow that up by putting its own unaided construction upon the claims of the Culmer patents, and then determine that they infringe the Byerley patent. It is sufficient to say that the question presented is not only perplexing, but so doubtful and uncertain under the evidence as to prohibit the issue of a preliminary injunction.

[1] The court will not ordinarily on a motion of this character determine the scope and validity of the claims of a subsequent patent under which a defendant is operating. Such a defendant is *prima facie* acting within his rights. The presumption is that the later patent substantially differs from the earlier.

In *Pavement Co. v. City of Elizabeth*, 4 Fish, 189, Fed. Cas. No. 312, Mr. Justice Strong said:

"The grant of the letters patent was virtually a decision by the Patent Office that there is a positive difference between the inventions. It raises the presumption that, according to the claims of the latter patentees, this invention is not an infringement of the earlier patent."

The above language was incorporated into the opinion of the Supreme Court in *Boyd v. Janesville Hay Tool Co.*, 158 U. S. 260, 261, 15 Sup. Ct. 837, 39 L. Ed. 973. See, also, *Miller v. Eagle Mfg. Co.*, 151 U. S. 186, 208, 14 Sup. Ct. 310, 38 L. Ed. 121, and *Randsome v. Hyatt*, 69 Fed. 148, 16 C. C. A. 185. Such presumption in favor of the subsequent patent exists until overcome by proof, as was held in the case relied upon by the complainant. *American Car & Foundry Co. v. Seeger Co.*, 178 Fed. 278, 101 C. C. A. 542. That ruling, it should be noted, was made at final hearing.

[2] Much might be added were it necessary upon the point that the defendant is responsible and apparently able to respond to any decree that may be ultimately made against it. It is sufficient to repeat, however, that the fact of infringement under the proofs rests in doubt and uncertainty.

The rule to show cause will therefore be discharged, with costs.

UNITED STATES v. GILLMORE.

(Circuit Court, S. D. New York. May 27, 1911.)

1. UNITED STATES (§ 114*) — FINDING OF COMPTROLLER — CONCLUSIVENESS — STATUTES.

Act July 31, 1894, c. 174, § 8, 28 Stat. 207 (U. S. Comp. St. 1901, p. 162), providing that the finding of the comptroller on claims against the United States shall be final and conclusive as to the executive branch of the government, does not render such finding conclusive on the courts, but leaves the merits open for judicial determination.

[Ed. Note.—For other cases, see United States, Dec. Dig. § 114.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. UNITED STATES (§ 118*)—CLAIMS—CONSTRUCTION OF STATUTES—ACTS OF OFFICIALS—MONEY PAID.

In the absence of statute, the United States is not bound by a mistaken construction of an act of Congress made by one of its officials, and may recover money paid pursuant to such construction.

[Ed. Note.—For other cases, see United States, Dec. Dig. § 118.*]

3. ARMY AND NAVY (§ 10*)—"SERVICE."

An army officer is not discharged from service by his retirement, or out of the service, within Acts Feb. 27, 1877, c. 69, 19 Stat. 244 (U. S. Comp. St. 1901, p. 915), May 26, 1900, c. 586, 31 Stat. 210 and March 2, 1901, c. 803, 31 Stat. 902 (U. S. Comp. St. 1901, p. 905).

[Ed. Note.—For other cases, see Army and Navy, Dec. Dig. § 10.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6430-6433]

4. ARMY AND NAVY (§ 13*)—SOLDIERS—ALLOWANCES.

Act March 3, 1865, c. 81, § 4, 13 Stat. 497 and Act Jan. 12, 1899, c. 46, 30 Stat. 784, providing that officers mustered out of the service shall be entitled to three months' pay and travel, apply to officers mustered out of the volunteer service, and not to a retired army officer who resumes his two-thirds pay from the date of his discharge, and, such officer having received such travel pay and allowances, the United States is entitled to recover the same.

[Ed. Note.—For other cases, see Army and Navy, Dec. Dig. § 13.*]

Action by the United States of America against Quincy O. M. Gillmore. Judgment for plaintiff.

A. S. Pratt and C. E. Whitney, for the United States.
Alexander S. Bacon, for defendant.

HAND, District Judge. This is a case in which I feel compelled with some reluctance to give judgment against the defendant for the following reasons:

[1] First. The statute (Act July 31, 1894, c. 174, § 8, 28 Stat. 207 [U. S. Comp. St. 1901, p. 162]) which makes the finding of the Comptroller "final and conclusive," limits its own effect to the "executive branch of the government." I do not know what that means, unless it be to leave it open to the courts to re-examine the merits and decide, regardless of the finding of the Comptroller.† It was no doubt to give to the treasury department an authoritative word when it chanced to differ with the other departments. Moreover, there is no evidence that the Comptroller passed upon the defendant's claim, at the time when it was first paid. So far as the facts show, he advised the Secretary of War to the contrary, though it is perhaps not certain that he was speaking of this very case. The payment was made by the Paymaster General under circumstances not appearing, and there is no room for the application of the statute.

[2] Second. In the absence of such a statute, which of course Congress could make generally applicable, the United States is not bound by a mistaken construction of an act of Congress made by one of its officials, but can recover the money so paid. U. S. v. Burchard, 125 U. S. 176, 8 Sup. Ct. 832, 31 L. Ed. 662; Wisconsin Central R. R. v. U. S., 164 U. S. 190, 17 Sup. Ct. 45, 41 L. Ed. 399. This does not mean that, where the account has once been settled and the sum paid

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† This accords with the universal understanding prior to the statute. U. S. v. Bank of Metropolis, 15 Pet. 377, 10 L. Ed. 774.

to the claimant, the Comptroller can still under the statute make a binding *ex parte* readjustment of it. *U. S. v. Olmsted*, 118 Fed. 433, 55 C. C. A. 249; *U. S. v. Willcox*, 118 Fed. 729, 55 C. C. A. 519. The language in *U. S. v. Olmsted*, 118 Fed., page 434, 55 C. C. A. 249, that the government may sue when an individual might sue, was in any case obiter, and is contrary to the two cases cited in the Supreme Court, if it means that any erroneous construction of an act of Congress makes the payment conclusive.

[3] Third. The question being open on the merits, it becomes one of whether or not the defendant was discharged from "service" or "the service" under the acts of 1877 and 1899. There seems to be no doubt that as a retired officer he is still in the military service of the United States. *U. S. v. Tyler*, 105 U. S. 244, 246, 26 L. Ed. 985. Mr. Justice Miller says in that case as follows:

"It is impossible to hold that men who are by statute declared to be a part of the army, who may wear its uniform, whose names shall be borne upon its register, who may be assigned by their superior officers to specified duties by detail as other officers are, who are subject to the rules and articles of war, and may be tried, not by a jury, as other citizens are, but by a military court-martial, for any breach of those rules, and who may finally be dismissed on such trial from the service in disgrace, are still not in the military service."

He is thus entitled to all the rights and must be subject to all the duties of an officer in the military service of the United States.

[4] The next question is whether the two statutes refer to a discharge from the military service of the United States or from the volunteer service. If they do refer to the military service, this is a *casus omissus*, and the defendant has no relief. If they refer to the volunteer service, he was within the statute. As to the act of 1899, which refers specifically to the volunteer service, it would seem that the words "hereafter mustered out of the service" might more properly mean "mustered out of the volunteer service" than "out of all military service." However, by section 4 of chapter 81 of Act March 3, 1865, 13 Stat. 497, it was provided that all volunteer officers "who shall continue in the military service to the close of the war shall be entitled to receive, upon being mustered out of said service, three months' pay proper." Later by chapter 181 of Act July 13, 1865, 14 Stat. 94, this section was amended so as to provide that all volunteer officers "who were in service" at a given date and who were "honorably discharged from the service" before another should have the allowance. It was held in *U. S. v. Merrill*, 76 U. S. 614, 19 L. Ed. 664, that in these two statutes "military service" and "service" included any kind of service, volunteer or regular, and that where a regular officer was discharged from the volunteers, so that he resumed his former pay *instantly*, he could not claim this allowance. I cannot think that the act of 1899, which was drawn to meet the same situation, should be differently construed, and, if so, a regular army officer on active duty would still fall within the decision in *United States v. Merrill*, *supra*. Now after *U. S. v. Tyler*, *supra*, I can see no ground to exempt the defendant, because he is on the retired list. If he is as the Supreme Court has held, in the military service, there is no

escape from the conclusion that the statute does not cover him, except to say that, when applied to active officers, the act means any kind of military service, and when applied to retired officers it means the volunteer service. That is of course an impossible way to treat a statute. As to the travel pay and subsistence, the act of 1877 is the same in substance as the act of 1899, except that, since its terms are of general application, there is no room for construing it from the context as applying only to volunteers. It is a stronger statute for the plaintiff than the act of 1899.

The defendant urges that I should accept the executive interpretation of the acts, but the trouble is that the executive branches differ, and it so happens that I agree with that construction placed on them by that department which Congress has inter se made controlling.

A great deal has been said of the hardship of such a construction, and indeed the hardship is great in compelling a man to refund money which he has long since and in good faith spent and forgotten. As an original question, however, there is really no great hardship in the Comptroller's construction. As Justice Clifford says in *United States v. Merrill*, supra, these allowances are not gratuities, but are intended to tide over that period after discharge when a civilian has presumably no means of support. Such is not the case with a retired army officer, who resumes his two-thirds pay from the day of his discharge. He is pro tanto precisely in the same position as his brother upon active duty, and there is no period when he is left without resources. It is true that in respect of the commutation of travel and subsistence, the statute results in most shabby treatment, because the government requires the discharged officer to find his way home at his own charges, which is hardly a generous position for a sovereign to whom he has just volunteered his life. Even as to that, ungenerous as the result may be, it is a mistake to suppose that the loss so imposed was \$412.50. That figure is reached upon the assumption of a travel of 20 miles per diem, or some other archaism, long since out of any relation with the facts. The court may take judicial notice that it costs not more than one-tenth of \$412.50 to travel with the greatest comfort from South Carolina to New Jersey, so that though the result be unhandsome, the actual loss involved to the defendant would not have been great, had the allowance been originally denied. An act of Congress must be judged by the fair meaning of the words, and not by what Congress would have said, had the contingency been presented to it which subsequently arises and which the words do not cover; nevertheless it is always a legitimate inquiry whether the construction is unjust or unreasonable. In the case at bar I do not think that except in the omission of a travel commutation which bears some relation to the facts, this construction is either unjust or unreasonable. It is perhaps rather hard on Capt. Gillmore that he should not be permitted to keep a travel allowance, even though it be out of proportion to the actual expenses, to which volunteer officers are entitled, but so is it hard upon officers upon the active list, that they, too, are so deprived, and are only provided with actual transportation, when they retire from the volunteer service. Each loses a substantial perquisite which has be-

come sanctioned by time, but which is none the less for the most part a mere gratuity. The only individual hardship which no one but Capt. Gillmore must bear is the actual expenses he was put to, to reach home. As to those he has a very real grievance, and for that I wish I could give him a remedy.

Verdict directed for the plaintiff for \$812.50, without interest.

In re RUTLAND GROCERY CO.

(District Court, N. D. Georgia. June 7, 1911.)

No. 336.

1. BANKRUPTCY (§ 397*)—PARTNERSHIP—EXEMPTIONS.

On bankruptcy of a firm, a partner could not be allowed as exemptions against his creditors more than he had actually put into the business.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 397.*]

2. BANKRUPTCY (§ 400*)—RULINGS OF REFEREE—REVIEW.

Rulings of a referee on questions of fact in allowing exemptions will not be reversed unless clearly erroneous.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 400.*]

Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

In Bankruptcy. In the matter of bankruptcy proceedings against the Rutland Grocery Company. On certificate of a referee as to the disallowance of certain claims of exemption. Affirmed.

O. N. Starr, J. M. Lang, and F. A. Cantrell, for objecting creditors.
T. W. Skelly and J. G. B. Erwin, Jr., for bankrupt.

NEWMAN, District Judge. This case comes before the court on certificate from the referee as to the disallowance by the referee of certain claims of exemption.

The Rutland Grocery Company appears to have been a partnership composed of J. W. Rutland and O. E. Rutland. The referee says:

"J. W. Rutland inaugurated a business at Calhoun, Ga., in July, 1909, about one year before the filing of the voluntary petition on July 15, 1909, on an investment of approximately \$500. Afterwards he invested about \$600, making a total investment of about \$1,100. A short time after the inception of the business he took into partnership O. E. Rutland, by selling to him a half interest in the business for \$600. The two brothers then ran the business disastrously for about one year, supporting themselves and families from it during that time and incurred a total trade and other indebtedness of \$3,133.58, still unpaid. According to the testimony of O. E. Rutland they put in altogether about \$1,200. J. W. Rutland varies this a little by stating that other vague amounts were put in, making a total of something like \$2,000. They now claim \$1,600 in the shape of exemptions, which is some \$500 more than they invested in the business originally, one year before, if O. E. Rutland testified correctly, and only slightly less than the first investment if J. W. Rutland is correct, which would seem a rather substantial bonus in addition to the support of themselves and families already obtained from the business."

The referee allowed J. W. Rutland \$290 in household and kitchen furniture, etc., and O. E. Rutland \$293 in household and kitchen

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

furniture, etc. He declined to allow them the additional exemption of \$800 each, which the trustee had set apart by dividing the stock of merchandise equally between them at that valuation.

The finding of the referee as to J. W. Rutland is undoubtedly correct as to the transaction with reference to the piano, which I assume, although I have not the papers before me, was not scheduled among his assets.

[1] The other partner, O. E. Rutland, only put \$600 into the business, and he clearly could not claim more as against his creditors than he actually put into the business.

In this court, *In re Camp* (C. C.) 91 Fed. 745, it is said (page 750) :

"But conceding, in view of what has been stated, that the bankrupt court, sitting in Georgia, and passing upon an exemption of a citizen of Georgia, would feel bound to allow an exemption to one partner out of the partnership assets, it is nevertheless perfectly clear that the partner seeking the exemption should have an interest in the partnership assets to the extent and to the amount of the exemption sought. If, on an accounting between the partners, the partner applying for an exemption would have no interest in the partnership effects as against the other partners, he would hardly be allowed to claim such an interest as against the creditors of the partnership."

Independently of this, I do not believe that it would be right to grant an exemption, under the facts of this case, further than the referee has approved it; that is, to O. E. Rutland for more than the amount of \$293, as approved by the referee. He put \$600 into this business, and lived off of it, according to the evidence, for about a year, and now proposes to take one-half of the partnership assets, amounting to \$800, as against creditors to whom they owe over \$3,000, and a large part of this being the purchase money for the stock sought to be so exempted.

I stated in a case some time ago that section 3380 of Hopkins' Code of 1911 appeared to apply to personalty, and I still think that is so, but it will be observed that section 3378 provides that in applying for an exemption:

"(2) The applicant shall also accompany his petition with a schedule containing a minute and accurate description of all real and personal property belonging to the person from whose estate the exemption is to be made, so that persons interested may know exactly what is exempted, and what is not.

"(3) For a failure to comply with this section, either in the original petition or amended petition * * * the ordinary shall dismiss the petition."

While section 3380 might, therefore, not apply to O. E. Rutland, it seems perfectly clear, according to their own contention as to what they believed they owned, that they failed to schedule real estate in Alabama, as a part of their assets, in the bankruptcy petition and in their application in connection with the allowance of an exemption.

[2] The case is not as clear as to O. E. Rutland as it is as to J. W. Rutland, but I am unwilling to disturb the action of the referee. Therefore the conclusion of the referee on the subject is approved, and only the exemptions of \$290 and \$293, respectively, will be allowed.

LOCKPORT FELT CO. v. UNITED BOX BOARD & PAPER CO.

(Circuit Court, D. Connecticut. May 5, 1911.)

No. 1,274.

1. RECEIVERS (§ 148*)—MANAGEMENT OF PROPERTY—CLAIMS.

A lessor of water for mill property in the hands of a receiver, which has no right of lien accruing at each recurring rent day, except as a means of enforcing its claim for rent due for water actually drawn and used by the lessee or its representatives, has no lien for water reserved and not sold or used by the receiver but its claim, if any, is in the nature of a debt against the lessee.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 148.*]

2. RECEIVERS (§ 148*)—MANAGEMENT OF PROPERTY—LIENS—WAIVER.

Where a lessor of water for mill property in the hands of a receiver did not exercise its right to pursue the property each recurring rent day to collect rent for water not used, but sat by silently, it waived any right of lien on the property therefor.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 148.*]

In Equity. Action by the Lockport Felt Company against the United Box Board & Paper Company. The Ousatonic Water Power Company filed a claim for rent. Denied.

Gross, Hyde & Shipman, for complainant.

E. A. Harriman, for claimant.

John T. Robinson, for the United States.

J. G. Boston, for Trust Co. of America.

Chas. A. Safford, for defendant company.

PLATT, District Judge. When this matter was heard the claimant was entitled to the rent due under its water leases on July 1, 1908. Since the hearing that claim with interest has been paid by the general receivers and no longer clogs our action. We are now concerned with its claims since the Connecticut receivers took possession. I decided (182 Fed. 328) that if the claimant had a right of lien on account of the water rent, it was subordinate to that of the Trust Company of America. The net proceeds received from the sale of the Connecticut property amounted to \$9,750, which was placed in the hands of the Riverside Trust Company, subject to the further order of court. Its main function is to provide security for the mortgage which the Trust Company of America represents, which will not be due for a long time. If that function were dissipated, the claimant could look to it for security, if it had a right of lien after the property came into the hands of the Connecticut receivers. If the claimant has no such right of lien, it has no interest in the fund, unless the defendant owes it for rent of the water since the receivers came in. This is the proper time to face the problem about the lien right of claimant, because, if the title to the property which the fund represents was still in the defendant company, the claimant would, if it had such a lien right, be entitled, on the proper proceedings, to take the property and hold it, subject to the lien of the Trust Company of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

America. It ought to have the same privilege in respect of the fund which has taken the place of the property. The fund, therefore, if the claimant's right of lien exists, ought to be kept intact to await the turn of events in regard to the security of the Trust Company of America, and in the meantime the income should be paid to the claimant. We are not now discussing the question whether the claimant reserved any water for the defendant company which the receivers did not use, and is therefore a creditor of the defendant company without security. We are deciding whether a right of lien accrued at each recurring rent day which the claimant could have enforced, and as a corollary to that, whether if such a right of lien did accrue, the claimant has not waived such right by its conduct.

[1] I am clearly of the opinion that under the leases the claimant had no right of lien by paragraph 19, except as a means of enforcing its claim for rent due to it for water actually drawn and used by the defendant or its representatives. If claimant reserved the water called for by the leases during the time of the receivership, selling it to nobody else, hoping against hope that the receivers might ask for it, it may be that it has a claim, in the nature of debt, against the defendant company, but no such claim has been presented, and there is no evidence before the court establishing the fact of such a reservation.

The bulk of claimant's demand comes out of second surplus water at \$8,200 per year. Permanent water, under the lease, went for \$750 per year. It may be that it could have presented to the receivers and established by proof a claim against the defendant company for \$750 per year during the receivership, but it would be another story to show that while the plant was closed and idle, with no use for the water and no prospect that any call would be made while the receivership continued, the claimant constantly had on storage 41 feet of second surplus water, which it religiously refrained from disposing of to any one else. In dry times it might not have had it, and, if it did have it, the temptation to let it go to the next fellow would have been great indeed.

[2] A word more about the right of lien. If claimant could have pursued the property each quarter to collect rent for water not used, it waived that right by acting as it did. The truth about it is that the claimant sat by complacently and saw the unused property going to rack and ruin, and maintained a sphinx-like silence. Its right, if it had any, was an equitable one, and the failure to bring it into action during all those passing quarters killed it. It is impossible for the claimant to galvanize it into life and validity at this late day.

As I understand it, the only issue before the court for discussion at this time is the claim of the petitioner to the fund, based upon its rights as a prior lienor under the Trust Company of America. Being satisfied that no such right of lien exists, the petition of the claimant must be denied.

GERMAN ALLIANCE INS. CO. v. BARNES, Superintendent of Insurance
of Kansas.

(Circuit Court, D. Kansas, First Division. June 17, 1911.

No. 8,868.

1. CONSTITUTIONAL LAW (§ 276*)—PROPERTY RIGHTS—LIBERTY TO CONTRACT—
"TAKING OF PRIVATE PROPERTY."

The taking away by legislative enactment of the free exercise of the right of private contract is an appropriation by the state of private property within the meaning of the fourteenth constitutional amendment.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 845, 846; Dec. Dig. § 276.*

For other definitions, see Words and Phrases, vol. 8, pp. 6851-6862; 7813.]

2. CONSTITUTIONAL LAW (§ 298*)—INSURANCE (§ 4*)—POLICE POWERS OF
STATE—REGULATING FIRE INSURANCE CHARGES—KANSAS STATUTE.

Laws Kan. 1909, c. 152, providing for the regulation of rates and charges by fire insurance companies doing business in the state, is not in violation of any rights secured to such companies by the fourteenth constitutional amendment, but is within the legitimate powers of the state and valid.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 847; Dec. Dig. § 298; * Insurance, Dec. Dig. § 4.*]

In Equity. Suit by the German Alliance Insurance Company against Charles W. Barnes, as Superintendent of Insurance of the State of Kansas. On demurrer to bill. Demurrer sustained.

Thomas Bates, Z. T. Hazen, and Seymour Edgerton, for complainant.

Fred S. Jackson and Charles Blood Smith, for defendant.

POLLOCK, District Judge. This suit was instituted by complainant, an insurance corporation of the state of New York, engaged in transacting the business of fire insurance within the state by its permission and authority, to procure a decree perpetually enjoining and restraining defendant, as Superintendent of Insurance, from proceeding further under or in the enforcement of an act of the Legislature of the state entitled, "An act relating to fire insurance and to provide for the regulation and control of rates of premium thereon, and to prevent discrimination therein," being chapter 152, Sess. Laws 1909, which said act took effect May 29, 1909, by which the Legislature assumed to regulate and limit the rates which should be charged for policies of fire insurance in all cases except where the policy is issued by a farmers' mutual insurance company, organized and doing business under the laws of this state, and insuring only farm property.

The question intended to be presented by the bill for decision is the constitutional validity of the act. Defendant has demurred to so much of the bill of complaint as challenges the validity of the act. The act reads as follows:

"Section 1. That every fire insurance company shall file with the Superintendent of Insurance general basis schedules showing the rates on all classes

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of risks insurable by such fire insurance company in this state, and all charges, credits, terms, privileges and conditions which in any wise affect such aforesaid rates or the value of the insurance issued to assured.

"Sec. 2. No change shall be made in the schedules which have been filed in compliance with the requirements of this act, except after ten days' notice to the Superintendent of Insurance, which notice shall plainly state the changes proposed to be made in the schedules then in force and the time when such changes will go into effect; and such changes shall be shown by filing new schedules, or shall be plainly indicated on the schedules in force at the time; provided, that the Superintendent of Insurance may, in his discretion and for good cause shown, allow changes upon less than the notice specified herein, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

"Sec. 3. When the Superintendent of Insurance shall determine that any rate made by an insurance company in this state is excessive or unreasonably high, or that said rate is not adequate to the safety or soundness of the company granting the same, he is authorized to direct said company to publish and file a higher or a lower rate, which shall be commensurate with the character of the risk, but in every case the rate shall be reasonable.

"Sec. 4. That no fire insurance company shall engage or participate in the insurance of any property located in this state unless the schedules of rates under which such property is insured has been filed in accordance with the provisions of this act; nor shall any fire insurance company write any insurance at a rate different than the rate named in its schedules, or refund or remit in any manner or by any device any portion of the rates so established, or extend to any insured or other person any privileges, advantage, favor, inducement or concession, except as is specified in such schedule.

"Sec. 5. Any fire insurance company entering into any contract of insurance on property located within this state for which no rate has been filed by such company as provided in section 1 of this act, shall within thirty days after entering into such contract, file with the Superintendent of Insurance in such form as may be required by him, a schedule of such property showing the rate thereon, and such information as may be required by such Superintendent of Insurance. Such schedule shall conform to the general basis schedule as provided in section 1, of this act, and when filed shall constitute the premium rate of such company for the described property.

"Sec. 6. That all schedules and local tariffs filed in accordance with the provisions of this act shall be open to the inspection of the public, and each local agent shall have and exhibit to the public copies thereof relative to all risks upon which he is authorized to write insurance.

"Sec. 7. That no fire insurance company shall directly or indirectly by any special rate, tariff, rebate, drawback or other device, charge, demand, collect or receive from any person or persons a greater or less or different compensation for the insurance of any property located in this state than it charges, demands, collects or receives from any other person or persons for like insurance or risks of a like kind and hazard under similar circumstances and conditions in this state; and any fire insurance company violating any of the provisions of this section shall be deemed guilty of unjust discrimination, which is hereby declared to be unlawful.

"Sec. 8. That the Superintendent of Insurance, if he shall find that any insurance company or any officer, agent or representative thereof, has violated any provisions of this act, may in his discretion, revoke the license of such offending company, officer or agent; but the revocation of any license as provided in this section shall in no manner affect the liability of such company, officer, agent or representative to the infliction of any other penalty herein-after provided by any other section for violation of this act; and, provided, that any action, decision or determination of the Superintendent of Insurance under the provisions of this act shall be subject to review by the courts of this state as herein provided.

"Sec. 9. The Superintendent of Insurance shall not make any regulation or order without giving the insurance company concerned reasonable notice thereof, and an opportunity to appear and be heard in respect to the same,

and if any insurance company or any other person, city or municipality which shall be interested in said order shall be dissatisfied with any regulation, order or rate adopted by said superintendent of insurance, said party or parties shall have the right within thirty days after the making of said regulation or order to bring an action against said superintendent of insurance in any district court of the state of Kansas to have such regulation or order vacated, and shall set forth in the petition the particular regulation or order complained of and the particular cause or causes of objection to any or all of them, and a summons shall be served upon the Superintendent of Insurance by delivering a copy thereof to his office at the state capitol, and such service may be had by the clerk delivering a certified copy of said summons by mail to the said superintendent of insurance at his office. Issues shall be formed and the controversy tried and determined as in other cases of a civil nature; and the court may set aside, vacate or annul one or more or any part of any of the regulations or orders adopted or fixed by the said superintendent of insurance which shall be by said court found to be unreasonable, unjust, excessive or inadequate to compensate the company writing insurance thereon for the risk assumed by it, without disturbing others. No injunction, interlocutory order or decree suspending or restraining the enforcement of an order of the Superintendent of Insurance shall be granted, provided; that the court may permit any company complaining under this act to write insurance at any rates which obtained prior to the ordering of the rate complained of, by the Superintendent of Insurance, upon condition that the difference between the rate complained of by the company and the rate at which it seeks to write insurance may be deposited with the superintendent of insurance, and on the final determination of the suit shall be paid by him to the insurance company, if the court shall find it entitled to the same, or to the holders of policies written by said company after the rate complained of was ordered by the Superintendent of Insurance, as the court may deem just and equitable. Whenever any action shall be brought by any insurance company under the provisions of this section within said period of thirty days, no penalties or forfeitures shall attach or accrue on account of the failure of the plaintiff to comply with the order sought to be vacated or modified in said action until the final determination of said suit. Either party to said cause, if dissatisfied with the judgment or decree of said court, may institute proceedings in error in the Supreme Court as in other civil cases, and said court shall examine the record, including the evidence, and render such judgment as shall be just and equitable, in the premises. No action shall be brought in any of the courts of the United States to set aside any order made by the Superintendent of Insurance under the provisions of this act before all of the remedies provided for herein shall have been exhausted by the party complaining. And if any company organized under the laws of this state, or authorized to transact the business of insurance in this state by the Superintendent of Insurance, shall violate this section, the Superintendent of Insurance may cancel the authority of said insurance company to transact business in this state.

"Sec. 10. That any fire insurance company, or any director or officer thereof, or any agent or person acting for or employed by such company, who alone, or with any other corporation, company or person, shall willfully do or cause to be done, or shall willfully suffer or permit to be done, any act, matter or thing in this act prohibited or declared to be unlawful, or who shall willfully omit or fail to do any act, matter or thing so directed by this act to be done, not to be done, or shall be guilty of any infraction of this act, shall be deemed guilty of a misdemeanor, and shall upon conviction thereof be punished by a fine not to exceed one hundred dollars for each offense: provided, that if the offense for which any person shall be convicted, as aforesaid, shall be an unlawful discrimination, such persons shall be punished by a fine not exceeding one hundred dollars, or by imprisonment in the county jail for a term not exceeding ninety days, or by both such fine and imprisonment.

"Sec. 11. No person shall be excused from giving testimony, or producing evidence, when legally called upon so to do at the trial of any other person charged with violation of any of the provisions of this act, on the ground that

it may tend to incriminate him under the laws of this state; but no person shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence under the authority of this act, except for perjury committed in so testifying; provided, that nothing in this act shall affect farmers' mutual insurance companies organized and doing business under the laws of this state and insuring only farm property.

"Sec. 12. This act shall take effect and be in force from and after its publication in the statute book."

While the bill of complaint charges the act to be repugnant to the several provisions of the fourteenth amendment to the national Constitution, and section 1 of article 3 of the Constitution of the state as well, at the oral argument, and in the elaborate and exhaustive brief and argument filed for complainant, but one position is taken and urged with that vigor and reliance which characterizes the presentation to a court of justice of a matter of large importance by earnest, able and diligent solicitors, thoroughly convinced of the justice and right of their client's cause.

The position thus sought to be maintained by solicitors for complainant in their endeavor to establish the invalidity of the act challenged because in violation of the provisions of the fourteenth amendment to the national Constitution may be briefly presented by a statement of the following propositions on which complainant relies:

(1) The statute is one providing for the regulation of rates and charges which may be contracted for and received by complainant in this state in the transaction of the business for which it was created and which by the state it is authorized to transact.

(2) The act of the state in regulating rates to be paid and charges for the performance of a service or in the transaction of a business authorized to be transacted is the taking of private property.

(3) The power exercised by a state in the regulation of rates and charges to be paid for the performance of a service or the transaction of a business is the power of eminent domain; that is, the power to take private property for a public use only.

(4) A contract of fire insurance is a purely private contract of indemnity against loss by fire, and the business of writing such insurance policies or contracts of indemnity for the protection of the property of the citizen against the contingency of loss by fire is a purely private business, disassociated from, and not affected with, any public use.

(5) Ergo, as a contract of fire insurance written between complainant and a citizen of the state is a purely private contract of indemnity of the citizen against loss by fire, and as the fire insurance business of complainant transacted by it within the state, under authority from the state, is a purely private business, wholly disassociated from and not affected in any manner with a public use, it is beyond the constitutional power of the state to regulate the rates charged by it because such attempted regulation constitutes a taking of its private property for the use and benefit of the private citizens of the state; hence, the attempt of the state to so do by the act in question is in violation of the provisions of the fourteenth amendment to the national Constitution, and void.

(6) That the exercise by the state of the power of taking private property for a private use attempted to be employed in the passage of the act in question cannot be justified either under the police power of the state,

(7) Or, under its power of admitting foreign corporations within its borders to engage in business on such terms as it may prescribe, or in pursuance of any other power possessed by the state.

From the foregoing statement of fundamental propositions on which complainant bottoms its charge of invalidity against the act, it is seen to be freely conceded by complainant when in any given case the business transacted or the service performed is in its nature public, quasi public, or affected with a public use in which the public have an interest, or in any case where a member of the public may of right demand on any terms the performance of the service, or the transaction of the business, in such cases the lawmaking power of the state may for the purpose of securing to the public reasonable rates and charges for the service performed or business transacted, and for the purpose of protecting the public from extortion, oppression, or unreasonable rates or charges, make such reasonable regulations of rates and charges to be paid therefor as the lawmaking power may deem wise and prudent. On the contrary, however, it is most earnestly insisted by complainant the business in which it is engaged within the state, under authority of the state, is neither in its inherent nature public, quasi public, nor affected with any public use whatever, but that the business in which it is engaged is in its very nature purely and strictly private between itself and the members of the public with which it deems proper to deal by private contract, in the same manner and to like extent as is the business of the merchant, the grocer, or the butcher in dealing with his patrons; that the personal element does and of necessity must enter into the transaction of such business; that the property of one man of known standing for his care, diligence, probity, and honesty may be a good risk, whereas, like property similarly situated, owned by the weak, the slothful, or the vicious is a hazardous risk, and, as the rate charged is based absolutely and alone on the risk assumed from sheer force of necessity and out of a just regard for fairness and honesty in dealing, the greater risk must pay the greater rate; that the act of the state in stepping between the parties in their negotiations over purely private business affairs, and its attempt to regulate their personal contracts, in such manner as to require complainant to indemnify against the risk by fire, the scoundrel who would willingly, if he believed he could escape detection and punishment for his crime, put the brand to his property, on the same terms and conditions as to the compensation to be paid for assuming the risk as is charged the upright and just man, when from the inherent differences between the men themselves who own the properties, and not a difference in the properties insured, the hazard in the one case is greater than in the other, is not alone an unwarranted intermeddling and invasion on the part of the state with the right of private contract possessed by the citizen under the Constitution, but is also positively paternalistic and vicious.

The elaborate and exhaustive brief, argument, and review of authorities filed and relied upon by complainant in support of the contention made in this behalf cannot but impress the thinking mind with the gravity of the situation and the ultimate consequences which in the natural order of sequence must follow in the wake of such legislation if it be upheld as valid and be extended to all subject-matters to which it may and undoubtedly will in future be made applicable. However, the question presented to the court to determine in this case does not concern itself, on the one hand, with the wisdom or policy of the act, or, on the other, with that state of affairs which will or must inevitably follow in the course of such legislation. The court must consider alone and only whether beyond all reasonable doubt the act challenged lies clearly without the legitimate exercise of that wide range of constitutional power which the people of the state, with the consent of the nation, have conferred on the lawmaking power of the state, as the lawful exercise of that power has been defined, delimited, and declared by those courts whose decisions are controlling here. And in this regard it may be observed the obligation does not rest with those who seek to uphold and maintain the validity of the exercise of power by the state here challenged to point out wherein or whereby the state lays claim to the right to lawfully exercise the power displayed, but it does devolve upon those who deny the exercise of such power to the state to point out with clearness and certainty the precise provision of the national Constitution which in express terms or by necessary implication, says this thing may not be done, for upon the Legislature of this state, by the organic law of the state, is conferred all the legislative power possessed by the people in their collective capacity except such as was by the national Constitution conferred on the Congress, or is by the state Constitution expressly reserved to the people by prohibitive provisions contained in that instrument.

The very broad and comprehensive language of that provision of the state Constitution conferring legislative power reads as follows:

"The legislative power of this state shall be vested in a House of Representatives and Senate." Section 1, art. 2, State Const.

Wherein, then, does complainant with that clearness and precision demanded by the occasion point out beyond peradventure or doubt the act challenged to be in violation of the national Constitution, and thus beyond the power of the state?

It is conceded the act in question does make provision for the regulation of rates and charges in the transaction of the business of fire insurance; that the exercise of the power of fixing or regulating rates is the exercise of legislative power; that the business of fire insurance is a private business, and a contract of insurance has been declared to be a purely private contract of indemnity; that no one has the right to demand of or to compel an insurance company to contract with him either on such terms as may be agreed between the parties, or such terms as may be prescribed by the lawmaking power of the state; that, generally speaking, it is true the only power of the state to compel a member of the body public to part with his private property is in aid of the administration of the affairs of the state or government

under some form of taxation, a power essential to the continued existence and perpetuity of the state, where the compensation made in return for that taken lies in the protection afforded the donor, or by the exercise of that other sovereign power of eminent domain by which a member of the public is compelled to part with his private property for a public use on just compensation being made him in return, a power, the exercise of which is indispensable to the accomplishment of the purposes of government, or where, in the lawful exercise of the police power of the state, private property is seized and confiscated as contraband goods, a power, the exercise of which is essential to the preservation of order and the enforcement of the laws. Again, it may have been at one time thought by the courts of this country the state could only take the private property of its citizens or those members of the great body politic present in or having property within the state by the exercise of the one or the other of the powers above enumerated.

[1] It may also be conceded the exercise of the legislative power of fixing or regulating rates and charges for services performed or engagements undertaken is an appropriation by the state of private property; for it is a taking away from the contracting parties of their right of private contract which is private property. *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937; *Mathews v. People*, 202 Ill. 389, 67 N. E. 28, 63 L. R. A. 73, 95 Am. St. Rep. 241; *State v. Julow*, 129 Mo. 163, 31 S. W. 781, 29 L. R. A. 257, 50 Am. St. Rep. 443; *Harbison v. Knoxville Iron Works*, 103 Tenn. 421, 53 S. W. 955, 56 L. R. A. 316, 76 Am. St. Rep. 682.

It may be further conceded heretofore the exercise of the right to fix or regulate rates and charges has been almost, if not altogether, confined to those engaged in the transaction of a public business or the transaction of a business affected with a public use. And it may be further conceded, as contended by complainant, it were better in the preservation of the liberties and rights of the individual citizen, both natural and corporate, and would the better tend toward the preservation and perpetuation of the state itself, if the line of demarcation in the power of the state to interfere in the regulation of the affairs of its citizens, or those transacting business within its borders were absolutely fixed and established by sound and settled judicial decisions so plain, clear, and cogent that no one might err therein as to his individual rights, that no Legislatures might dare overstep such rights, and that no court might be found in which such rights would not be known, recognized, and enforced. But has this been done?

[2] In the light and trend of recent judicial decisions controlling here, can it be said the state must be denied the right to regulate the rates and charges of either foreign insurance companies transacting business within her borders, as is complainant, or domestic insurance corporations of her own creation, in the exercise of her reserved powers, having in view the great magnitude of the business transacted by such companies, its intimate relation to the commercial business world, and the direct influence the business so transacted has on the prosperity of the individual citizen affected thereby? Although it may be con-

ceded never before to have been done, and that no authority expressly authorizing such interference may be found, and although it may have been heretofore thought the foundation stones underlying the right of the state to enact such regulation has been in principle rejected by the more remote adjudications.

In the determination of this question it will be both a useless and unnecessary labor to attempt a review and discussion of the many authorities on the briefs of solicitors for the respective parties. A reference to a few only of the more recent cases will be attempted. The case of *Noble State Bank v. Haskell et al.*, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, decided January 3d of this year, was a case in which the Legislature of the state of Oklahoma undertook to compel all banking institutions of that state to contribute to a fund to be employed by the state in the liquidation of the debts of any such institution of the state as might become insolvent and unable to pay its depositors. This legislation was challenged as beyond the constitutional power of the state on the seemingly sound ground that in its operation it took the private property of the stockholders of one institution to pay the private obligations of another without the consent and over the protest of the owners. It will be observed there was involved in that case no question of the state's power of taxation. No question of the exercise by the state of the power of eminent domain, no question of the exercise of its police power to take, hold, or confiscate contraband property, and apparently no question of the exercise of any other power of the state heretofore exercised under settled and well established authority, yet the contention of complainant that the act in its operation took its private property for a private use was met by Mr. Justice Holmes, delivering the opinion of the court, in the following language:

"The substance of the plaintiff's argument is that the assessment takes private property for private use without compensation. And, while we should assume that the plaintiff would retain a reversionary interest in its contribution to the fund, so as to be entitled to a return of what remained of it if the purpose were given up (see *Receiver of Danby Bank v. State Treasurer*, 39 Vt. 92, 98), still there is no denying that by this law a portion of its property might be taken without return to pay debts of a failing rival in business. Nevertheless, notwithstanding the logical form of the objection, there are more powerful considerations on the other side. In the first place, it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what in its immediate purpose is a private use. *Clark v. Nash*, 198 U. S. 361 [25 Sup. Ct. 676, 49 L. Ed. 1085]; *Strickley v. Highland Boy Mining Co.*, 200 U. S. 527, 531 [26 Sup. Ct. 301, 50 L. Ed. 581]; *Offield v. New York, N. H. & H. R. Co.*, 203 U. S. 372 [27 Sup. Ct. 72, 51 L. Ed. 231]; *Bacon v. Walker*, 204 U. S. 311, 315 [27 Sup. Ct. 289, 51 L. Ed. 499]. And in the next it would seem that there may be other cases beside the everyday one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume."

Again, in defining the police power of the state, and in pointing out the wide extent of its operations, and the infinite variety of objects which by the state may be accomplished thereunder, it is said:

"It may be said in a general way that the police power extends to all the great public needs. *Camfield v. United States*, 167 U. S. 518 [17 Sup. Ct.

864, 42 L. Ed. 260]. It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

It is self-evident the decision of the question as to what constitutes "great public needs" or what shall be held by "prevailing morality or strong and preponderant opinion" to be "greatly and immediately necessary to the public welfare" must be left to the lawmaking power of the state, for of such matters courts know nothing, and have no means of discovery. It is equally obvious the range of a power so defined in its operations must be as boundless as the mental desires, imaginations, and visions of men.

Again, in speaking of the power of control of the state over the business of banking, which in its nature is a private business, as much as is fire insurance, at least in so far as it relates to mere banks of discount and deposit, it is said:

"We cannot say that the public interests to which we have adverted and others are not sufficient to warrant the state in taking the whole business of banking under its control. On the contrary, we are of opinion that it may go on from regulation to prohibition except upon such conditions as it may prescribe. In short, when the Oklahoma Legislature declares by implication that free banking is a public danger, and that incorporation, inspection, and the above-described co-operation are necessary safeguards, this court certainly cannot say that it is wrong."

Surely, then, if the police power or any power possessed by a state may go to the extent of a compulsory taking of the private property of one banking institution to meet the private obligations of another in the furtherance of a supposedly ultimate benefit to the public, why by the same token and to a like end may the Legislature of a state not provide for the regulation of the rates and charges of fire insurance companies transacting business within its borders and with its citizens, although it be conceded the business of fire insurance is a private business, and the regulation thus imposed does constitute the taking of the private property of the insurance company by destroying the free exercise of the right of private contract, it cannot be thought the intangible property of the insurance company so taken without compensation is more sacred or less inviolate than the tangible property of the bank appropriated by the same means and to the same end. Not only so, but under the doctrine therein declared the state may take under its control the whole subject of fire insurance and conduct its operations in such manner by such agencies and on such terms and conditions as to form of contract, compensation to be paid for the indemnity from risks secured by its citizens, as the lawmaking power may in its wisdom prescribe. Again, the power of the state over the transaction of corporate insurance companies, foreign or domestic, the business of which is not within the power of Congress to regulate under the commerce clause of the national Constitution, must be conceded to be as plenary as is the power of Congress over interstate commerce under the commerce clause (if we lay aside from consideration, for the moment, the public nature of such interstate commerce. In *Atlantic Coast Line Co. v. Riverside Mills*, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. 167, Mr. Justice Lurton, speak-

ing of the power of Congress to make the initial carrier liable for damages for loss or injury to goods in the hands of a connecting carrier, said:

"It is obvious from the many decisions of this court that there is no such thing as absolute freedom of contract. Contracts which contravene public policy cannot be lawfully made at all, and the power to make contracts may in all cases be regulated as to form, evidence, and validity as to third persons. The power of government extends to the denial of liberty of contract to the extent of forbidding or regulating every contract which is reasonably calculated to injuriously affect the public interests."

Again, it is not entirely clear at this late day, as contended by complainant, the business of fire insurance although in its nature a private business will in future continue to be regarded as entirely unaffected with a public use. Mr. Justice Harlan, delivering the opinion of the court in the recent case of *Complainant v. Hale*, 219 U. S. 307, 31 Sup. Ct. 246, 55 L. Ed. 229, wherein the constitutional validity of an act of the state of Alabama, which provided for the recovery by the assured from the company of 25 per cent. more than the actual loss sustained on the mere showing the company writing the contract belonged to an insurance tariff or rate association, said:

"We concur entirely in the opinion expressed by the state court that the statute does not infringe the federal Constitution, nor deprive the insurance company of any right granted or secured by that instrument. The business of fire insurance is, as every one knows, of an extensive and peculiar character, and its management concerns a very large number of people, particularly those who own property and desire to protect themselves by insurance. We can well understand that fire insurance companies, acting together, may have owners of property practically at their mercy in the matter of rates, and may have it in their power to deprive the public generally of the advantages flowing from competition between rival organizations engaged in the business of fire insurance. In order to meet the evils of such combinations or associations, the state is competent to adopt appropriate regulations that will tend to substitute competition in the place of combination or monopoly. *Carroll v. Greenwich Ins. Co.*, 199 U. S. 401, 411 [26 Sup. Ct. 66, 50 L. Ed. 246]. Regulations, having a real, substantial relation to that end, and which are not essentially arbitrary, cannot properly be characterized as a deprivation of property without due process of law. They are enacted under the power with which the states have never parted, of caring for the common good within the limits of constitutional authority. Insurance companies, indeed, all corporations, associations, and individuals, within the jurisdiction of the state, are subject to such regulations, in respect to their relative rights and duties, as the state may, in the exercise of its police power and in harmony with its own and the federal Constitution, prescribe for the public convenience and the general good. *Jacobson v. Massachusetts*, 197 U. S. 11, 27, 31 [25 Sup. Ct. 358, 49 L. Ed. 643]; *Lake Shore, etc., v. Ohio*, 173 U. S. 285, 297 [19 Sup. Ct. 465, 43 L. Ed. 702]; *House v. Mayes*, 219 U. S. 270 [31 Sup. Ct. 234, 55 L. Ed. 213]."

True, in that case, the act was upheld on the ground it was the intent of the Legislature in its enactment to prevent (by punishment of forfeiture to the assured) the combination of insurance companies to stifle competition on the theory that competition in business is an ultimate good, whereas the evident theory and intent of the Legislature in the enactment of the act here in controversy, as shown by its text and title, was that competition between insurance companies for business except mutual insurance companies of the state doing a farm busi-

ness is bad in its tendency and should therefore be cut off and destroyed, to the end that all dealing with them may receive like and equal treatment without discrimination. However, the principle involved and underlying the exercise of legislative power is the same in the one case as it is in the other. It is the exercise of the power to regulate the amount received by the complainant from the assured for entering into the contract of indemnity which is involved in this case, and in that it was the exercise of the power to regulate the amount to be paid to the assured in case of loss sustained, regardless of the terms of the contract. The one act is designed to promote, the other to destroy, competition, but that is a question of state policy, not of law.

Without attempting a further discussion of the propositions relied on by complainant in its elaborate brief and argument, or a reference to the many authorities therein cited and elaborated upon in argument, it will suffice to say in the light of recent decisions, which must control here, I am of the opinion the act challenged does not violate any right secured to complainant by the provisions of the fourteenth amendment to the federal Constitution, and that the act will be upheld as within the legitimate exercise of the lawmaking power of the state.

The demurrer, therefore, to so much of the bill of complaint as challenges the validity of the act will be sustained.

It is so ordered.

UNITED STATES v. ATLANTIC COAST LINE R. CO.

(Circuit Court, E. D. North Carolina. June 16, 1910.)

1. POST OFFICE (§ 22*)—CARRIAGE OF MAILS—DUTY OF CARRIER—OBLIGATION TO UNITED STATES—BREACH OF CONTRACT.

Though a railroad company carrying United States mails under a contract is not with reference thereto a common carrier, and is not therefore liable as an insurer for its safe carriage and delivery, yet, if mail so carried is lost or destroyed by the railroad company's negligence or default, it may nevertheless be liable as for breach of contract.

[Ed. Note.—For other cases, see Post Office, Dec. Dig. § 22.*]

2. POST OFFICE (§ 22*)—MAILS—DESTRUCTION—CARRIER'S LIABILITY—PLEADING.

An allegation that certain mail matter belonging to the United States was lost and destroyed by reason of the negligence and carelessness of defendant railroad company, causing a collision in which the mail and car containing it were destroyed by fire, was sufficiently comprehensive to cover any breach of duty imposed by the contract of carriage and was therefore sufficient.

[Ed. Note.—For other cases, see Post Office, Dec. Dig. § 22.*]

3. POST OFFICE (§ 22*)—DESTRUCTION OF MAIL MATTER—RAILROAD WRECK—RAILROAD'S LIABILITY—DEFENSE.

In an action by the United States against a railroad corporation for breach of a contract to carry the mails arising from a railroad wreck and resulting in the loss and destruction of valuable mail matter, it was no defense that the wreck resulted from the negligent acts of the railroad company's employes in failing to properly discharge assignable du-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ties, and not from acts and omissions imputable to the corporation as such.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 43; Dec. Dig. § 22.*]

4. POST OFFICE (§ 22*)—DESTRUCTION OF MAIL—LIABILITY OF CARRIER—RIGHT TO USE.

Where the United States had received fourth-class mail matter and engaged to transport the same in consideration of the charges exacted, it had sufficient interest in the property mailed to entitle it to maintain an action against the carrier for the value of such mail lost or destroyed through a breach of the carrier's contract to transport the mails with due and reasonable care, though the government was not liable to the owner of the mail for its value.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 43; Dec. Dig. § 22.*]

Action by the United States against the Atlantic Coast Line Railroad Company. On demurrer to complaint. Overruled.

Plaintiff complains in three causes of action, alleging:

(1) That prior to the 18th day of April, 1904, it was the owner and in the possession of certain mail pouches, mail sacks, keys, etc., of the value of \$135.85. That defendant was on and prior to February 13, 1900, and has been continuously since said date, a corporation carrying on, pursuant to the power conferred in its charter, the business of a common carrier engaged in interstate commerce, operating a line of railroad between Weldon, in the county of Halifax, in the state of North Carolina, and the state line dividing the states of North and South Carolina. That plaintiff, on February 13, 1900, entered into a contract with defendant, whereby defendant engaged to carry mail equipment over the line of its railroad between the town of Weldon and the line dividing the states of North and South Carolina and between other points and stations on said railroad, which said line was designated as mail route No. 118,002, at a compensation of \$59,792.16 per annum, being \$346.28 per mile for 172.67 miles and railway post office car service at the rate of \$17,260 per annum, being \$100 per mile for 172.60 miles. That, in pursuance of said contract and other like contracts, there was existing and in force, on the 18th day of April, in the year 1904, an authorized United States mail service designated as the Washington & Charleston Railway post office running between the city of Washington, D. C., and the city of Charleston, S. C., of which the said line between Weldon, N. C., and the said state line formed a part. That, under the contract aforesaid, it was the duty of the defendant to carry, in a safe and secure manner, over the line of said mail route, such railway post office car, and the mail matter and mail equipment therein contained, as should be delivered to it by the plaintiff, or its agents, for that purpose. That on the said 18th day of April, 1904, at Lucama, in the county of Wilson, in the state of North Carolina, on the mail route aforesaid, the defendant, its agents and employes, then and there having in its possession the said railway post office car and the said mail equipment therein contained, as a part of its train No. 35, so negligently and carelessly managed and operated the engine drawing said train, and the railway post office car attached thereto, which contained the mail equipment aforesaid, and the defendant, its agents and employes, so carelessly and negligently managed and operated another train and the engine drawing said other train, and the cars attached thereto, on said line of railroad, and the defendant, its agents and employes, negligently and carelessly permitted its railroad track at said Lucama to be in such defective condition and poor repair, as negligently and carelessly to cause a collision between said trains, and negligently and carelessly in the manner aforesaid and in another and other manners to cause the wreck, burning and destruction of said railway post office car attached to said train No. 35 and the mail equipment aforesaid therein contained; said equipment being of the value of \$101.89.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

(2) For a second cause of action, plaintiff alleges the matters set out in its first cause of action in regard to defendant's corporate existence, etc., and its contract with defendant, and: "That, under the contract aforesaid, the defendant had in its possession as bailee of the plaintiff on the 18th day of April, in the year 1904, one certain railway post office car which contained mail matter and mail equipment, which had theretofore been delivered to the defendant by the plaintiff under said contract. That, as a part of the mail matter in said cars, the defendant had in its possession on the date aforesaid certain pieces of registered, ordinary, and foreign mail matter, which is described in the complaint, and consisted of 46 registered parcels containing medallions, periodicals, pistols, crayons, pictures, books, merchandise, watches, cash, diamonds, jewelry, and numerous other articles of the aggregate value of \$9,154.54. Many of the parcels were mailed in Paris and addressed to persons at Havana, and other points in Cuba." Plaintiff alleged the negligent destruction of the mail car as its first cause of action, and further: "That on the 18th day of April, 1904, and upon other subsequent days, after the negligent wrecking, burning, and destruction of said train No. 35, at Lucama, in the county of Wilson, state of North Carolina, on the mail route aforesaid, the defendant, its agents and employes, knew, immediately after said wreck occurred, that there was in the debris of said railway post office car, and its contents, certain valuable matter, including certain and sundry precious stones or diamonds, of great value; nevertheless, the defendant, its agents and employes, wholly regardless of its duty, utterly failed and neglected to guard, protect, preserve, and rescue from said fire, loss, and destruction, and from the depredations of its own agents and employes and of other persons, the debris of said railway post office car and the said valuable matter which it contained, which could have been rescued and preserved by the defendant, its agents and employes, from said fire, loss, and destruction, and from the depredations of said agents, employes, and persons. But, on the contrary, plaintiff is informed and believes, and on such information and belief alleges, that the defendant, its agents and employes, in violation of its said duty, permitted other persons to rifle the debris of said railway post office and its contents and to pillage for and carry away large quantities of said valuable matter to the value of \$9,154.54."

(3) That, repeating the allegations in the first and second causes of action regarding the duty of defendant in the premises, it avers that, after the destruction of the car, defendant's agents and servants pillaged and carried away the diamonds in defendant's possession and under its control as aforesaid.

Defendant demurred to the complaint:

(1) For that said complaint does not allege that the said defendant was a common carrier of mail, nor a bailee thereof, and hence sets forth no breach of duty running to the plaintiff herein in regard thereto.

(2) For that said complaint shows no duty upon said defendant, either at law or under the contract referred to, to guard the said mail matter mentioned.

(3) For that said complaint does not allege that the said United States mail matter, alleged to have been lost and destroyed, was the property of the plaintiff herein, or that the plaintiff had any special or property interest therein; hence shows no right in said plaintiff to maintain this action.

(4) For that said complaint does not allege that the said plaintiff has been damaged or suffered any loss whatever, either in its own property, or its rights, or any loss or damage of property for which it is accountable to others; hence sets forth no cause of action against this defendant.

(5) For that said complaint does not allege that the said defendant has been negligent in any nonassignable duty imposed upon it by law or by the alleged contract, and does not allege that said defendant has been negligent or careless in the selection of its employes and servants engaged in the operation of the train specified in said contract.

(6) For that it appears from the facts stated in the said complaint that the plaintiff, neither in its own right, nor as custodian of the mail matter therein referred to, suffered any loss or damage by reason of the destruction and loss

of said mail matter alleged in and by said complaint, since, in accordance with the statute in such case made and provided, the plaintiff was not and is not liable to the owners of said mail matter for the full value thereof.

(7) For that it appears from said complaint that the plaintiff is undertaking therein and thereby to consolidate 45 different, separate, and independent causes of action brought by it as trustee or bailee for and on behalf of 45 different persons, the interests of said different persons being diverse and not identical, and is thereby improperly attempting to join 45 separate causes of action in one complaint.

(8) For that several causes of action have been improperly united in the said complaint, in that plaintiff seeks to recover in and by said declaration the value of certain property and mail matter belonging to many different persons, which were destroyed or lost, which did not belong to the plaintiff, but belonged to many different persons who are not parties to this action, which were destroyed while in the possession of the plaintiff as bailee by the alleged negligence of the defendant, and also to recover the value of certain mail equipment belonging absolutely to the plaintiff, and which it alleges was destroyed by the negligence of the defendant.

(9) That the plaintiff improperly united in the complaint a cause of action in its own right with a cause of action in its right as bailee.

H. F. Seawell, Dist. Atty., for the United States.
George Elliott and Davis & Davis, for defendant.

CONNOR, District Judge (after stating the facts as above). [1] If it be conceded, as the authorities hold, that defendant is not, in respect to carrying the mail, a common carrier, and therefore not an insurer of its safe carriage and delivery, yet it is alleged and, pro hac vice, admitted that, as authorized by its charter, and by congressional legislation, it entered into a contract with plaintiff for a valuable consideration to carry the mail—that is, the railway post office car, the equipment, and the mail matter therein—between the points designated in the complaint. This contract certainly imposed some degree of care—at the least ordinary care—to carry it safely. It is alleged that it so negligently and carelessly managed and operated its train, engine, etc., and that the track was in such defective condition, that two of its engines collided, causing the burning and destruction of plaintiff's property—its mail equipment committed to the care of defendant pursuant to and for the purposes set out in the contract. Unless, as contended by defendant, it is only liable for its corporate act or omission and not for the negligent manner in which its agents and employes discharged their duties, it would seem clear that, for the destruction of the plaintiff's property—the equipment, etc.—defendant is liable for a negligent breach of contractual duty.

[2] The general terms “negligently” and “carelessly” are sufficiently comprehensive to cover any breach of duty imposed by the contract—it is not necessary, or usual, to make the allegation more specific in regard to the degree of care imposed by the relation existing between the parties—this being, upon the evidence, a question of law. But the defendant insists that, as the complaint sets out the negligent acts, or omissions, of defendant's agents and servants resulting in the destruction of the property, the court must see, as matter of law, that such acts and omissions are not imputable to the corporation, but show a failure on the part of employes to discharge

assignable duties, and that for these the corporation, in the absence of any allegation of negligence in the selection of its agents and employes, is not liable. The question presented is interesting and not free from difficulty. The authorities cited by the learned counsel (*Bank v. Minneapolis*, St. P., etc., R. R. Co. [C. C.] 113 Fed. 414, and *Bankers' Mut. Cas. Co. v. Minn., St. P. & S. S. M. Ry. Co.*, 117 Fed. 434, 54 C. C. A. 608, 65 L. R. A. 397) were suits brought by the owners of the mail lost by the alleged negligence or misconduct of subordinate employes of the corporations. The point decided in both cases and fully sustained by the decisions cited is that the action cannot be maintained for the reasons and upon the principles set out. The decisions went upon the principle that there was no contractual relation between the plaintiff and the railroad company, which in carrying the mail was acting as a public agency, employed by the government in discharging a governmental function. *Banking Co. v. Lampley*, 76 Ala. 357, 52 Am. Rep. 334. In *Bank v. Minn., St. P., etc., R. R. Co.*, supra, Lochren, District Judge, says:

"A railway company carrying the mail does not assume any of the duties of a common carrier. No one but the government can require or receive such service, and the duties and responsibilities of such railway carrier of mails are measured by the terms of the contract, and by the provisions of the postal laws and regulations."

No case has been cited in which the government has sued for loss of mail occasioned by the negligence of the carrier or its employes based upon an alleged breach of the contract of carriage. While it may be that, as between the citizen, whose mail is carried by the railroad, as a public governmental agency and the carrier, no privity of contract exists, it does not necessarily follow that, when sued by the government for breach of a contractual duty, the company is not liable for the wrongful or negligent acts or omissions of its agents and employes, as in other cases of a contract for carriage. It is not easy to draw the distinction between those duties which can only be discharged by the corporation, acting in its corporate capacity, and those which it necessarily discharges through the medium of agents, servants, and employes acting within the scope of their employment.

[3] The corporation undertook, by its contract, to safely carry; that is, use ordinary care as a bailee for hire in carrying the mail equipment, etc. This it could do only by maintaining its tracks in a reasonably safe condition, and by operating its trains by means of engineers, conductors, and other employes intrusted with the discharge of such duty. Ordinarily it is conceded that it is liable for the negligence of these employes. It is not clear why, when the plaintiff enters into a contract with the corporation, to aid it in the performance of its duty to the public, the same principles governing the rights and duties of the parties, as in other similar contracts, do not apply. If the action was in tort, other principles might be invoked. The court cannot take judicial notice of the division of duties made by the company among its employes in the management and operation of its road and trains. The demurrer to the first cause of action must be overruled.

[4] In addition to the causes of demurrer assigned to the first, it is insisted that, as to the second cause of action for the loss of the diamonds and other articles contained in the mail pouches, the plaintiff had no property or interest, that it was not liable to the owner, and that, in no aspect of the case, is defendant liable for their value. Assuming that the defendant would be liable to plaintiff if it had been the owner of the diamonds, it would seem that, to the extent that plaintiff had a special property as bailee for carriage, it would recover at least nominal damages for breach of the contract of carriage. The Postmaster General is empowered to establish a uniform system of registration, and to provide rules under which the sender of first-class registered matter shall be indemnified for losses thereof in the mails not to exceed a fixed amount. R. S. § 3926 (U. S. Comp. St. 1901, p. 2685); 5 Fed. Stat. Anno. 871, amended by 32 Stat. L. 117 (U. S. Comp. St. Supp. 1909, p. 1008). The articles alleged to have been lost were fourth-class matter, and for these it seems no indemnity is provided. 20 Stat. L. 358, 5 Fed. Stat. Ann. 828 (U. S. Comp. St. 1901, p. 2646). It would seem, therefore, that the plaintiff is not liable to the owner of the diamonds and other articles lost by the burning of the mail car.

The only case in point which has been cited is *The Winklered*, L. R. Prob. Div. (1902) 42. In that case it is held that, when a vessel carrying the mail was sunk by a collision with another vessel, the Postmaster General could recover of the defaulting vessel the full value of the mail thus lost, upon the principle that as bailee of the mail he was entitled, as against a wrongdoer, to recover for the benefit of the owner the full value of the property destroyed. See, also, *National Surety Co. v. United States*, 129 Fed. 70, 63 C. C. A. 512. There the plaintiff in error had become surety on the bond of a mail carrier who converted to his own use a letter committed to his care for carriage containing \$11. The government sued for this amount. The owner of the letter had made no demand upon the government for the money. The plaintiff in error contended:

"That the United States is entitled to no recovery in any event because it has neither incurred any liability, nor suffered any loss, by the theft of the money by the principal in the bond."

To this contention Sanborn, Circuit Judge (for the Circuit Court of Appeals, Eighth Circuit), said:

"The right of the nation, however, to a recovery in this action, is not necessarily limited by the acts or omissions of the owner of the stolen money since the theft. It depends upon the facts and circumstances when the money was stolen. When this was done the money was in the custody—the possession—of the United States, under its contract with those who had intrusted the letters to its care to safely carry and deliver them to their addresses for the valuable consideration which it had received by virtue of the stamps upon the letters which had been purchased from it. The contract between the United States and the owners of the letters was a bailment of the class known as *'locatio operis mercium vehendarum'*. It was a carrier—a bailee of the letters for hire of labor or service. From this carrier, or bailee, Eich took and converted the letters to his own use. But a bailee may maintain an action of trespass, of trover, or of conversion against a wrongdoer for the disturbance of his possession of the property. The United States, there-

fore, was not without sufficient interest in the subject-matter to enable it to recover of Eich, the letter carrier, the entire value of the property he took, or its damages for the conversion of the money"—citing *The Beaconsfield*, 158 U. S. 303, 15 Sup. Ct. 860, 39 L. Ed. 993, and other cases.

The learned counsel for defendant insist that these decisions are not conclusive of the merits of this case. This must be conceded; but they are in point upon the right of the plaintiff to sue for the wrongful conversion or destruction of the property committed to its care for carriage through the mail. Whether the defendant is liable for the loss of a registered package containing diamonds and jewels without notice of such contents is an interesting question. The question whether any other or different liability accrues by reason of defendant's agents and employes converting the diamonds after the destruction of the car than for negligently permitting other persons to do so is not free from difficulty. I am of the opinion that the action can be maintained for the value of the equipment destroyed by the negligence of defendant's agents and servants. The other causes of action are much more doubtful; but upon a careful consideration of the entire case the demurrer will be overruled to the end that the defendant may answer, and upon a full development of the case present its defenses. There is no misjoinder of parties or causes of action. If, at any time during the progress of the cause, it should appear to be necessary or proper, the owners of the diamonds may be made parties plaintiff.

Demurrer overruled, and defendant allowed 60 days within which to file answer.

FRAME et al. v. BIVENS et al.

(Circuit Court, E. D. Oklahoma. October 30, 1909.)

No. 237.

1. INDIANS (§ 15*)—LANDS—ALIENATION—SURPLUS LANDS.

Under the provision of the Indian appropriation act (Act April 21, 1904, c. 1402, § 1, 33 Stat. 204), that "all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed," an adult intermarried citizen of the Chickasaw Nation, not of Indian blood, had power to execute a valid mortgage on his surplus allotment, although patent had not issued therefor, which was made a condition precedent to alienation by the supplemental agreement of July 1, 1902, with the Choctaw and Chickasaw Tribes.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 15.*]

2. INDIANS (§ 15*)—LANDS—"ALIENATION"—MORTGAGE.

A mortgage given to secure a loan by an intermarried citizen of one of the Five Civilized Tribes, not of Indian blood, on his surplus lands, is a conveyance amounting to an "alienation" within the meaning of Act April 21, 1904, c. 1402, § 1, 33 Stat. 204, removing all restrictions on alienation by such allottees except as to homesteads.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 15.*]

For other definitions, see Words and Phrases, vol. 1, pp. 302-306; vol. 8, p. 7571.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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3. WORDS AND PHRASES—"CONVEYANCE."

A conveyance is the transfer of the title of land from one person or class of persons to another.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1575-1584; vol. 8, p. 7619.]

Appeal from the United States Court for the Southern District of Indian Territory.

Suit by J. A. Bivens and W. A. Wolverton against W. B. Frame and J. S. B. Apollos. Decree for complainants, and defendants appeal. Affirmed.

L. S. Dolman, for appellants.

Potterf & Walker, for appellees.

CAMPBELL, District Judge. This case was tried in the United States Court for the Southern District of Indian Territory, and a decree rendered in favor of appellees on June 7, 1907. Thereafter appellants appealed the case to the Court of Appeals for the Indian Territory, and the case was pending in that court undetermined when statehood intervened.

Pursuant to provisions of the enabling act (Act June 16, 1906, c. 3335, 34 Stat. 267), it is now before this court for determination. The history of the case is substantially as follows:

On December 13, 1906, appellees, plaintiffs below, filed their complaint in equity, and alleged, in substance: That on or about May 28, 1905, Walcott & Mulkey borrowed from one Mrs. Maud Phillips \$2,000, and executed therefor their certain promissory note. That plaintiffs signed said note as sureties for the said Walcott & Mulkey. That theretofore, to wit, August 1, 1905, the defendants Arthur Walcott and Lutie May Walcott, his wife, and John G. Mulkey and Elsie Mulkey, his wife, joined in a mortgage upon the lands described in said complaint, the same being the lands or a portion of the lands, allotted to the said John G. Mulkey and Arthur Walcott as intermarried citizens of the Chickasaw Nation of Indians, exclusive of the homestead of each and commonly called their "surplus allotments." That thereafter, on November 28, 1905, the parties joined in a renewal of said note for a period of six months. That said mortgage was duly recorded in the office of the clerk of the United States Court at Ardmore, Ind. T., October 31, 1905, in book 28, at page 80. That by the terms of said mortgage defendants conveyed to plaintiffs said lands. That said note became due and was not paid, and J. A. Bivens, one of said sureties, on November 28, 1906, assumed and paid the same. That defendants W. B. Frame and Beula Frame, and J. S. B. Apollos and Lizzie Apollos, are claiming the surplus lands of Mulkey under a conveyance in the nature of a quitclaim deed from Mulkey made subsequent to said mortgage, and are in possession of said lands through tenants. That the said Arthur Walcott and John G. Mulkey are citizens by intermarriage, and not by blood, of the Chickasaw Nation and of the United States, and that they are insolvent. They pray a foreclosure of their mortgage

and a sale of the lands and a receiver during the pendency of the suit. On January 2, 1907, appellees W. B. Frame and J. S. B. Apollos filed a motion to make more specific and certain and a general and special demurrer, both of which were overruled by the court and excepted to by defendants. April 6, 1907, defendants Frame and Apollos filed an answer in which they admit the allegations in plaintiffs' complaint, except that they deny that the mortgage conveyed or affected the land allotted to John G. Mulkey in any way, and deny that the record of it constituted any notice to them. Defendants further admit that subsequent to the date of the mortgage, to wit, on May 11, 1906, they acquired by purchase and took possession of said lands and are still in possession of the same. Defendants allege that these lands are a portion of the lands selected by John G. Mulkey as such Indian under the act of July 1, 1902 (supplemental agreement), exclusive of his homestead. That his allotment certificate is dated October 21, 1903, and that his patent thereto had not issued at the time of the filing of the suit. That the mortgage sued on was contrary to sections 15 and 16 of said supplemental agreement. Defendants ask that the complaint be dismissed and for costs. Plaintiffs filed June 7, 1907, a general demurrer to defendants' answer which was upon the same day sustained by the court, which ruling was excepted to by defendants, whereupon defendants announced their intention not to plead further in the cause, and judgment was rendered against all the defendants as prayed for, including these defendants, and a decree entered upon said judgment, decreeing that the lands belonging to these defendants should be sold first, and, if they failed to bring the amount of the judgment, then resort should be had to the other lands therein, all of which was duly excepted to by defendants.

[1] There are numerous errors assigned by the appellants, but they may all be condensed in the one paragraph found on page 6 of appellants' brief, which is as follows:

"Briefly stated, the error complained of consists in holding that a mortgage of the surplus lands of an intermarried citizen of the Chickasaw Nation of Indians, given subsequent to allotment and the act of April 21, 1904, and prior to the issuance of patent and the act of April 26, 1906, was valid and enforceable against lands in possession of a grantee of the intermarried citizen, who purchased subsequent to the act of April 26, 1906."

In Act June 28, 1898, c. 517, 30 Stat. 495, relating to allotment of lands, it was provided that the lands allotted should be nontransferable until after full title should be acquired, and should be liable for no obligation contracted prior thereto by the allottee. It was further provided that if the agreement relating to the Choctaws and Chickasaws, commonly known as the "Atoka Agreement," which was incorporated in the act, should be ratified, the provisions of the act should only apply where the same would not conflict with the terms of said agreement. This agreement was ratified. In this agreement it was provided that the surplus land allotted to adult members should be alienable for a price to be actually paid and to include no former indebtedness or obligation—one-fourth in one year, one-fourth in

three years, and the balance in five years from date of patent. This agreement was followed by Act July 1, 1902, c. 1362, 32 Stat. 641, relating to the Choctaws and Chickasaws, commonly known as the "Supplemental Agreement," which provided in detail for the allotment of land.

Section 3 of the supplemental agreement provides as follows:

"The words 'member' or 'members' and 'citizen' or 'citizens' shall be held to mean members or citizens of the Choctaw or Chickasaw Tribe of Indians in Indian Territory, not including freedmen."

Section 15 provides:

"That lands allotted to members and freedmen shall not be affected or incumbered by any deed, debt or obligation of any character, contracted prior to the time at which said lands may be alienated under this act, nor shall said lands be sold, except as herein provided."

Section 16 provides:

"All lands allotted to the members of said Tribes, except such land as is set aside to each for a homestead, as herein provided, shall be alienable after issuance of patent, as follows: one-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years, in each case from date of patent."

Section 23 provides:

"Allotment certificates issued by the commission to the Five Civilized Tribes shall be conclusive evidence of the right of any allottee to the tract of land described therein."

Section 71 provides:

"After the expiration of nine months after the date of the original selection of an allotment by or for any citizen or freedman of the Choctaw and Chickasaw Tribes, as provided in this agreement, no contest shall be instituted against such selection."

By the Indian appropriation act (Act April 21, 1904, c. 1402, 33 Stat. 204), it was provided that:

"All the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed."

By Act Cong. April 26, 1906, c. 1876, 34 Stat. 137, entitled "An act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes," it was provided:

"That conveyances heretofore made by the members of any of the Five Civilized Tribes, subsequent to the selection of allotment and subsequent to the removal of restrictions, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances are made prior to the issuance and recording or delivery of patent or deed." Section 19.

At the time the mortgage was made from Mulkey to appellees, Mulkey held the land in controversy by virtue of his allotment certificate. As said by Judge Sanborn in *Wallace v. Adams*, 143 Fed. 716, 74 C. C. A. 540:

"The allotment certificate, when issued, like a patent to land, is dual in its effect. It is an adjudication of the special tribunal empowered to decide the

question that the party to whom it issues is entitled to the land and is a conveyance of the right to this title to the allottee."

The interest in the land conveyed to Mulkey by the allotment certificate was such a property interest as he could have immediately conveyed to another but for the restrictions imposed upon its alienation by the terms of the agreement. *Doe et al. v. Wilson*, 23 How. 457, 16 L. Ed. 584; *Jones v. Meehan*, 175 U. S. 1, 20 Sup. Ct. 1, 44 L. Ed. 49.

Now, what were the restrictions upon the alienation of the land in controversy? They were finally fixed by section 16 of the supplemental agreement of 1902, quoted above, namely, that it should be alienable after issuance of patent, one-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years in each case from date of patent. The first prerequisite to alienability was the issuance of a patent. The second, the expiration of a prescribed time after the date of that patent. These prerequisites to alienability constitute the restrictions upon alienation. But Mulkey was an adult allottee, not of Indian blood, and the land was not his homestead. As to such allottees, the act of April 21, 1904, above quoted, removed all restrictions upon the alienation of their surplus lands.

We have seen that on April 21, 1904, Mulkey had a property interest in the land which but for the restrictions imposed he could have alienated or conveyed. The act removes "all" restrictions, as well that relating to the issuance of patent as that prescribing and fixing the time which must elapse after date of patent. Therefore the contention of appellants that the act of April 21, 1904, did not remove the necessity that patent should issue as a prerequisite to alienation must fail. After the passage of that act, Mulkey could convey or alienate his interest in the land in controversy without restriction. There having subsequently arisen some question as to whether, notwithstanding the act of April 21, 1904, the lands thereby intended to be relieved from restrictions could be sold by allottees before issuance of patent, Congress by the provision above quoted from the act of April 26, 1906, settled the question by declaring that the prior issuance of patent was not necessary to the conveyance by the allottee of such right or interest in the land as he held by virtue of the certificate. By this provision, in my judgment, Congress was merely declaring and making clearer, if possible, what was intended by the act of April 21, 1904. It was not an attempt to validate transactions theretofore deemed invalid. Nor can appellants complain that their interests are in any way affected by this act, for the conveyance under which they claim is of a still later date.

Does the right to alienate include the right to mortgage? To "alienate" is to "convey"; to "transfer." 1 Bouvier's Law Dictionary, p. 130.

[3] A conveyance is the transfer of the title of land from one person or class of persons to another. 1 Bouvier's Law Dictionary, p. 434. As is customary in such instruments, the mortgage in this case

provides that the mortgagors granted, bargained, sold, and conveyed to the mortgagees the lands involved, conditioned that upon payment of the note and interest the instrument shall be void, otherwise to remain in full force and effect. At the time this mortgage was made certain statutes of Arkansas relating to mortgages were in force in Indian Territory by virtue of an act of Congress. At the time these statutes were so adopted, the effect given to mortgages by the Supreme Court of that state is thus stated in the syllabus to *Whittington v. Flint*, 43 Ark. 504, 51 Am. Rep. 572:

"The legal estate in mortgaged property passes to the mortgagee, subject to be defeated by performance of the conditions of the mortgage; and the right of possession follows the legal title, unless controlled by stipulations in the deed, or by the apparent intention of the parties."

In the case last mentioned the court refers to the decision of the United States Supreme Court in *Conard v. Atlantic Insurance Company*, 1 Pet. 386, 7 L. Ed. 189. In that opinion the Supreme Court had occasion to consider the effect of a mortgage, and said:

"Then, again, it is contended on behalf of the United States that the priority thus created by law, if it be not of itself a lien, is yet superior to any lien, and even to an actual mortgage, on the personal property of the debtor. It is admitted that, where any absolute conveyance is made, the property passes, so as to defeat the priority; but it is said that a lien has been decided to have no such effect, and that in the eye of a court of equity a mortgage is but a lien for a debt. *Thelusson v. Smith*, 2 Wheat. 396, 4 L. Ed. 271, has been mainly relied on in support of this doctrine. That case has been greatly misunderstood at the bar, and will require a particular explanation. But the language of the learned judge who delivered the opinion of the court in that case is conclusive on the point of a mortgage. 'The United States,' said he, 'are to be first satisfied; but then it must be out of the debtor's estate. If, therefore, before the right of preference has accrued to the United States, the debtor has made a bona fide conveyance of his estate to a third person, or has mortgaged the same to secure a debt, or if his property has been seized under a *fiери facias*, the property is divested out of the debtor, and cannot be made liable to the United States.' The same doctrine may be deduced from the case of *United States v. Fisher*, 2 Cranch, 358, 2 L. Ed. 304, where the court declared that 'no bona fide transfer of property, in the ordinary course of business, is overreached by the statutes,' and 'that a mortgage is a conveyance of property, and passes it conditionally to the mortgagee.' If so plain a proposition required any authority to support it, it is clearly maintained in *United States v. Hooe*, 3 Cranch, 73 [2 L. Ed. 370]. * * *

"It is true, that in the discussions in courts of equity a mortgage is sometimes called a lien for a debt. And so it certainly is, and something more. It is a transfer of the property itself, as security for the debt. This must be admitted to be true at law, and it is equally true in equity; for in this respect equity follows the law. It does not consider the estate of the mortgagee as defeated and reduced to a mere lien, but it treats it as a trust estate, and, according to the intention of the parties, as a qualified estate, and security. When the debt is discharged, there is a resulting trust for a mortgagor. It is therefore only in a loose and general sense that it is sometimes called a lien, and then only by way of contrast to an estate absolute and indefeasible."

[2] In my judgment the mortgage in this case was a conveyance amounting to alienation as that term is used in the act of April 21, 1904. In view of the class of persons, the character of the land affected by the act, and the local conditions and circumstances which evidently occasioned this legislation, I cannot conceive that Congress

intended that while an individual of the class named might convey his land by deed absolute and indefeasible, without regard to the adequacy of the consideration, he might not convey it conditionally as provided by this mortgage.

The decree of the United States Court for the Southern District of Indian Territory is therefore affirmed.

CARSON v. ALLEGANY WINDOW GLASS CO. et al.

(Circuit Court, D. Delaware. May 15, 1911.)

No. 291.

1. CORPORATIONS (§ 553*)—APPOINTMENT OF RECEIVER—JURISDICTION.

While there is no statutory authority in Delaware for the appointment of a receiver of a solvent private manufacturing corporation, a circuit court of the United States sitting as a court of chancery may in the exercise of its general equity powers properly constitute such a receivership under exceptional and exigent circumstances as, for instance, where it has become impossible for the corporation to answer any of the ends of its creation or where there has been such fraudulent, willful or reckless mismanagement of its business and affairs by its board of directors as to produce a conviction that further control of the corporation by the same board would result in the destruction of its business and insolvency or cause great and unnecessary loss to its creditors or stockholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2201-2216; Dec. Dig. § 553.*]

2. CORPORATIONS (§ 553*)—RECEIVERS—APPOINTMENT.

No mere differences of opinion among the stockholders or directors as to the business methods or policy of the corporation can of themselves constitute a legitimate ground on which to vest in a receiver control and management of the corporate property and franchises.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2201-2216; Dec. Dig. § 553.*]

3. CORPORATIONS (§ 553*)—RECEIVERS—GROUND FOR APPOINTMENT.

Mere irregularities or minor and comparatively trivial faults of commission or omission on the part of the directors and officers of the corporation, not amounting to flagrant disregard of their official duty showing their unfitness to control its business and establishing the probability of serious and substantial disaster or ruin to the corporate enterprise should they further continue in charge, will not afford sufficient ground for the appointment of a receiver.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2201-2216; Dec. Dig. § 553.*]

4. CORPORATIONS (§ 557*)—RECEIVERS—GROUNDS FOR APPOINTMENT.

To justify the appointment of a receiver of a corporation on the ground of fraud on the part of its directors in the conduct of its affairs, the bill must definitely allege facts and the allegations must be strictly proved.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2227-2236; Dec. Dig. § 557.*]

5. CORPORATIONS (§ 155*)—SALE OF MANUFACTURED PRODUCT—PAYMENT OF DIVIDENDS.

The court will not at the instance of a minority stockholder of a solvent manufacturing corporation order a sale of its manufactured product and the application of the proceeds to the payment of dividends declared

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

and unpaid, the application of its funds to the payment of dividends being within the legitimate functions of the board of directors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 560-603; Dec. Dig. § 155.*]

6. CORPORATIONS (§ 320*)—SUIT BY STOCKHOLDER—CANCELLATION OF CONTRACT.

In a suit by a stockholder of a solvent corporation on behalf of himself and other stockholders for the cancellation of a contract between that corporation and another on the ground that it was fraudulently procured and improvident, the court in the absence of evidence to the contrary may infer from the fact that no other stockholder has sought to intervene that the other stockholders do not view the contract unfavorably or that they believe that the setting aside of it under the circumstances would be more detrimental to than promotive of their interests as stockholders.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 320.*]

7. CORPORATIONS (§ 317*)—SUIT BY STOCKHOLDER—SETTING ASIDE CONTRACT.

The mere fact that the president of a corporation, who owns the majority of its stock, has been guilty of such fraud in procuring the execution by it of the contract as would warrant the setting aside of the contract on a bill brought by the corporation, does not justify the court in setting it aside at the suit of a minority stockholder.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1401-1415; Dec. Dig. § 317.*]

8. COURTS (§ 307*)—FEDERAL COURTS—JURISDICTION.

Where the joinder of an indispensable party will oust the jurisdiction of a federal court having cognizance of the cause on the ground of diversity of citizenship the party seeking relief must proceed in a state tribunal.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 307.*]

In Equity. Suit by Catherine E. Carson against the Allegany Window Glass Company and Robert W. Hilton. Bill dismissed.

Saulsbury, Ponder & Morris and Rufus B. Stone, for complainant.
Marvel & Marvel and E. R. Mayo, for defendants.

BRADFORD, District Judge. The Allegany Window Glass Company, one of the defendants, hereinafter referred to as the glass company, is a corporation of Delaware engaged in the manufacture of window glass, and having its principal place of business at Port Allegany, McKean County, Pennsylvania. Robert W. Hilton, the other defendant, who is a director and the president of the glass company, is a citizen of Pennsylvania. Catherine E. Carson, the complainant, is a citizen of New York, and a stockholder of the glass company. The allegations of the bill are to the general effect that the defendant Hilton is, and during the period when the various acts complained of occurred was, the president and a director of the glass company and the owner and holder of over sixty per cent of its capital stock, the complainant being one of the minority stockholders; that during that period Hilton was president of the Ormsby Gas Company, hereinafter referred to as the Ormsby company, engaged in producing and supplying natural gas, and by virtue of ownership of capital stock controlled that company, his interest in the Ormsby company being greater than his interest in the glass company; that natural gas was used by the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

glass company for the manufacture of glass from the time it commenced operations in 1901; that the glass company had obtained its initial supply of natural gas at certain rates specified in the bill, and such supply prior to 1904 had become inadequate for the full operation of its plant; that in 1904 the Manufacturers Gas and Fuel Company, hereinafter referred to as the manufacturers company, offered to enter into a contract with the glass company to supply to it all the natural gas it would require for a period of three years, delivered at the plant of the glass company, at certain rates specified in the bill; that such offer was fair and favorable to the glass company and was submitted to its board of directors, but Hilton, having in view his larger interest in the Ormsby company and possessing by virtue of his ownership of a majority of the capital stock of the glass company a controlling influence with its board of directors, opposed the acceptance of the offer which by reason of such opposition and influence was rejected; that the supply of natural gas available to the glass company was immediately prior to the rejection of the above offer restricted to the manufacturers company, the Ormsby company and the Citizens Gas Company, hereinafter referred to as the citizens company, then inadequately supplying the glass company under a contract shortly thereafter to expire; that Hilton induced the rejection of the offer of the manufacturers company knowing that such rejection was against the interests of the glass company, and in order to promote his personal advantage by compelling the latter company to resort to the Ormsby company for its supply of natural gas upon such terms as the last named company should dictate; that following the rejection by the glass company of the offer of the manufacturers company, Hilton, in violation of his fiduciary relations to the glass company and without action on its part or consultation with its board of directors, negotiated for it the purchase from the Ormsby company of certain gas and oil leaseholds represented by him to be productive of natural gas, at an exorbitant price fixed by himself with the Ormsby company, and subject to a certain agreement on the part of the glass company to drill wells, the consideration coming to the Ormsby company being a comparatively small cash payment by the glass company and the payment by it to the Ormsby company for each 1,000 feet of natural gas at a certain rate specified in the bill, the cost of production and transportation of such gas to be borne by the glass company; that the effect of the above contract of purchase was for an indefinite period to transfer to the Ormsby company largely for the use of Hilton the entire surplus and profits which the glass company and its stockholders would have derived and enjoyed from the operation of its plant; that before any formal action was taken by the directors or stockholders of the glass company touching such contract of purchase, Hilton unlawfully and fraudulently took of its funds \$2,100 "to pay to himself" on account of the consideration coming to the Ormsby company under such contract of purchase, and the further sum of \$900 "to replace in the treasury of the company money taken from it by him without right or authority" to purchase in his own name "stock in a corporation manufacturing a certain patent glass machine"; that the complainant in March, 1906, protested to

Hilton against the above mentioned contract of purchase and the misappropriation by him of the funds of the glass company, but such contract of purchase was on or about September 24, 1906, against the protest of the complainant through her attorney in fact ratified by the stockholders of the glass company, Hilton through his ownership of a majority of the capital stock and his misrepresentations securing that result; that such contract of purchase has proved of "great and incalculable detriment and injury" to the glass company; that no dividends have since been received by its stockholders but its funds available for that purpose have been arbitrarily expended by direction of Hilton in drilling wells for the purpose of meeting personal obligations on his part arising out of the affairs of the Ormsby company and in "matters of his own personal expense as, for instance, in the cost of keeping his own driving horses"; that Hilton without authority on or about January 1, 1904, withdrew from the treasury of the glass company \$2,500 which under remonstrance from the complainant was subsequently in whole or in part refunded by him; that he procured the sale of capital stock of the glass company to one of his relatives then serving as its secretary and treasurer for the consideration of a promissory note for \$2,500 given by the latter, such note not constituting lawful consideration for the purchase of such stock; that the glass company "under the direction and influence" of Hilton within two years before the commencement of this suit entered into the National Brokerage Association, "formed for the unlawful purpose of increasing the selling price of window glass by means of keeping the factories of the constituent companies closed after the expiration of the usual closed season, and thereby curtailing the manufacture of window glass," by reason whereof the output or product of the glass company of the value of more than \$40,000 "has been retained for long periods of time in its storerooms at the cost of insurance, interest and taxes thereon," whereby the glass company "has suffered in great measure the loss of its market, its good will and its credit, and the interests of its minority stockholders have been sacrificed, prejudiced and disregarded"; that the factory and site of the glass company are covered by a mortgage on which the sum of about \$15,000 is due and unpaid, and foreclosure is now threatened; that a judicial sale of its factory and site would leave the glass company in possession of its franchises but "stripped of its property, and powerless to resume operations"; that "in the manner aforesaid, and by divers means in like manner," Hilton and the other directors of the glass company controlled by him have in wrongful and fraudulent disregard of their fiduciary duty to the minority stockholders so mismanaged the affairs of the company that its capital stock has lost one half of its value and is rapidly depreciating and the company is "involved in debt and on the verge of insolvency"; and that the continuance in the management of the glass company of Hilton and the directors associated with him "is a menace to the best interests of said minority stockholders, and threatens to still further impair and eventually destroy the value of their stock and of the property, good will and credit of the said defendant company." In addition to subpoena and answer, the bill

prays for (1) the appointment of a receiver "to take charge of all the property and assets" of the glass company and "to manage the said company for the best interests of all its stockholders"; (2) an order that "the merchantable manufactured product" of the glass company on hand "be sold at the best price obtainable therefor, and the proceeds thereof applied in payment of the dividends declared and unpaid"; (3) an order that the glass company withdraw from the National Brokerage Association, "if now connected with it"; (4) a decree canceling the contract of purchase between the glass company and the Ormsby company and directing the defendant Hilton to account to the glass company "and it to the plaintiff herein for all moneys due, and for all losses and damages, which it and the said plaintiff, respectively, have sustained in the premises"; (5) an injunction, "preliminary until hearing, and perpetual thereafter," restraining the glass company "from making sale, pledge or lease or otherwise in any manner disposing of or encumbering the property, or any part thereof, of said company, excepting only current sales of glass"; and (6) other and further relief.

[1] The prayer for a receiver will first be considered. By the act of March 25, 1891, c. 181, vol. 19, Del. Laws, it is provided that whenever a corporation other than for public improvement "shall be insolvent, the Chancellor, on the application and for the benefit of any creditor or stockholder thereof, may, at any time, in his discretion, appoint one or more persons to be receivers of and for such corporation, to take charge of the estate, effects, business and affairs thereof, * * * the powers of such receivers to be such and continued so long as the Chancellor shall think necessary." The statute contemplates two classes of cases: (1) proceedings which may result in the full and final administration and distribution on an equitable basis of the assets of the insolvent corporation among its creditors, and, should a surplus from any cause exist, among its stockholders, subject to valid existing liens, if any; and (2) proceedings which may result in the taking possession of such assets and their retention by the court until such time as by a prudent, economical and successful management of the affairs of the insolvent corporation it may be restored to solvency. *Jones v. Mutual Fidelity Co.* (C. C.) 123 Fed. 506, 523. But while the bill avers that the glass company has been brought to "the verge of insolvency," it does not allege nor does it appear from the evidence that it is insolvent. In fact its solvency was admitted by counsel in open court during the argument. Insolvency not existing, there is no statutory authority in Delaware, state or federal, for the constitution of a receivership in such a case as the present.

The right to appoint a receiver, if it exists, must, therefore, be found in the general equity powers of this court sitting as a court of chancery.

[2] The bill does not contemplate a winding up of the affairs of the glass company and a distribution of its assets among creditors and stockholders, but seeks the appointment of a receiver "to manage the said company for the best interests of all its stockholders" for

an indefinite period and without limitation as to time. What the complainant asks, in substance, is that this court substitute a receiver of its appointment for the board of directors of the glass company, a strictly private corporation, to exercise, until otherwise ordered, the corporate franchises on the ground of alleged mismanagement and disregard of fiduciary duty on the part of the directors detrimental to the interests of the company and its stockholders and threatening disaster to them in the near future. To justify the continued exercise of its corporate powers by the court through the instrumentality of a receiver, a strong and clear case must be established. The board of directors of the glass company is charged by the statute under and by virtue of which it was organized and exists, with the control and management of its business and affairs; and when the law-making power has declared that the business and affairs of a corporation, created and organized under that power, shall be directed by its board, it ill becomes courts created for the administration of the law, unless under special and exigent circumstances, to declare that its business and affairs shall not be directed by such board. *Sellman v. German Union Fire Ins. Co. (C. C.) 184 Fed. 977*. Special and exigent circumstances may, in the absence of a statute, warrant and justify a receivership of a corporation, although solvent, for the purpose of winding up its affairs and distributing its assets or of temporarily taking charge of and protecting its property and managing its business and affairs. If it has become impossible for the corporation to answer any of the ends of its creation and it has thus utterly failed of its purpose a court of equity would, under its general jurisdiction and powers and wholly aside from any statutory provision in that behalf, be authorized to wind up its business and affairs for the benefit of those really interested, namely, its creditors and stockholders, although not involving a dissolution or termination of the corporate franchise. So, although the legitimate purposes of a corporation may not have become impossible of accomplishment, if the facts clearly disclose such fraudulent, wilful or reckless mismanagement of its business and affairs by its board of directors as to produce a conviction that further control of the corporation by the same board would result in the destruction of its business and insolvency, or cause great and unnecessary loss to its creditors or stockholders, a receivership properly may be constituted. [2] But no mere differences of opinion among stockholders or directors as to business policy or methods pursued or to be pursued by the corporation can of themselves constitute a legitimate ground on which to vest in a receiver control and management of the corporate property and franchises. In *Republican Mountain Silver Mines v. Brown*, 58 Fed. 644, 7 C. C. A. 412, 24 L. R. A. 776, the circuit court of appeals for the eighth circuit said:

"A court of equity has no power to interpose its authority for the purpose of adjusting controversies that have arisen among the shareholders or directors of a corporation relative to the proper mode of conducting the corporate business, as it may do in case of a similar controversy arising between the members of an ordinary partnership. Corporations are in a certain sense legislative bodies. They have a legislative power when the directors or shareholders are duly convened that is fully adequate to settle

all questions affecting their business interests or policy, and they should be left to dispose of all questions of that nature without applying to the courts for relief. A stockholder in a corporation cannot successfully invoke the power of a chancery court to control its officers or board of managers, or to wrest the corporate property from their charge through the agency of a receiver, so long as they neither do nor threaten to do any fraudulent or ultra vires acts, and so long as they keep within the limits of by-laws which have been prescribed for their governance. If in either of the cases last specified a stockholder is nevertheless dissatisfied with the business policy that is being pursued, or the methods of corporate management, he must seek redress within the corporation, in the mode prescribed by its charter and by-laws, rather than by an appeal to the courts."

In *Ranger v. Champion Cotton-Press Co.* (C. C.) 52 Fed. 609, Judge Simonton in denying a motion for the appointment of a receiver of a solvent private corporation said:

"This motion is, in effect, to take the control of this company out of the hands of the majority of its stockholders and put it under the control of the court and its receiver; this, too, at the request of a person who is in a minority of the stockholders. The majority entertain and favor a certain method in the management of the affairs of the company, by which a large, and perhaps uncontrolled, power is given to the president. He thinks this all wrong. The majority have confidence and trust—up to this stage of the case, a remarkable degree of confidence—in their president. He has no confidence in him whatever, and is willing to believe the worst of him. The complainant, therefore, invites the interference of the court to remove this president, and change this, to him, dangerous method. He bases his prayer for the favorable consideration of the court upon the fact that he is a stockholder. But so are the others. Each one of them has as much right to the aid of the court, and to its interference, as he; and, as the aggregate of them have a larger number of shares than he, this majority have a paramount claim upon the court. * * * One of the results of membership in a corporation—one of the evils, we may say—is that the minority are largely under the control of the majority. So long as the latter act in good faith, and within the constitution and by-laws of the corporation, they can adopt any line of policy which commends itself to their judgment, however great may be the hostility of the minority to it, or however deep their conviction that it is destructive of their interests."

[3] The vital question touching the propriety of appointing a receiver as prayed is not whether there have been mere irregularities or minor and comparatively trivial faults of commission or omission on the part of the directors and officers of the glass company, but whether there has been such fraud, wilfulness or recklessness in their management of its property and affairs,—such flagrant disregard of their official duty,—as to show their unfitness to control its business, and to establish the probability of serious and substantial disaster or of ruin to the corporate enterprise should they further continue in charge. Certainly the appointment of a receiver could not be justified on the ground that the glass company formerly was a member of the National Brokerage Association, its connection with that body having ended in the summer of 1907 when that association ceased doing business; nor on the ground that the company at sundry times prior to the commencement of this suit made certain cash advances to Hilton, the complainant, and other stockholders on account of dividends to be declared, all such advances having been covered by and deducted from the amount of such dividends, and having been made

without fraud or concealment, and the sum of \$2,500 received by Hilton September 30, 1904, but erroneously alleged in the thirteenth paragraph of the bill to have been received on or about January 1, 1904, being one of such advances; nor on the ground that Hilton at a time when he served as president without charging or receiving a salary was permitted by the company to keep his driving horses in its stable; nor on the ground that the company took the promissory note of Hilton's uncle, who was then its secretary and treasurer, for a number of shares of the original issue of capital stock, which were for a time held and retained for him, he having subsequently made full payment in cash for five of them and abandoned all claim for the balance; nor on any or all of these grounds. To wrest the possession and control of the property and affairs of the glass company from its board of management and substitute a receiver for such trivial considerations as the above would betray a lack of all proper sense of proportion.

The bill alleges that the secretary of the company refused the complainant access to its books. This allegation is denied in the answer where it is averred that she has always had free and unobstructed access to all the books and correspondence of the company. Assuming, however, that she or her agent was refused such access, such refusal while it might serve as ground for the awarding of a mandamus by a court of competent jurisdiction would not justify the appointment of a receiver. While denouncing Hilton's acts and motives the bill does not charge, either in form or in substance, that there was any conspiracy or corrupt or wrongful combination or collusion between him and the other directors, or any of them, to ruin or otherwise injure the company, its business or property; or that the other directors were actuated by any fraudulent or wrongful purpose in determining the policy and managing the affairs of the company; or that the other directors on any specific occasion did not observe good faith in their action and conduct as members of the board. The bill abounds in epithets of fraud, but with respect to fraud adjectives cannot supply the place of facts. [4] To sustain a charge of fraud the facts constituting it must be definitely set forth in the pleadings and strictly proved. The charges made in the bill against the other directors as such, while misleading on a superficial reading, clearly are inadequate. Thus, in the fifth paragraph of the stating part of the bill it is alleged with respect to the rejection of the offer made by the manufacturers company to supply gas that Hilton "by virtue of his ownership of a majority of the stock of the Allegany Window Glass Company having a controlling influence with its board of directors, opposed the acceptance of the said proposition, and by reason of his opposition and undue influence it was thereupon rejected." In the fourteenth paragraph it is alleged that the glass company "under the direction and influence" of Hilton entered into the National Brokerage Association. And in the seventeenth paragraph it is alleged that "in the manner aforesaid, and by divers means in like manner the said Robert W. Hilton and the directors of the said Allegany Window Company, elected by him by virtue of his majority

interest, have wrongfully and unlawfully and in fraudulent disregard of their fiduciary relations to the minority stockholders of said company, controlled and mismanaged the said corporation." The only charges to which the words "in the manner aforesaid, and by divers means in like manner" can have any pertinency are those contained in the fifth and fourteenth paragraphs which afford absolutely no justification for the application of the language, above quoted from the seventeenth paragraph, to the directors other than Hilton. As applied to them it fails to commend itself to the court and is vituperative. Nor is it warranted by the evidence. Directors may be elected by the holder of a majority of the stock of a corporation and yet be free agents and honest men. The fact that they have been so elected does not necessarily or usually convert them into mere puppets to further any fraudulent or wrongful scheme that may be proposed by the majority stock owner. The presumption of honesty and fair dealing is not destroyed. In fact there is evidence here that on one or more occasions the views of the other directors prevailed against those of Hilton. And, further, the evidence does not show that on any occasion the board was induced by Hilton against the honest judgment of a majority of his co-directors to take or omit action touching the conduct or affairs of the company.

The glass company is a solvent going concern. It enjoys an enviable reputation for skill in the operation of its plant, and its manufactured product commands a premium in the market. The allegation in the bill, on information and belief, that foreclosure of a mortgage, on which there is due a balance of \$15,000, covering the factory and site of the company, is threatened, has been completely refuted by the evidence. Under the circumstances necessity does not require nor would propriety permit the appointment of a receiver as prayed. A receivership, as before stated, is here sought, not for the purpose of winding up the affairs of the company and making distribution of its property and assets, but to carry on its business in the exercise of its corporate franchises for an indefinite period. Such receivership could not of itself rescind the contract of purchase between the glass company and the Ormsby company, or secure redress for any wrongs alleged to have been suffered by the former at the hands of any of its officers or directors. A receivership is wholly unnecessary to that end; for full redress for such wrongs, if inflicted, could after proper but unsuccessful effort to induce the company to take action be secured through proper proceedings instituted by one or more of its stockholders. Further, while injunctive relief might well be granted against any illegal, ultra vires, wrongful or fraudulent acts, calculated to inflict injury and loss upon the company, threatened by Hilton or any other of its officers or directors, this court cannot undertake to forfeit Hilton's majority stock ownership or, under the circumstances, deprive him, even though temporarily, of the right legitimately to exercise the control incident to such ownership. If the power possessed by Hilton through his ownership of a majority of the stock to control the election of directors and thus indirectly to influence the policy and conduct of the company were of itself a sufficient ground

for the appointment of a receiver, the receivership logically should be continued until Hilton's death or the alienation of his majority ownership, whichever event should first occur, and for and during that uncertain period this court would be engaged wholly unnecessarily in carrying on the private business of manufacturing window glass, and that, too, with probably no assistance from the persons on the present board who have had extensive and practical experience in the conduct of the business and affairs of the company. The creation and indefinite continuance of a receivership would most seriously impair the reputation and standing of the company and in all likelihood produce a condition requiring the winding up of its affairs, the distribution of its assets, and practically, though not theoretically or technically, the termination of the corporate enterprise. Such a result should be avoided even on the assumption that the contract of purchase between the glass company and the Ormsby company was unwise, improvident and improper.

In some of its features this case is strikingly similar to *Worth Mfg. Co. v. Bingham*, 116 Fed. 785, 54 C. C. A. 119. There, however, the corporation was insolvent. The circuit court of appeals for the fourth circuit in reversing a decree appointing a receiver said:

"The chief ground of complaint was the purchase of the Engleworth Mills at a price beyond their value, alleged to have been brought about by the contrivance of two directors, but sanctioned by a unanimous vote of the stockholders. Because of this purchase and the alleged total insolvency of the corporation, they pray its dissolution, the winding up of its affairs. To this end the receivership is prayed. * * * It must be kept in mind that this is a private corporation, a business enterprise; that it is governed by the votes of its stockholders; that they are the judges, and the best judges, as to the conduct of their own enterprise, and that when a majority adopt in good faith a line of policy which, in their opinion, will best subserve the interests of the enterprise, the minority must yield. * * * The most grave charge is that there was fraud in the purchase of the Engleworth Mills. There is no presumption of fraud. The sole question is, does the record disclose a fraud so manifest, a necessity so stringent, as to justify the court in taking possession of this enterprise, winding up its business, and terminating its existence? * * * We then have this condition of affairs: In a private corporation all the directors and a large majority of stockholders, in the exercise of their judgment, purchase a piece of property, believing it to be for the best interest of the enterprise. A minority object. Does this authorize the dissolution of the corporation, the cessation of all its business, the taking away of all of its property out of the hands of the corporation and putting it in the hands of receivers? The question answers itself. Even were it a fraud, or an act ultra vires, the court cannot be asked to destroy the whole enterprise in order to correct a wrong done to the enterprise."

The course pursued by the complainant in the conduct of this cause amounts to an admission by her that the appointment of a receiver of the glass company is not a matter of necessity or of urgency. The bill was filed October 9, 1908, and on the same day on her motion a restraining order was awarded to restrain the glass company, its officers and directors, until the decision upon the motion for a preliminary injunction, or the further order of the court, "from making sale, pledge or lease or otherwise in any manner disposing of or encumbering the property" of that company, or any part thereof,

"excepting only current sales of glass." This exception is expressed not only in the motion for the restraining order but in the prayer for injunctive relief, preliminary and perpetual. Yet the right of the existing officers and directors to sell glass carries with it the right to receive the proceeds of sale and to have charge and custody of the fund derived from that source. It is difficult, if not impossible, to reconcile the willingness of the complainant that the glass company should receive and handle the proceeds of glass sold by it with the position taken by her that there has been such fraud, wilfulness, recklessness and disregard of fiduciary duty on the part of the present management as to show it to be unfit to have possession or control of the corporate property and assets or to exercise the corporate franchises. Further, the parties by their respective solicitors, entered October 28, 1908, within three weeks after the filing of the bill, into a stipulation, made part of the record, which contained, among others, the following provisions:

"1st. That further proceedings in the cause above entitled as to the appointment of a receiver for said defendant corporation, as prayed for in said plaintiff's bill of complaint, be postponed to abide the result of the trial of said cause.

* * * * *

3rd. That in the meantime [until the final determination of this cause] the said defendant corporation be empowered and permitted to pursue the general business of said corporation in manufacturing and selling their manufactured product."

Thus the complainant was willing, not only that "current sales of glass" should be made by the company, but that it should until the final determination of this cause, which already has been in progress for more than two years and a half, pursue its general business of manufacturing and selling glass. The stipulation is certainly not suggestive of any apprehension on the part of the complainant that ruin or financial disaster to the company or its stockholders would result from the further continuance of the existing management in control of the corporate property, business and affairs. She expressly agreed that further proceedings for the appointment of a receiver should be postponed "to abide the result of the trial of said cause." On the whole it is quite clear that no case for the appointment of a receiver has been established, and that the prayer in that behalf and that for injunctive relief must be denied.

[5] The prayer that the merchantable manufactured product of the glass company on hand be sold and the proceeds applied to the payment of dividends declared and unpaid must also be denied, on the ground that, like a receivership, it would involve without necessity an invasion of the legitimate functions of the board of directors and wrest from it the determination of the wisdom, policy or practicability of making such sale and application under existing circumstances, regard being had to the form and amount of the corporate assets and the obligations or liabilities of the company.

The allegation in the eighth paragraph of the bill to the effect that prior to any formal action by the directors or stockholders of the glass company on the contract of purchase from the Ormsby com-

pany Hilton unlawfully and fraudulently appropriated of the funds of the former company \$2,100 on account of the consideration coming to the latter company and \$900 to replace in the treasury of the glass company money taken from it by him without authority to purchase stock in a corporation manufacturing a patent glass machine is not sustained by the evidence. The contract of purchase is evidenced by a written offer contained in a letter dated February 24, 1906, from Hilton, acting for the Ormsby company and himself, to the secretary of the glass company, which offer was accepted by the board of directors of the latter company June 2, 1906, and was subsequently ratified by the stockholders of that company September 24, 1906. The letter is as follows:

"Smethport, Pa., Feb. 24, 1906.

H. R. Hilton, Secy., Port Allegany, Pa.—

Dear Sir: Proposition for sale of Tretton gas lease 80 acres and other leases 470 acres owned by Ormsby Gas Co., is \$40000. Payment \$20000 in notes with certain collateral \$3000 in cash and \$2000 payable after the \$23000 is paid from Tretton lease all drawing interest until paid which makes the \$25000 for Tretton lease. Price of \$15000 for the other property amounting to about 470 acres paid for by the thousand at the rate of eight cents per thousand for only gas taken out of the 470 acres with interest on the \$15000 payable every four months when a credit of gas is to be given on amount taken out at the price of eight cents. Understand this eight cents is not a royalty, but a style of paying instead of giving notes or cash for the \$15000, so that the price of eight cents stops just as soon as the \$15000 is paid. There is the advantage that the Company never makes any of this payment of \$15000 unless it is produced by this property, so that the income out of the Tretton lease or Taylor will not have to assist as payment of this amount. Practically all that the Company will have to pay me is \$23000 unless produced out of property.

Yours respectfully,

R. W. Hilton."

The provision in the contract for a cash payment of \$3,000 was satisfied in the following manner according to the evidence. During the winter of 1905-6 the Ormsby company—Hilton by reason of the ownership of its capital stock virtually being that company—had furnished gas to the citizens company which in turn was supplied by it to the glass company. The citizens company being slow in making payment for gas received from the Ormsby company, Hilton after the gas so furnished by him through the latter company had been supplied to and consumed by the glass company asked the last named company to make payment of the amount due for it directly to him. This was done; the glass company giving its check January 23, 1906, to Hilton for \$975.76 for gas furnished by the Ormsby company to the citizens company during December, 1905, and its further check February 21, 1906, to him for \$834.22 for gas furnished by his company to the citizens company during January, 1906. June 23, 1906, three weeks after the contract of purchase had been entered into by the acceptance by the board of directors of the glass company of Hilton's offer as contained in his above quoted letter of February 24, 1906, the glass company, crediting itself with the above two payments aggregating \$1,809.98, paid Hilton \$1,190.02, being the difference between the aggregate amount so credited and the sum of \$3,000 contracted for as a cash payment. I can per-

ceive no fraud in this transaction. Had the contract of purchase not been entered into Hilton, of course, could not have compelled the citizens company to pay to his company the amount advanced by the glass company and thus have secured double payment, and the citizens company being relieved to the extent of its indebtedness to the Ormsby company could have held the glass company liable only for the difference, if any, between what the citizens company had agreed to pay for the gas received by it and what the glass company had agreed to pay to the citizens company for the gas supplied to it by the last named company. But the contract of purchase having been entered into and the two sums advanced by the glass company to Hilton as above stated having been credited on the sum of \$3,000 agreed to be paid in cash, the right of Hilton or the Ormsby company to receive full payment for the gas furnished to the citizens company during the two months above specified, and the right of the citizens company to receive full payment from the glass company for the gas so supplied during that period, remained wholly unaffected by the above mentioned advances by the glass company to Hilton. If the portion of the eighth paragraph of the bill charging fraudulent appropriation by Hilton of moneys on account of the consideration coming to the Ormsby company under the contract of purchase was intended to apply to the transaction just explained it has no justification.

[6] The prayer for the cancellation of the contract of purchase between the glass company and the Ormsby company remains for consideration. The complainant denounces the transaction as iniquitous in itself and as having been induced through fraud and undue influence on the part of Hilton. The latter denies fraud or undue influence and contends that the contract was reasonable and fair, and was after due inquiry and investigation ratified by both the board of directors and the stockholders of the glass company. The evidence on this branch of the case is voluminous and on a number of points conflicting. It has been carefully considered; but a discussion of it in detail is impracticable and would be well-nigh interminable. A statement of conclusions reached rather than of the particular evidence from which they have been drawn is all that shall be attempted. There are, however, certain circumstances in or surrounding the case which are not without much significance on the question whether the contract of purchase was, as claimed in the bill, a "profligate contract of purchase, in which the defendant company is still hopelessly involved," and "of great and incalculable detriment and injury" to the glass company, or, as also claimed on the part of the complainant in the brief of her solicitors, a "compulsory sale by the defendant, Hilton, of certain comparatively worthless property of his own to the defendant corporation, of which he was in control." Apart from the considerations hereinbefore discussed in connection with the prayer for a receivership, including the stipulation of October 28, 1908, there is the fact that, although the complainant sets forth that the bill is filed "for herself and in behalf also of other stockholders of the defendant company in like manner aggrieved," no other stockholder has either intervened or applied for leave to intervene in the

case. The complainant stands alone as the complaining party. Yet this court having jurisdiction of the subject-matter and over the parties as they now stand on the record by reason of diversity of citizenship and the amount in controversy, any other stockholder by virtue of his stock-ownership and regardless of his citizenship or the value of his stock, was entitled to intervene by leave of the court. That no other stockholder has sought to intervene justifies, in the absence of evidence to the contrary, an inference, by no means conclusive of the case it is true, that the other minority stockholders either do not view the contract of purchase as unfavorably as does the complainant or believe that the setting aside of that contract under existing circumstances would be more detrimental to than promotive of their interests as stockholders. Further, there is no evidence that of the minority stockholders, other than the complainant, more than a small proportion in number or amount sympathize with the purpose of the bill. Again, there is no evidence that Hilton used any threats or improper or undue influence upon or against any director or stockholder of the glass company to secure the acceptance by it of the offer contained in his letter of February 24, 1906, or that he even asked any other director or stockholder to vote for it. Nor has any director or stockholder of the glass company who voted for it testified that in so voting he deemed that the interests of Hilton rather than those of the glass company were being promoted, or that his vote represented anything else than his own honest judgment. Their testimony is directly to the contrary. Still further, it appears from the evidence that Hilton did not vote as a member of the board of directors of the glass company for the acceptance of the offer of February 24, 1906, nor after it had been accepted by the board did he vote as a stockholder for the ratification of the contract, but abstained from voting on either occasion in order that the minority stockholders and their representatives on the board might not be controlled or unduly influenced by him on either occasion, but feel free to pursue such course as should commend itself to them. And again, before the glass company accepted Hilton's offer the directors caused the property covered by it to be carefully valued by competent judges. John Troy, president of the Crosby Gas Company, after examining the record of the actual sales of gas from the Tretton leaseholds during five consecutive months preceding May, 1906, together with a map of the Hackett-Stickles leasehold showing the test of that territory with the capacity of certain wells drilled thereon, reported in favor of an acceptance of the offer. It appears from the evidence that Troy's services were secured for the making of such valuation at the suggestion of Philip W. Carson, the complainant's son, who regarded Troy as an expert of practical experience on whose judgment the glass company could safely rely. Now Carson, who was a director of the company continuously from its organization until the stockholders' meeting of September 24, 1906, when he failed of re-election, was and had been attorney in fact of the complainant fully authorized and empowered to act for her in all matters pertaining to the glass company, and all his acts as her representative have been fully approved and ratified by her. Personally she took

no part in the affairs of the company. His approval of Troy as a competent expert on value was her approval. Indeed, an examination of the evidence cannot fail to produce a conviction that Carson, while a stockholder to a small amount, is virtually though not technically the party complaining in this suit in the name of his mother. Ralph E. Burdick also, who was and for years had been a stockholder and director of the glass company, and was at the time a member of its gas committee, investigated for and on behalf of that company the value of the property embraced in Hilton's offer. He testified to the effect that he had "been through the matter quite thoroughly"; that he was wholly uninfluenced in reaching his conclusion by Troy's opinion; and that he was satisfied the offer would be "a profitable thing" for the company. No combination or conspiracy between Hilton, Troy and Burdick to defraud or injure the glass company by placing false values upon the property included in Hilton's offer has been either alleged or proved. In addition to the above circumstances it appears from the minutes of the glass company and corroborative evidence that a special meeting of the directors was held March 15, 1906, at which were present, including Carson, seven of the eight active members of the board, the ninth member being the statutory Delaware director, and that Hilton's offer "was favorably considered but final action deferred till the Citizens Gas Co. had been interviewed and prospects for a new lease ascertained." And it further appears from the minutes and corroborative evidence that at the meeting of the board June 2, 1906, six directors including Carson and Burdick were present, and that on motion of the latter Hilton's offer was accepted. The minutes do not show that Carson made any protest against or objection to that offer or its acceptance at any meeting of the directors prior to September 24, 1906, when the annual stockholders' meeting was held, and according to a clear preponderance of the evidence no such protest or objection was made by him prior to the last named day, if, indeed, any was made on that day, there being entire or substantial unanimity among the directors on this subject. It appears from the minutes that at the annual stockholders' meeting above mentioned all the minority stockholders present in person or by proxy aside from the Carsons voted to approve the acceptance by the board of directors of Hilton's offer. It is difficult, if not impossible, to reconcile the foregoing facts and circumstances with the charge in the bill that Hilton "in fraudulent disregard of the interests of the minority stockholders" of the glass company and without "consultation with its board of directors" negotiated the contract of purchase "at an exorbitant consideration or price," or that Hilton "improperly and unduly influenced a majority of the said stockholders to vote in approval and ratification of the said purchase" or that the acceptance of Hilton's offer constituted a "profligate contract of purchase." There is a presumption of honesty and fair dealing in the business transactions of mankind, and fraud, to be established, must be strictly proved. It cannot be supposed that the directors of the glass company and a large majority of its minority stockholders, other than the Carsons, combined to sacrifice their own pecuniary in-

terests for the sake of benefiting Hilton. The evidence does not show that he bribed them to cheat themselves or that he made any false representations of fact by which they were deceived. They had the opportunity and either directly or indirectly the means of forming an intelligent judgment as to the value to the company of Hilton's offer. They used such opportunity and means and were satisfied with the bargain. While among others there was considerable variance of opinion on the question of value, they without any fraud or undue influence on the part of Hilton deemed the offer reasonable under the circumstances and that its acceptance would be advantageous to the company. This court is unable to find from the evidence taken as a whole that they erred in their judgment; and, unless there be something else in the case requiring the setting aside of the contract, full effect must be given to the acceptance by the board of Hilton's offer and its approval by the stockholders.

The bill charges in substance that Hilton prior to the making and acceptance of his offer fraudulently prevented the glass company from obtaining the requisite amount of gas for the operation of its plant from sources other than the Ormsby company, with the wrongful intention of compelling the glass company to resort to the Ormsby company for its supply of gas upon such terms as the latter company should dictate; and it is contended on the part of the complainant that to secure such result the negotiations theretofore conducted by Hilton for a proper supply of gas "were not in good faith," but "were conducted in a dishonest and dilatory way with the design to preclude the defendant corporation from obtaining a supply by contract with accessible natural gas companies." Careful examination of the evidence has failed to satisfy me that these charges of fraud are justified. Mere suspicion or surmise cannot establish fraud. The evidence falls far short of the necessary measure of proof. The terms and conditions of the contracts under which the glass company had been obtaining gas and the evidence of the terms and conditions on which that company could thereafter obtain the requisite supply, and of delays caused in negotiations for gas by persons other than Hilton, serve, not to support, but rather to negative the charges made against him in this connection. If he with deliberate and fraudulent intent and in utter disregard of the interests of minority stockholders had prevented the gas company from obtaining its supply from sources other than the Ormsby company, it is somewhat remarkable that, having the former company at his mercy through his ownership of stock according to the contention of the complainant, he should not have insisted upon a much less moderate price than that contained in his offer of February 24, 1906. And even if it be assumed for the sake of the argument that Hilton pursued an improper or indeed fraudulent course in order to pave the way for the making and acceptance of his offer of February 24, 1906, it would not follow that the action of the glass company in accepting that offer should be set aside at the instance of one or more minority stockholders, if the offer was not in itself unreasonable, but advantageous to the company, or if the setting aside of the transaction would be disastrous to the company or involve net loss and damage to it in its business and property.

The manner in which the contract of purchase was carried into execution has met severe animadversion on the part of the complainant. Hilton's offer called for the payment by the glass company of \$3,000 in cash and of \$20,000 in notes with collateral, and of the further sum of \$2,000 at a future time from gas obtained from the Tretton leasehold at a certain rate per 1,000 cubic feet, aggregating \$25,000, the value placed upon that leasehold. The sum of \$15,000, being the residue of the purchase price, was to be paid for by gas obtained from the residue of the property at a certain rate per 1,000 cubic feet. In his offer Hilton said "practically all that the company will have to pay me is \$23,000 unless produced out of property." The glass company after acquiring the gas leaseholds would, of course, be at the expense of producing and conveying gas therefrom; and whether this would entail much or little expense necessarily entered as a factor into the valuation of the leaseholds before their acceptance by that company. The cash payment of \$3,000 was properly effected in the manner hereinbefore stated. The carrying of the contract of purchase into execution in other respects required some circumspection and ingenuity. The glass company as a foreign corporation was without authority to exercise the right of eminent domain and thus might be subject to serious embarrassment in the conveyance of gas to points not within the territorial limits of the leaseholds. There was some question whether that company could hold, free from liability to escheat, the leaseholds included in Hilton's offer. The ability of the Ormsby company both to hold such leaseholds free from such liability and to exercise the right of eminent domain was beyond question. And Hilton owned practically all the capital stock of the Ormsby company and could control its disposition. Further, the glass company, although a foreign corporation, had a right to acquire and hold the stock of the Ormsby company. These circumstances on being duly weighed suggested the course which was pursued. Hilton transferred to the Ormsby company the leaseholds and secured the transfer of all the capital stock of that company to trustees to hold for the benefit of the glass company or its stockholders. And the Ormsby company gave its promissory note for \$20,000 to the glass company which endorsed and delivered the same to Hilton for his own benefit. The Ormsby company also executed and delivered to Hilton as collateral security for the payment of the above note its bond together with its mortgage covering the leaseholds included in his offer. The promissory note, bond and mortgage were transferred by Hilton to the Hamlin Bank & Trust Company of Smethport, Pennsylvania, on account of his individual dealings with and indebtedness to that bank, and the note or a renewal of it and the bond and mortgage have ever since been held by the bank, the amount originally secured thereby having been much reduced. It appears that through the instrumentality of Hilton a gas and oil leasehold which the glass company had obtained from Welthia A. Taylor and Charles Taylor was assigned to the Ormsby company and included among the leaseholds covered by the above mentioned mortgage, and this circumstance is treated by the complainant as an evidence of fraud or wrong doing on the part of

Hilton. The court is unable to take this view of the matter, for the reason that under the offer made by Hilton and accepted by the glass company, the latter was to incur an absolute obligation to pay the specified sum of \$20,000, and no reason is perceived why a mortgage given as collateral security for its payment should not include the Taylor leasehold or any other property owned by the glass company. There can be no foundation for an assumption that the mortgage security must have been restricted to the property mentioned in Hilton's offer. All of the capital stock of the Ormsby company having been transferred to trustees for the benefit of the glass company, the latter company was virtually though not technically, indirectly but not directly, the owner of the business and property of the former. There is an expression of doubt or distrust on the part of the complainant as to the bona fides of the arrangement under which the trustees are holding the stock of the Ormsby company; but there is nothing to justify a finding of mala fides in that arrangement. Three certificates, each for 200 shares of the capital stock of that company of the par value of \$50 each, amounting in the aggregate to \$30,000, the total capital, were issued to Hilton, Burdick and another director of the glass company, who made an express declaration in writing to it to the effect that such capital stock had been so issued to them as trustees for it, and delivered the certificates to its secretary. There is no evidence that the trust thus assumed has been in any manner repudiated or abused. Deducting from the purchase price of \$40,000 the cash payment of \$3,000 and the \$20,000 represented by the promissory note and secured by bond and mortgage as collateral as above mentioned, the remaining \$17,000 which under Hilton's offer was to be paid from gas proceeds as therein provided, remained a charge upon such proceeds notwithstanding the transfer of the gas producing leaseholds to the Ormsby company. I do not perceive anything fraudulent, wrongful or oppressive in this arrangement effected for the purpose of carrying into execution the contract of purchase arising from Hilton's offer of February 24, 1906, and its acceptance by the glass company. That company has never through its board of directors or in stockholders' meeting either repudiated or condemned it. The glass company is not here complaining. It is a defendant. [7] Even if it be assumed that Hilton was guilty of fraud of such character and extent as to warrant the setting aside of the contract of purchase on a proper bill brought by the glass company, it by no means follows that it should be set aside on the application of a minority stockholder. In *Corbus v. Gold Mining Co.*, 187 U. S. 455, 463, 23 Sup. Ct. 157, 160, 47 L. Ed. 256, the court said:

"The directors represent all the stockholders and are presumed to act honestly and according to their best judgment for the interests of all. Their judgment as to any matter lawfully confided to their discretion may not lightly be challenged by any stockholder or at his instance submitted for review to a court of equity. The directors may sometimes properly waive a legal right vested in the corporation in the belief that its best interests will be promoted by not insisting on such right. They may regard the expense of enforcing the right or the furtherance of the general business of the corporation in determining whether to waive or insist upon the right. And a court of equity may not be called upon at the appeal of any single

stockholder to compel the directors or the corporation to enforce every right which it may possess, irrespective of other considerations. It is not a trifling thing for a stockholder to attempt to coerce the directors of a corporation to an act which their judgment does not approve, or to substitute his judgment for theirs. As said in *Dodge v. Woolsey*, 18 How. 344: "The circumstances of each case must determine the jurisdiction of a court of equity to give the relief sought."

The ownership of only a minority of the minority of stockholders is behind the objection taken in the bill to the contract. The other minority stockholders are entitled to receive from this court consideration equal to that which should be accorded to the complainant. If the setting aside of the contract would on the whole be more detrimental than advantageous to innocent stockholders the court should not interfere. And much less should it interfere if the result would involve or threaten grave disaster to the business of the company. That such would be the result of interference by this court as prayed in the bill there can be little or no doubt.

The defendants in addition to their defense on the merits rely on certain points among which are the nonjoinder of the Hamlin Bank & Trust Company and the Ormsby company as parties defendant; alleged laches on the part of the complainant in bringing suit; and the omission by the complainant either personally or by Carson, her attorney in fact, to make formal request of the board of directors of the glass company to cause suit to be brought in its name for the purpose of setting aside the contract of purchase. I am strongly inclined to think that the Hamlin Bank & Trust Company as the holder of the bond and mortgage given by the Ormsby company in carrying into execution the contract sought to be set aside, is, so far as that purpose is concerned, not only a necessary but an indispensable party and that the defect can be taken advantage of at the hearing or by the court at any time of its own motion. [8] If the joinder of an indispensable party will oust the jurisdiction of a federal court the party seeking relief must be content to proceed in a state tribunal. But it is not necessary to rely on this or any other of the points last above mentioned, as for the reasons already stated at length the complainant is not entitled to the relief she prays. The bill must be dismissed with costs.

WRIGHT & COBB LIGHTERAGE CO. v. NEW ENGLAND NAVIGATION CO. et al.

(District Court, S. D. New York. July 18, 1911.)

1. COLLISION (§ 96*)—VESSEL LYING AT END OF PIER—HARBOR REGULATIONS. New York City Charter (Laws 1901, c. 466) § 879, which provides that it shall not be lawful for any vessel to lie at the exterior end of wharves in the waters of the North or East Rivers, "except at their own risk of injury from vessels entering or leaving any adjoining dock or pier," does not make such mooring illegal, nor does it have any application to a case

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of collision between a boat lying at the end of a pier and a moving vessel not entering or leaving an adjoining slip.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 203, 204; Dec. Dig. § 96.*]

2. SHIPPING (§ 54*)—CHARTERS—LIABILITY FOR INJURY TO VESSEL—MOORING AT END OF PIER.

The mooring of a barge for the night outside of another at the end of a pier in East River, while waiting an opportunity to enter the adjoining slip, which was then full, to load from a vessel therein, was not negligence, and a charterer by a demise of the barge cannot be held liable to the owner for her injury by another vessel which came into collision with her while lying in such position.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 219-221; Dec. Dig. § 54.*]

3. COLLISION (§ 100*)—MOORED VESSEL AND FERRYBOAT—NAVIGATION OF FERRYBOAT IN FOG.

A ferryboat is not negligent for navigating in a fog, and one crossing East River in the early morning in a fog so dense that other vessels could be seen but a very short distance was not in fault for a collision with a car float alongside a tug, which was moored with two others off the end of a pier, and against which the ferryboat was drifted by the tide while waiting a clear entrance to her slip, where she was in all respects carefully navigated and had a lookout properly stationed, but who could not see nor hear the tug and float until too late to prevent the collision.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 213-215; Dec. Dig. § 100.*]

4. COLLISION (§ 100*)—LIABILITY OF VESSELS—NEGLIGENT MOORING.

Three companion tugs each with a car float on either side, caught in a sudden fog about midnight in East River, made fast side by side at the end of a pier; the flotilla extending out into the river about 315 feet. *Held* that, under the circumstances, it not appearing that any better place was available, such action was not negligent.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 100.*]

5. COLLISION (§ 100*)—MOVING AND MOORED VESSELS—FOG SIGNALS BY MOORED VESSEL.

There is no rule requiring vessels moored to a pier to ring a bell in a fog, and a failure to do so is not negligence which renders the vessel liable for a collision with a moving vessel.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 100.*]

6. COLLISION (§ 100*)—FOG—INEVITABLE ACCIDENT.

A collision in East River in the early morning in a dense fog, by which a moored barge was struck and injured by a car float in tow which had been broken from its mooring with the tug by collision with a ferryboat, *held* a result of inevitable accidents, for which none of the vessels was in fault.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 100.*]

In Admiralty. Suit for collision by the Wright & Cobb Lighterage Company against the New England Navigation Company, in which the Union Ferry Company and the New York, New Haven & Hartford Railroad Company were brought in under the rule. Libel dismissed.

Foley, Martin & Nelson (Mr. Martin, of counsel), for libellant.

Charles M. Sheafe, Jr. (James T. Kilbreth, of counsel), for New England Navigation Co. and another.

James J. Macklin, for Union Ferry Co.

HOLT, District Judge. This suit is brought by the Wright & Cobb Lighterage Company to recover damages for a collision on January 22, 1909, between the barge Howard J. Vail, owned by the libellant, and a car float owned by the New York, New Haven & Hartford Railroad Company. The barge at that time was under a charter from the libellant to the respondent the New England Navigation Company. The charter was a demise of the bare boat, the charterer furnishing the crew and supplies, and having the entire control of the barge. On the afternoon of the day before the collision, the barge was taken by a tug of the New England Navigation Company to Pier 15, East River, the pier of the Mallory Line. She was to be loaded from a steamer there. The slips on each side of the pier were entirely occupied by other vessels, and the captain of the tug moved the barge outside another barge at the end of the pier. There was a light fog on the river that night until about midnight. Then the fog became very thick, and so continued till morning. That night three tugs of the New York, New Haven & Hartford Railroad Company, each towing two car floats loaded with cars, going from Oak Point to Greenville, arrived near Pier 5, East River, about midnight, when the fog became dense, and the three tugs with their floats thereupon moored off the end of Pier 5. The first tug, No. 20, was moored to the pier, the next, 14, was moored to 20, and the outside one, 19, was moored to 14. 20 was headed up the river; 14 and 19 down the river. 14 and her floats were a little farther up the river than the other two. About 5:45 o'clock the next morning the ferryboat Pierrepont of the Hamilton Ferry line, owned by the Union Ferry Company, started from Hamilton avenue, Brooklyn, with several hundred passengers, on the first of her regular trips that day to the foot of Whitehall street, New York. The night was dark and the fog very dense. There was a strong flood tide. The Pierrepont proceeded at slow speed, sounding fog signals. The captain was at the wheel. With him in the wheelhouse was a man acting as a lookout, and another lookout was stationed forward outside the gates. A South Ferry boat, going also from Brooklyn to Whitehall street, was ahead of the Pierrepont all the way across, blowing fog signals, and, after the Pierrepont had proceeded part of the way across, fog signals from a Staten Island ferryboat coming in to her berth were also heard. The ferry racks of the South Ferry and Hamilton Ferry in New York adjoin each other, and it is necessary that a South Ferry boat ahead of a Hamilton Ferry boat should completely enter her berth before the Hamilton Ferry boat attempts to enter. The Pierrepont, therefore, when she had proceeded part way across the river, stopped and waited for the usual signal from the South Ferry boat that she had entered her slip. There was a delay of some minutes. The Staten Island ferryboat, in entering her slip, which adjoins the Hamilton slip on the south, got in the way of the South Ferry boat, and prevented it from landing for a time. At length, the captain of the Pierrepont heard the signal from the South Ferry boat that she had reached her slip, and gave an order to the engineer to go forward slowly. The engine had made only a few turns when the lookout forward of the

gates saw a light off the starboard bow, and immediately notified the captain. The fog was so dense that the captain at first could not see the light, but he immediately ordered the engines reversed. Immediately after he saw the light, which was on the outside car float of tug 19, and was not more than 50 feet away. The flood tide was carrying the Pierrepont down upon the car float, and the captain, seeing that a collision was inevitable, stopped backing. Immediately after a collision occurred. The corner of the forward car on the outer side of the car float crashed into the steamer's cabin about 20 feet abaft the wheel, and the deck of the car float, running under the guard of the ferryboat, broke a section of the paddle wheel, the force of the blow throwing the front part of the car off the rails. The collision caused much excitement among the passengers, some of whom, jumped off upon the adjacent car float, and either because most of the passengers came to the side of the ferryboat next to the car float, or for some other reason, the ferryboat's guard, which overlapped the float's deck, stuck fast, so that for a number of minutes the ferryboat and the car float were fast together. The collision broke the set of lines nearest to the Battery fastening the inside float attached to tug 20 to the end of the pier. Thereupon the whole flotilla floated out, under the influence of the flood tide, until the other set of lines fastening the inner float to the pier parted. At the same time the lines between 20 and 14 either parted, or were thrown off. This left 14 and 19 fast together, and the pilot of 19 asked the pilot of 14 to cast off the lines between them and move forward and push the Pierrepont away so as to separate it from his car float. The pilot of 14 did so, and succeeded in pushing the Pierrepont free from the car float to which it was first attached; but in doing so one of the car floats of tug 14 went under the guard of the ferryboat farther forward, breaking one of the rudder chains of the ferryboat, and became fastened to the ferryboat in the same way that the float of No. 19 had previously been fastened. Thereupon tug 14, with its two car floats, and the Pierrepont fastened to one of them, drifted with the flood tide up the river. At some time the Pierrepont became detached from the car float. The evidence is conflicting as to when that time was. Some witnesses assert that she became detached from the car float very quickly after she had become fastened; others that she remained fastened until after the car float came into collision with the barge Vail. I think from all the evidence that the Pierrepont got separated from the car float shortly before or about the time of the collision. At all events, one of the car floats attached to No. 14 came in collision with the Vail, lying moored at the end of Pier 15, as they were floating up on the tide. So long as the Pierrepont was fast to the front of the car float, tug 14 could not practically navigate or control the flotilla, and I am satisfied that the collision with the Vail took place before tug 14 had obtained any practical control of the navigation of the car floats.

The original libel was filed by the Wright & Cobb Lighterage Company, owners of the barge Vail, against the New England Navigation Company, as charterer, on the theory that the charterer was bound to return the barge in good order at the expiration of the charter.

Thereupon the New England Navigation Company, under the fifty-ninth rule, brought in by petition the Union Ferry Company as owner of the Pierrepont, alleging that the Pierrepont was in fault. Thereupon the Union Ferry Company brought in the New York, New Haven & Hartford Railroad Company, under the fifty-ninth rule, as owner of the three tugs and the accompanying car floats, alleging that the tugs or some of them were at fault for the collision.

[1] The first question in the case is whether the original respondent, the New England Navigation Company, was at fault. The barge was moored at the end of Pier 15 at the time of the collision, and therefore no fault of navigation can be imputed to it. The single question is whether it was negligence to moor the barge at the end of Pier 15. It is claimed in the first place that such mooring was a violation of section 879 of the New York City charter, which is as follows:

"It shall not be lawful for any vessel, canalboat, barge, lighter, or tug to obstruct the waters of the harbor by lying at the exterior end of wharves in the waters of the North or East River, except at their own risk of injury from vessels entering or leaving any adjacent dock or pier; and any vessel, canalboat, barge, lighter or tug so lying shall not be entitled to claim or demand damages for any injury caused by any vessel entering or leaving any adjacent pier."

It has always been the custom in New York Harbor for vessels to moor for temporary purposes at the ends of piers as well as at the sides (*The Mary Powell* [C. C.] 36 Fed. 598; *The Dean Richmond*, 107 Fed. 1001, 47 C. C. A. 138); and, while any vessel so moored is obviously in a somewhat more dangerous position than if moored in a slip, it never has been held, so far as I am aware, to be illegal or a fault in navigation for a vessel to moor at the end of a slip. This statute obviously does not make it illegal. It simply provides that, if a vessel does lie at the exterior end of a wharf in the North or East River, it shall be at its own risk of injury from vessels entering or leaving any adjacent dock or pier. This statute does not make a vessel moored at the exterior end of a pier take the risk of injury from collision with a vessel which is not entering an adjacent dock or pier. This has been expressly held in various cases. *The Cincinnati* (D. C.) 95 Fed. 302; *The Dean Richmond*, 107 Fed. 1001, 47 C. C. A. 138; *The Chauncey M. Depew*, 139 Fed. 236, 71 C. C. A. 362. The car float that came into collision with the Vail was not attempting to enter any adjacent pier, and therefore the statute has no application.

[2] Nor can I see that there was any legal negligence in mooring the Vail outside the other barge at the end of Pier 15. She was brought there light to be loaded from a steamer lying in the slip. The slips on both sides of the pier were completely filled with other vessels. The weather at the time she was moored there was not unusual. There was no dense fog until midnight that night. She was moored at the end of the pier temporarily until a place in the slip could be obtained for her to be loaded. In my opinion, under these circumstances, it was not negligent to moor her for the night at the end of the slip. The result is that there can be no recovery in this case against the New England Navigation Company. Such a charterer is

not an insurer. It is not responsible for injuries to a vessel which it has chartered unless such injuries were caused by its own negligence.

[3] I cannot see that the Pierrepont was guilty of any fault. Ferryboats cannot tie up in a fog. Public interests require that they should make their regular trips even in very thick fogs. On this trip the Pierrepont was navigated carefully and prudently. The captain, a licensed pilot of long experience, was at the wheel. He had a lookout with him in the wheelhouse, and another on deck forward of the gates. He proceeded slowly, sounding fog signals. He had to stop till the South Ferry boat landed. He knew substantially where he was. He could hear the big bell rung in fogs off the ferry entrance. He did not know of the New Haven car floats moored off Pier 5. This was the first trip of his boat since about midnight. If the car floats had not been there, he would have had water enough. The fog was so dense that the light on the float could not be seen until it was so near that a collision could not be avoided. No one on the Pierrepont heard any bell on the New Haven tug. I think it doubtful whether any was rung. If rung, it was admittedly a small bell, and was not heard. In short, I see no ground for any charge of fault in the Pierrepont. The masters of New York ferryboats are generally experienced pilots, and careful, faithful men, who have surprisingly few collisions in view of the crowded condition of the harbor. They have to run in fogs; and there is no justice in holding them responsible for collisions in thick fogs, when they have done their best.

[4] The question whether the New York, New Haven & Hartford Railroad Company should be held responsible in this case because its tugs and car floats moored at the foot of Pier 5 is one upon which I have felt much doubt. These car floats are 41 feet, and the tugs 26 feet wide. Each tug and its two floats, therefore, together had a width of more than 100 feet. Three of these tugs and the accompanying floats were moored off Pier 5, making a projection of that pier, consisting of 9 vessels moored side by side, extending about 315 feet into the river. The place where these vessels were moored is one of the most crowded parts of the harbor. Pier 5 is but a little way above the Battery. Vessels are passing there all the time. Three ferry racks, into and from which ferryboats are constantly going, are immediately below Pier 4, and, in fact, there are few more congested waterways in the world than that part of New York Harbor. There is therefore much plausibility in the charge that it was negligent to moor these tugs and floats there, and especially for the captain of tug 19 to moor there after two other tugs and floats had already tied up off that pier. But, on the other hand, as already stated in respect to the Vail, it is not illegal or unusual, in New York, especially in a sudden exigency, to moor vessels temporarily at the end of piers. In this case the fog became dense suddenly. It was the duty of the captains to moor somewhere, and they had to act quickly. It is claimed that they should not have all moored off the same pier. But there is no evidence that other piers were not occupied, and, if they were, these long floats, 315 feet in length, could probably be moored more securely to each other than they could to shorter boats lying at the end

of piers. These flotillas, made up of a tug and two car floats, which project on each side far beyond the bow of the tug, constitute an unwieldy body, difficult to navigate anywhere, and particularly difficult to put into a slip quickly. The captains of the New Haven tugs were all licensed pilots, of long experience and good reputation. They were called on to act promptly, and there is nothing to show that they did not use their best judgment in the course which they took. Under all the circumstances, my conclusion, with some hesitation, is that they were not negligent in mooring off Pier 5.

[5] A claim also is made that they did not give any notice to the Pierrepont of their presence. They give evidence that a bell was rung that morning on tug 19. All the witnesses from the Pierrepont testified that they did not hear it, and I think it doubtful whether it was rung. But there is no rule that I am aware of requiring a bell to be rung by a vessel moored to a pier. A bell must be rung by a vessel at anchor, but these tugs and floats were not at anchor. They claim that a bell was rung. Their lights were burning; and I do not see that they did anything or omitted to do anything which it was their legal duty to do or to omit.

[6] Moreover it is a question whether, if they were guilty of negligence, the injury to the Vail from the collision 10 piers up the river can be considered the proximate result of such negligence. No demand is made in this case for a recovery for the injuries to the Pierrepont. The sole recovery sought is for the injuries to the Vail. But it is unnecessary to pass upon the question of proximate or remote result, for I think that, in view of all the circumstances, the injury which the Vail sustained was not the result of any negligence by anybody, but was the result of a series of inevitable accidents.

There should be a decree for the respondents, dismissing the libel, but, under all the circumstances of the case, without costs to any party.

In re CARLON.

(District Court, D. South Dakota, S. D. August 12, 1911.)

No. 639.

1. BANKRUPTCY (§ 396*)—HOMESTEAD—RIGHT TO SELECT UNDER SOUTH DAKOTA STATUTE.

A bankrupt who some two weeks before the filing of an involuntary petition against him moved with his family in good faith from the home he had previously occupied to another of about the same value was entitled under the laws of South Dakota, which give a debtor the right to select his homestead, to hold the new home exempt as a homestead; the old one having been turned over to his trustee.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 396.*]

2. BANKRUPTCY (§ 396*)—EXEMPTIONS—LIFE INSURANCE—SOUTH DAKOTA STATUTE.

Under Code Civ. Proc. S. D. § 348, which provides that the avails of any life insurance payable to the estate or representatives of the assured, and not assigned, to the extent of \$5,000, shall inure to the separate use of his wife, if any, free from his debts, and Civ. Code S. D. § 728, which

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

provides that a policy of life insurance to the extent of \$5,000 shall be exempt from debts, policies on the life of a bankrupt, payable to his wife and less than \$5,000 in amount, are exempt, and do not pass to his trustee as assets of his estate.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 396.*]

In the matter of John E. Carlon, bankrupt. On review of decision of referee. Affirmed in part, and reversed in part.

W. E. Van Demark, for bankrupt.

Bailey & Voorhees, for trustee.

ELLIOTT, District Judge. This is a case in involuntary bankruptcy in which the bankrupt has filed exceptions to the decision of the referee disallowing in part his claim to exempt property, and refusing to set off to the bankrupt as exempt four policies of life insurance upon the life of the bankrupt, with his wife as beneficiary, and the trustee in bankruptcy filed exceptions to that part of the decision of the referee decreeing that the said bankrupt is entitled to have and to hold as exempt the property claimed by him as his homestead, and particularly described in said order. The two petitions for review were filed and were allowed.

A statement of the facts found by the referee, in so far as they are material to the questions presented by these exceptions, is, in substance, as follows:

Prior to the commencement of the bankruptcy proceedings herein, John E. Carlon was engaged in the buying and selling of grain. He operated an elevator at Emery, S. D., one at Bridgewater, S. D., one at Dickens, Iowa, and one at Cylinder, Iowa. He lived at Emery, Hanson county, S. D., and had resided there for 17 years.

On August 31, 1910, an involuntary bankruptcy petition was filed against him in this jurisdiction, and he was adjudicated a bankrupt, and George E. Todd of Bridgewater, S. D., duly appointed trustee in bankruptcy of his estate, and he is still acting in that capacity.

On the 1st day of December, 1910, the said bankrupt filed with the referee in bankruptcy his schedules in bankruptcy and in schedule B-5 he made claim for exemptions, claiming, among other property, the homestead then occupied by himself and his family, consisting of his wife and five children, which homestead was described as the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 36, township 102, range 57, in Hanson county, S. D., and also the following life insurance policies, to wit, policy No. 1375586 in the Mutual Life Insurance Company of New York, for \$1,000, and three policies for \$1,000 each in the New York Life Insurance Company, numbered 908493, 3332387, and 3039897, respectively.

That subsequently, by leave of the referee, the said bankrupt duly obtained leave to file and did file his amended claim for exemptions, claiming as exempt the foregoing insurance policies and limiting the tract of ground claimed as a homestead to one acre in area, described by metes and bounds, and upon which the buildings of the bankrupt were situated, same being a part of the 80-acre tract above described.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

That since 1897 the bankrupt has been and is a married man, living with his family, consisting of a wife and five children, and for a number of years has been the owner of ten lots in the town of Emery, on which was located a modern cottage, the value of which is \$4,000, incumbered at the time of his bankruptcy by a mortgage of \$2,500, which had up to August 18, 1910, and prior to moving upon the tract claimed as exempt, been occupied by the bankrupt and his family.

The said bankrupt was also the owner of an undivided one-half interest in an 80-acre tract of land adjoining the town of Emery, described as the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 36, township 102, range 57, in Hanson county, S. D. This land prior to July, 1910, was unimproved farm land, and was worth approximately \$100 per acre. The land was purchased from the state of South Dakota, and was owned jointly by John E. Carlon and one A. D. Mayer. There was unpaid upon the purchase price of the bankrupt's half interest \$1,620, leaving the bankrupt's equity in this land approximately \$2,380, exclusive of the improvements subsequently placed thereon, which land was purchased by the bankrupt and Mayer in 1905.

That on or about the 15th day of July, 1910, the bankrupt commenced the construction of a house and barn upon the said 80-acre tract. The barn was completed some time prior to August 18, 1910, but the house was not completed until later in the month of August, 1910. The bankrupt expended in the building of said house and barn the sum of approximately \$2,500.

On the 18th day of August, 1910, the bankrupt moved his family from his residence at Emery, S. D., to his new residence on the 80-acre tract. The barn at that time was completed. The house was not completed, but was in the course of construction, and the bankrupt for about three weeks lived with his family in the barn, and afterwards, when the house was completed, moved into the house where he now resides with his family. The referee in bankruptcy further found, as a finding of fact, that the bankrupt had for some time prior to July, 1910, contemplated building on said 80-acre tract, and as much as six months prior to said time had conversations with A. D. Mayer and his wife in which he expressed himself as having the intention of building on said tract.

On August 18, 1910, and for some time prior thereto, John E. Carlon was insolvent, his assets being worth about \$35,465, and his liabilities aggregating \$43,736. The referee further found from the evidence that the bankrupt on the 1st of August was owing certain sums, and that on or about that time he gave certain chattel mortgages upon certain of his elevators, and on August 15, 1910, the bankrupt's elevators at Bridgewater and Emery were taken possession of and foreclosure of chattel mortgages thereon commenced, and thereupon involuntary petition in bankruptcy was filed by other creditors. The referee further finds that at the time the bankrupt moved with his family from his residence in Emery, S. D., to his new house on the 80-acre tract, he did so without contemplating bankruptcy, in good faith, with the intent and purpose upon his part to abandon his old

homestead and to make his home with his family in the new home, and that in doing so he did not intend to hinder, delay, or defraud his creditors. He also finds that the former homestead of the bankrupt had been taken possession of by the trustee in bankruptcy, and was subsequently sold by the trustee for \$3,200, and the estate of the bankrupt received the benefit of such sale, and that there was only a small difference in value of the two homes.

The referee further found, with reference to the four life insurance policies above referred to, that policy No. 1375586 in the Mutual Life Insurance Company of New York, for \$1,000, has a cash surrender value, which on August 1, 1911, was \$228, together with compound interest credits, which on August 1, 1911, amounted to \$62.80, and, if said policy is surrendered before August 1, 1911, such cash surrender value should be discounted at the rate of 5 per cent. per annum. Also the three policies in the New York Life Insurance Company for \$1,000 each by their terms do not provide for an express surrender value. These policies, however, have an actual intrinsic value in that said company would pay on October 10, 1910, for the surrender of said policies the following amounts, to wit: On No. 908493, \$210; on No. 3039897 the sum of \$263; and on No. 3332387 the sum of \$221. And, further, that said New York Life Insurance Company will pay for said policies, if the same are surrendered at any time, such amounts in addition to the foregoing amounts, as may have accumulated on said policies since October 10, 1909. The referee thereupon determined that the said bankrupt on August 31, 1910, was and ever since has been the head of a family, as defined by the laws of the state of South Dakota in reference to homesteads and exemptions, and that he in good faith, and without any intent to hinder, delay, or defraud his creditors, moved with his family from his homestead in the town of Emery to his new homestead on the 80-acre tract of farm land, and that he is entitled to claim, hold, and to have set off to him as exempt, as his homestead, an undivided one-half interest in and to one acre of ground, with buildings thereon, the same being a part of the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 36, township 102, range 57, in Hanson county, S. D., and described by metes and bounds as set forth in said amended schedule.

He further found: That the life insurance policies above referred to constitute assets belonging to the estate of the bankrupt and pass to the trustee in bankruptcy of said estate, subject to the bankrupt's right to redeem the same upon payment by him of the surrender value or actual value of said policies, as provided by section 70, subd. 5, Bankr. Act July 1, 1898, c. 541, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451), and the amendments thereto. That all of said life insurance policies pass to and are the property of the trustee in bankruptcy of the estate of the bankrupt, and that he is entitled to have and to hold the same, free from any claim of exemptions on the part of the bankrupt. That the said bankrupt is not entitled to claim as exempt under the laws of the state of South Dakota the said life insurance policies or any of them. The referee in bankruptcy thereupon entered an order setting aside the property claimed by the bankrupt as a home-

stead, and refusing to set off to the bankrupt as exempt the insurance policies above described. From this order both parties have appealed.

[1] Upon the question of the right of the bankrupt to the homestead exemption demanded in his amended schedule, under the findings of the referee and upon the entire record submitted for consideration upon this review, in my opinion the referee's conclusion is right, and that portion of his order allowing said bankrupt his homestead exemption should be sustained. The Constitution of the state of South Dakota provides that:

"The right of the debtor to enjoy the comforts and necessities of life shall be recognized by wholesome laws exempting from forced sale a homestead, the value of which shall be limited and defined by law, to all heads of families. * * * Const. S. D. art. 21, § 4.

Pursuant to this constitutional provision, the statutes of the state of South Dakota provide:

"The homestead of every family, resident in this state, as hereinafter defined, to the extent of \$5,000 in value, whether such homestead be owned by the husband or wife, so long as it continues to possess the character of a homestead, shall be exempt from judicial sale, from judgment lien, and from all mesne or final process from any court." Revised Pol. Code, § 3215.

"The homestead must embrace the house used as a home by the owner thereof, and, if he or she has two or more houses thus used at different times and places, such owner may select which he or she will retain as a homestead." Id. § 3222.

"The property mentioned in this section is absolutely exempt from all process, levy or sale * * * to all heads of families a homestead * * * or a house and lot or lots or parcel of ground in any town or city * * * not exceeding one acre of ground, which lot or lots, or parcel of ground and improvements shall not exceed \$5,000 in value, to be selected by the debtor or his agent or attorney." Revised Code Civ. Proc. § 345.

Section 6 of the bankruptcy act provides that:

"This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition, in the state wherein they have had their domicile for the six months or the greater portion thereof, immediately preceding the filing of the petition." Bankr. Act 1898, § 6A.

The question to be determined is whether or not the premises occupied by the bankrupt and claimed by him as being exempt were, under the laws of the state of South Dakota, the homestead of himself and family. The referee has found the facts in this case, and I am satisfied his findings are supported by the record, and under the findings, applying the law of this state as it has been construed by the Supreme Court of the state, this bankrupt clearly had the right to select the property in question as his homestead. The referee has found that he had owned this one-half interest in this property for some years; that he had determined for reasons shown in the record to build a little home and occupy a portion of this land long prior to the time of his bankruptcy; that there was no fraud; that he moved upon this property with his family, in good faith, without any intent to hinder, delay, or defraud his creditors, turned the old homestead over to the trustee in bankruptcy, and the same has been sold by the

trustee and the proceeds of such sale are held for distribution to his creditors. The record in this case shows no contention upon the part of any one that this debtor did not select this particular piece of property as his homestead, no question of abandonment after such selection, no question of an excessive value in this property implying fraud, no denial that the trustee has sold the old homestead that was abandoned when he removed to the new homestead; in fact, nothing except suspicion upon which to base a suggestion that every act of the bankrupt was not in the best of good faith.

In this state of the record and with the findings of the referee there can be no question as to the intent of the bankrupt to impress this property claimed as his homestead with his homestead right under the statutes of the state of South Dakota. The bankrupt's use and occupation of these premises were such as to prove them to be the home of himself and his family, that they so used it, and that the character and such use were permanent, continuous, and were neither transient or for temporary convenience. It is such use with intent or the use and intent combined which impress the homestead stamp on real estate. *Wap. Homestead*, 190; *Clark v. Evans et al.*, 6 S. D. 244, 60 N. W. 862. My judgment is that these premises were impressed with the stamp of a homestead so as to entitle the bankrupt to the exemptions demanded in his amended schedules, and that portion of the order of the referee setting the same apart to him as exempt property should be affirmed.

[2] The next question for consideration is involved in the appeal of the bankrupt from that part of the order of the referee disallowing in part his claim to exempt property and refusing to set off to the bankrupt as exempt the four policies of life insurance upon the life of the bankrupt, with his wife as beneficiary, as fully set forth in the foregoing statement of facts.

Keeping in mind section 6 of the bankruptcy act of 1898 above quoted, which provides that this act does not affect the allowance to bankrupts of the exemptions prescribed by state laws, it becomes necessary to consider section 70a of the bankruptcy act of 1898, which provides that when a bankrupt has any insurance policy which has a cash surrender value that he may, within 30 days after the cash surrender value has been ascertained, pay or secure to the trustee the sum so ascertained, and continue to hold, own, and carry such policy free of claim or claims of creditors.

Conflicting views as to the operation upon section 6 of the proviso in section 70a referred to were entertained by different courts, and the question finally settled for this circuit by Judge Caldwell in *Re Steele et al. v. Buel et al.*, 104 Fed. 968, 44 C. C. A. 287, and by the decision of the United States Supreme Court in the case of *Holden v. Stratton*, 198 U. S. 202, 25 Sup. Ct. 656, 49 L. Ed. 1018. It is there held that section 70a deals not with exemptions, but solely with the nature and character of property, title to which passes to the trustee in bankruptcy, and this is followed by enumeration under six headings, of the various classes of property which pass to the trustee. The court further states:

"Clearly the words 'except in so far as it is to property which is exempt' make manifest that it was the intention to exclude from the enumeration property exempt by the act."

It is further held in this opinion that this qualification necessarily controls all the enumerations, and therefore excludes exempt property from all the provisions contained in the respective enumerations. That section 70a deals only with property which, not being exempt, passes to the trustee, and under this decision the sole question upon this record is, Were these insurance policies exempt, under the laws of the state of South Dakota? The law of the state of South Dakota upon the subject of the exemption of life insurance policies is somewhat involved, and, so far as I can learn, has never been interpreted by a decision of the Supreme Court of the state except in the case of *Skinner v. Holt et al.*, 9 S. D. 427, 69 N. W. 595, 62 Am. St. Rep. 878. Section 728 of the Civil Code of South Dakota, in reference to the exemption of insurance policies, provides as follows:

"A policy of insurance, to the extent of \$5,000 on the life of an individual, in the absence of an agreement or assignment to the contrary, shall inure to the separate use of the husband or wife and children of said individual, independently of his or her creditors; and an endowment policy, payable to the assured on attaining a certain age, to the amount of \$5,000 shall be exempt from liability from any of his or her debts, and the avails of any life insurance, or any other sum of money, not exceeding in amount \$5,000, made payable by any mutual aid or benevolent society upon the death of a member of such society are not subject to the debts of the deceased."

Section 348 of the Code of Civil Procedure of South Dakota provides as follows:

"The avails of any policy or policies of insurance heretofore or hereafter issued upon the life of any person and payable upon the death of such person, to the order, assigns, estate, executors or administrators of the insured, and not assigned to any other person, shall if the insured in such policy at the time of death reside or resided in this state and leave or left surviving a widow or husband or any minor child, to an amount not exceeding in the aggregate the sum of \$5,000, inure to the separate use of such widow or husband or minor child or children or both, as the case may be, independently of the creditors of such deceased, and to such an amount shall not in any action or proceeding, legal or equitable, be subject to the payment of any debts of such decedent."

In the case above cited the Supreme Court held the first provision above set forth as it then existed unconstitutional, it at that time not having the \$5,000 limitation, and held that a law which exempts to a debtor or his family all the money attainable from the policies of all the life insurance companies in existence furnishes no basis for computation or measure of value and is manifestly unreasonable and clearly repugnant to that provision as to exemptions for a "reasonable amount of personal property the kind and value of which to be fixed by general laws." The court has construed this section of the law which was exactly as it is now except that the \$5,000 limitation has been added to bring it within that decision of the Supreme Court, and used the following language:

"Endowment life insurance partakes of the nature of an investment, and like other insurance is often obtained by and made payable to the assured, his executors, administrators or assigns, for the sole purpose of creating a

fund subject to the payment of his debts and upon which his creditors may securely rely in case other resources fail. The clear intent of the Legislature as expressed in the foregoing enactment was to defeat such purpose, and create a statute exempting from the payment of debts, without any limitation whatever, the total amount of life insurance which can be in any manner obtained on the life of the assured." *Skinner v. Holt*, 9 S. D. 432, 69 N. W. 596, 62 Am. St. Rep. 878.

Modify this language of the Supreme Court by inserting the \$5,000 limitation and eliminating the words, "without any limitation whatever," and you have a construction of the statute as it now stands.

Subsequent to the decree of the county court from which this appeal was taken and before the same was argued in the Supreme Court, the statutory provision last above set forth was enacted by the Legislature of this state. It thereupon became necessary for the court to determine what, if any, effect this latter statute had upon the rights of the parties to the action. In determining this question, the purpose and intent of the Legislature as viewed by the Supreme Court was expressed as follows:

"We find ourselves unable to avoid the inevitable deduction that it was clearly the express purpose of the framers thereof to exempt from the payment of existing debts the avails of all life insurance policies heretofore or hereafter issued. * * *

The court then goes on to hold the same inoperative in so far as the same relates to antecedent contracts, but sustains the purpose and intent of the Legislature in its operation in all other respects. *Skinner v. Holt*, 9 S. D. 435, 69 N. W. 595, 62 Am. St. Rep. 878. I, also, note that in *Holden v. Stratton*, supra, the statute of the state of Washington exempting the proceeds or avails of life insurance simply provides "that the proceeds or avails of all life insurance shall be exempt from all liability for any debt." In this case it was urged in the Supreme Court that this statute "relates only to a fund realizable by death," and therefore the words "all life insurance" in the Washington statute must be given that restricted meaning. It was further urged that exemptions of life insurance policies do not generally protect the avails of insurance from pursuit by creditors of the insured where the proceeds of the policy are payable to his estate, nor do they protect the avails of insurance from pursuit by the creditors of the wife of the insured where she is a beneficiary. In that case the wife was the beneficiary in both of the policies, and was also one of the bankrupts. In one of the policies the husband was entitled, if he survived the 20-year period, to surrender the policy and receive its cash value. The court held under this condition and under this state of facts that such a construction should not be placed upon the Washington statute; that the error in the argument was manifest; that the broad terms of the statute as ordinarily understood embraced both of the policies, and it would not be construction, but legislation, to restrict the meaning of the statute in accord with narrower legislation in other states. Under this interpretation it is possible to sustain an exemption of all life insurance policies to an amount not exceeding \$5,000, regardless of their terms, and whether the insured is deceased or not under section 348 of the Code of Civil Procedure of

South Dakota. It is not necessary, however, under the statutes of this state, to place this construction upon section 348, and for the purposes of this case it is sufficient to hold that this section exempts the avails of any policy of insurance to the extent of \$5,000 to the persons therein named. Section 728 of the Civil Code of South Dakota just as clearly protects a "policy of insurance" to the extent of \$5,000 on the life of an individual, and provides that the same shall inure to the separate use of the husband or wife and children of said individual independently of his or her creditors. It also makes provision for an endowment policy in the same sum, and provides that this shall be exempt from liability from any of his debts.

A casual reading of this section naturally impresses one with the thought that this section is to provide against the claim that is contended for in this case that this exemption of insurance policies does not obtain except in case of death. Section 728 of the Civil Code is not in conflict with section 348 of the Code of Civil Procedure in this view. The former exempts the policy of insurance in the hands of the individual in any sum less than \$5,000, and the latter section exempts the avails of any policy of insurance after death. This was the evident intent of the Legislature in the enactment of both of these sections. Life insurance is generally esteemed the best and safest measure by which a man of limited property, or one dependent on his daily earnings, can make provision to preserve his family from suffering and want after his death. In my judgment these two statutes giving them the effect I have indicated are but an expression of that public policy which justifies a debtor in preserving his family from suffering and want, and recognizes the support of wife and children as an obligation of the debtor greater than the claims of any creditors, and that law as well as morals should be extended to protect them from destitution after the debtor's death by permitting him, not to accumulate a fund as a permanent provision, but to devote a moderate portion of his earnings to keep policies of insurance within a reasonable sum, limited in this state to the sum of \$5,000, a security for their support. It follows that, entertaining this view of these exemption statutes as they apply to insurance policies within the state of South Dakota, the four policies referred to in the order of the referee appealed from herein are not assets of the bankrupt estate. That portion of the order of the referee appealed from by the bankrupt herein refusing to set off to the bankrupt as exempt the policies of life insurance referred to therein should be reversed and judgment entered in favor of the bankrupt for the four policies of insurance claimed by him, and also affirming the portion of the order appealed from by the trustee setting aside the homestead to the bankrupt.

Judgment will be entered accordingly.

THE BLUE BELL

(District Court, E. D. Virginia. March 20, 1911.)

1. TOWAGE (§ 15*)—LOSS OF TOW—LIABILITY.

In a libel against a tug for loss of a crib raft made up in sections and secured by a bridle of manila rope furnished by the libelant, evidence held to require a finding that the casualty occurred by reason of the manner in which the raft was made up, and the insufficiency of the fastenings furnished by the libelant, and not by reason of improper navigation by the master of the tug.

[Ed. Note.—For other cases, see Towage, Dec. Dig. § 15.*]

2. TOWAGE (§ 13*)—LOSS OF TOW—NEGLIGENCE OF TUG.

Where a part of a raft in tow broke loose in the night on the Maryland shore owing to the fault of the libelant in the manner in which the raft was constructed and secured, and at the time of the casualty all the lights on the tow which were to have been furnished by the libelant were out, the tug, owing to the dangers incident to a search for the raft in the darkness, and the improbability of fruitful results therefrom, was not at fault for failure to stand by to try to recover the raft on the night of its loss, it being impossible for the tug to have rendered material advantage in the removal of the wreck at that time.

[Ed. Note.—For other cases, see Towage, Dec. Dig. § 13.*]

3. TOWAGE (§ 11*)—MASTER OF TUG—LICENSE.

Where the master of a tug was a licensed mariner on the Atlantic Coast, and, at the time of the loss of part of a raft in the Potomac river which he was towing, it appeared that he properly navigated his boat and tow, it was not material that he had no license for such river.

[Ed. Note.—For other cases, see Towage, Dec. Dig. § 11.*]

4. TOWAGE (§ 4*)—LOSS OF TOW—LIABILITY OF TUG.

A tug is not an insurer of the safety of the tow, nor is it bound to perform the obligations of a common carrier respecting the same, but is only required in its management to exercise reasonable or ordinary care, caution, and maritime skill.

[Ed. Note.—For other cases, see Towage, Cent. Dig. § 4; Dec. Dig. § 4.*]

In Admiralty. Libel by Thomas W. Smith against the steam tug Blue Bell for loss of a tow. Dismissed.

Garnett & Garnett, for libelant.

Floyd Hughes and James A. Toomey, for respondent.

WADDILL, District Judge. The libel in this case was filed to recover damages sustained by the libelant for the loss of a raft in tow of the respondent tug. The facts are briefly that on or about the 24th day of December, 1907, the owner of the Blue Bell contracted with the libelant to tow a certain raft, a portion of which was at the Upper Machodoc creek, some 38 miles above the mouth of the Potomac river, and the other part on Maddox creek, some seven miles below, the whole to be towed to Chesapeake City, at the entrance of the Chesapeake and Delaware Canal, at the price of \$75 per day of 24 hours towing time, and \$50 per day of 24 hours lay-over time, to be paid upon completion of the service; the tug boat to furnish sufficient towing hawser for the service, and the libelant the necessary bridles, lanterns and one anchor. Pursuant to this undertaking, the raft in ques-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion, having been made up by the libelant, was early on the morning of the 26th of December taken up by the respondent, the first section at the mouth of Upper Machodoc creek, and the remaining section at Maddox creek, where the two were made fast to each other, and taken in tow by the respondent. The raft was not of the ordinary type—that is to say, of logs or piles made fast together, and drawn over the water, in large or small numbers, having regard to the waters over which, and the place they were to be taken to, but what was known as a “crib raft,” made up in two sections, the first containing 425, and the other 333, logs, each about 40 feet in length, arranged in five layers, one upon the other, five of these groups of layers composing the first section of the crib, making it about 210 feet long, and containing, as indicated above, about 425 logs. The second section was similarly made up, containing 333 logs, and was also about 210 feet long. These logs and layers were made fast by means of stringers, iron cables, bolts and wire, in such manner as the libelant insists was sufficient for the safety of the raft over the waters it had to traverse. The tow proceeded down the river on a hawser of 200 fathoms. The weather was good, and the journey uneventful until late in the afternoon, when in the neighborhood of St. Mary’s river, some six miles above Point Lookout, the representative of the libelant, who was then on the tug, according to his statement, suggested the propriety of going into that river for harbor, on account of the then condition of the weather, the wind at the time blowing, as it is claimed, 10 or 15 miles an hour from the southwest. This conversation the respondent denies, and says on the contrary that libelant’s representative commented on the favorable condition of the weather half an hour before the breaking loose of the raft. That about the time it broke loose, it was discovered that the raft’s lights were out; the wind was blowing 12 to 15 miles from the southwest; and that then, about 9 o’clock p. m., when within $1\frac{1}{2}$ to 2 miles of Point Lookout, the raft did break loose; that there were no weather conditions justifying the abandonment of the journey and going into harbor at St. Mary’s river, and had there been such, with the then condition of the wind from the southwest, the safer course would have been to go around Point Lookout into the bay, and make harbor on the lee of the land around Point Lookout.

The errors in navigation relied on specifically by the libelant are that the master of the tug was without license to navigate the waters of the Potomac river; that he erred in failing to go into St. Mary’s for harbor; and that he neglected to stand by sufficiently long to search for the raft the night of its loss, and to properly assist in saving it when it was discovered two days later. The respondent, on the other hand, insists that the raft was insecurely made up for such a journey; that it would have gone to pieces upon striking rough water; that the tow log was inefficient, and insufficiently secured; that the bridle of manila rope furnished the tow was not such as the service demanded; that the raft was without proper anchor, and the lights defectively constructed; and that there was nothing in the condition of the weather to justify going into harbor; and that the loss resulted solely from the inherent weakness in the towing apparatus provided by the libelant.

[1] The solution of the case depends almost entirely upon the correct determination of questions of fact, and the conclusion of the court is that there would have been no accident had there been sufficient towing attachment to the raft, and that the loss arose because of the lack thereof. It was an unusual structure, made up as above indicated. There were a number of logs fastened together, piled one on top of the other, so that the raft sank down in the water some five or six feet, showing not more than 10 or 12 inches freeboard. It was 400 feet long, necessarily of immense weight, and required the strongest and most powerful appliances for the tow; and, when put to the test, the strain was too great, the tow log pulled loose from the raft, setting the same adrift. Whether the manila rope broke or not, is not known, but the probabilities are that it did not, as the tow log was pulled off the raft, and the entire bridle, manila rope, and tow log were lost. The hawser was hauled aboard the tug in the presence of the libellant's representative and showed that it did not break, and, when the raft was recovered, it was apparent that the tow log had become detached. This was an appliance furnished by the libellant which gave way, and brought about the disaster.

The view of the testimony taken by the court is that there was no reason why the master of the *Blue Bell* should not have proceeded with the tow; that is, that the weather conditions were not such as required him to go into St. Mary's river. As the raft's appliances gave way so quickly after passing the river, the strong probabilities are that the accident would have happened had the *Blue Bell*, in the face of a southwest wind, attempted to change the course of the tow, so as to make in to that river, and the effort so to do would have certainly caused considerable strain upon the appliances of the raft, doubtless more so than to have gone straight ahead.

The libellant, in the construction of this raft, undoubtedly exercised great care in putting it together, and endeavored as far as was possible, with the material used, to make it safe, as he also especially did in the construction of the tow log across the forward end of the first section; but the tow log was not so constructed in the estimation of many experts who testified before the court, as to make it safe for the towing of a raft of this character, length, size and weight, and when put to the test, it pulled away, thereby demonstrating its insufficiency.

[2] Moreover, the *Blue Bell* should not be held liable for failure to stand by for the purpose of trying to recover the raft, on the night of the loss, considering the darkness of the night, the fact that the lights to be supplied by the libellant on the raft were confessedly out, the dangers to the tug incident to such a search, and the improbability of fruitful results therefrom; nor should she be held liable under the circumstances of this case, for the failure to remain longer than was done, after the raft was found, virtually upon the Maryland shore, two days after the occurrence. It was impossible for the tug to have rendered material advantage in the removal of the wreck at that time, nor, indeed, could the same have been made until new towing appliances were put upon it. As soon as the raft was ready, and the weather made it practicable to move it, the respondent did all that reasonably could be required of it.

[3] The failure of the master to have a license for the Potomac river likewise did not enter into this occurrence. He was evidently a mariner of exceptional experience, his licenses showing that he was authorized to act as "Master on Atlantic Coast. First class pilot bays and harbors from Portland, Me., to Gay Head, Mass.; from Point Judith, including Narragansett Bay and Providence river; Long Island and Block Island Sounds, via The Race to Faulkner's Island, Conn.; New York Bay and harbor; Delaware River and Bay; Capes of Virginia to Norfolk, Va.; and Chesapeake Bay, including Hampton Roads and Patapsco river, between Baltimore and Cape Henry;" and while technically his license seems not to have included in terms the Potomac river, evidently the waters of Delaware river and Bay, Capes of Virginia to Norfolk, Va., and Chesapeake Bay, including Hampton Roads and Patapsco river, between Baltimore and Cape Henry, indicated that he was familiar with the mouth of the Potomac river. At all events, the failure of the license to include that river, seems not to have entered into this occurrence, as it is clear that he properly navigated his boat and tow on the occasion in question.

[4] The duty of the tug to its tow is not that of an insurer of its safety, nor has it imposed upon it the obligation of a common carrier respecting the same; but there is required of those charged with the tug's management the exercise of reasonable or ordinary care, caution, and maritime skill in and about the duties imposed upon and performed by them; and if these are omitted, and disaster occurs, the towboat becomes responsible. *The Syracuse*, 12 Wall. 167, 20 L. Ed. 382; *The Cayuga*, 16 Wall. 177, 21 L. Ed. 354; *Eastern Transportation Line v. Hope*, 95 U. S. 297, 24 L. Ed. 477; *The Adelia*, 154 U. S. 593, 14 Sup. Ct. 1191, 21 L. Ed. 672; *Southern Towing Co. v. Sarah J. Egan, Administratrix*, etc. (Circuit Court of Appeals, Fourth Circuit, November term, 1910) 184 Fed. 275. This obligation it has fully met in this case.

The accident having occurred by reason of the libellant's omission of duty, without fault on the part of the respondent, it follows that no damages can be allowed, and that the libel should be dismissed at libellant's costs, and it will be accordingly so decreed.

THE E. V. M'CAULLEY.

(District Court, E. D. Virginia. June 6, 1911.)

1. TOWAGE (§ 4*)—TUG'S LIABILITY FOR LOSS OF TOW—CARE REQUIRED.

A tug is not an insurer of the safety of the tow, nor subject to the obligations of a common carrier, but is only required to use ordinary care and maritime skill in performing the contract of towage.

[Ed. Note.—For other cases, see *Towage*, Cent. Dig. § 4; Dec. Dig. § 4.*]

2. TOWAGE (§ 11*)—PORT OF SAFETY—DISCRETION OF MASTER.

Where, on the day after departure of a tug and tow from Norfolk for Boston, the weather conditions became such that it was deemed advisable for safety to seek shelter from an impending storm, whether those in charge should have returned to the Virginia Capes some 70 miles away

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

or sought shelter under the lee of Assateague Shoal, which would have necessitated a comparatively short run, feasible, but slightly more dangerous, was a matter for the judgment of the master, whose determination will be held conclusive, in the absence of manifest error or negligence.

[Ed. Note.—For other cases, see *Towage*, Cent. Dig. §§ 11-23; Dec. Dig. § 11.*]

B. TOWAGE (§ 11*)—LOSS OF TOW—NEGLIGENT NAVIGATION.

Where the master of a tug in charge of a tow, being required to seek shelter from a storm, unnecessarily and in broad daylight ran the tow on the Blackfish Bank, a charted shoal of large proportions, well known and recognized by mariners, the loss of the tow and cargo resulted from negligent navigation for which the tug was liable.

[Ed. Note.—For other cases, see *Towage*, Cent. Dig. §§ 11-23; Dec. Dig. § 11.*]

In Admiralty. Libel by Staples Coal Company against the steam tug E. V. McCaulley. Decree for libellant.

Harrington, Bigham & Englar (Howard S. Harrington and T. Catesby Jones, advocates), for libellant.

Floyd Hughes, for respondent.

WADDILL, District Judge. On the 28th of November, 1909, the tug E. V. McCaulley, owned by the respondent, the Lambert's Point Towboat Company, took in tow at the port of Norfolk the barge Gatherer, also owned by said towboat company, with a cargo of 2,340 tons of soft coal, en route from Norfolk to Boston, Mass. The weather at the time was favorable for the voyage, and no difficulty was encountered until on Monday, the 29th of November, about 11:45 a. m., when the tug had gotten well out at sea, and some 12 miles to the northward and eastward of the Winterquarter Lightship, the weather conditions became such that it was deemed advisable for the safety of the tug and tow to discountinue the journey and seek shelter from the impending storm. The wind was north northeast, blowing 45 or 50 miles an hour. Some difficulty was encountered in putting about, but a second effort proved successful, and the barge and tow proceeded with a view of making the nearest available harbor, navigating on a course, as insisted by the libellant, of west by south half south, passing Winterquarter Lightship about 2 p. m., a mile and a half to the westward of the light—that is, between the shore and the light—and when three or four miles below the lightship, after having observed the Assateague Lighthouse, the course was changed to southwest by south, and upon running on that course 20 or 30 minutes, at 4:10 p. m. her course was again changed to west one quarter north, and, after continuing on that course 30 or 40 minutes, the barge stranded on the northern edge of Blackfish Shoal, causing a total loss of the barge and cargo.

The libel is filed to recover the value of the cargo lost; and libellant insists that the McCaulley should be held liable for the failure to so navigate as to avoid running upon a well-recognized charted shoal; that the navigator of the tug was incompetent and negligent in failing to keep on the proper course, and that the tug was not of sufficient power to safely tow the barge on the voyage in question. Whereas,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

respondent insists that the tug was properly manned, and in all respects seaworthy and sufficient for the service in hand, and that the disaster occurred in an effort to make harbor, or secure anchorage under the shelter of Assateague Shoal, and was in no respect due to negligence, omission, or want of skill on the part of those charged with the navigation of the tug, but solely because of the severity of the storm.

[1] Under the law, the towboat is not an insurer of the safety of the tow, nor has she imposed upon her the obligation resting upon common carriers; but there is required of those charged with her management, the exercise of reasonable or ordinary care and caution and maritime skill in and about the duties imposed upon, and to be performed by her. If these are omitted and disaster occurs, she becomes responsible. *The Syracuse*, 12 Wall. 167, 20 L. Ed. 382; *The Cayuga*, 16 Wall. 177, 21 L. Ed. 354; *Eastern Transp. Line v. Hope*, 95 U. S. 297, 24 L. Ed. 477; *The Adelia*, 154 U. S. 593, 14 Sup. Ct. 1191, 21 L. Ed. 672; *Southern Towing Co. v. Egan*, Adm'x (November 10, 1910, C. C. A. Fourth Circuit) 184 Fed. 275; *Thomas W. Smith v. Blue Bell*, District Court, E. D. Virginia, March, 1911, 189 Fed. 824.

This case turns almost entirely upon a question of fact, as to whether or not, under the circumstances, the McCaulley should have abandoned her voyage, and attempted to make harbor; whether the particular harbor or place of refuge should have been sought, or some other; and whether in attempting to make anchorage under the lee of Assateague Shoal, reasonable care and caution and maritime skill was exercised on the part of her navigator, or that there was such lack thereof as constituted within itself fault for which the tug should be held responsible. In passing upon the conduct of those in control of the McCaulley's navigation, on the occasion in question, the court cannot, and should not, lose sight of the fact that the same is being viewed after the event, as distinguished from the exigencies of the position in which they were placed, and hence as to all matters involving the exercise of discretion, such as whether there should have been a temporary abandonment of the voyage, the course best to have been pursued, and what particular harbor should have been sought, all largely matters of discretion, error should not be imputed to them except in case of gross and manifest error or negligence.

[2] The testimony is clear to the court that the return trip with a north-northeast wind to the Virginia Capes, some 70 miles away, could have been readily and safely made, the tug and tow running before the wind; but whether this should have been done, or refuge sought under the lee of Assateague Shoal, was a matter as to which the judgment of the master of the McCaulley should control, and he was entirely justified in seeking protection from the storm under Assateague Shoal, which necessitated a comparatively short run. It is true that it was a more dangerous course to pursue than returning to the Capes, but one that was entirely practicable, and there was no reason to believe could not have been safely made under the then conditions of the weather.

[3] The real question to be determined is whether the McCaulley should be held responsible for her navigation in the effort to make this harbor, or place of refuge, and as a consequence, in grounding the barge upon the shoal of Blackfish Bank, instead of taking the same under the lee of the land safely to anchorage. The evidence is virtually undisputed that there was no difficulty in making this anchorage in the daytime, with clear weather as existed on this occasion, and the wind north-northeast, blowing 45 or 50 miles an hour. All that was necessary was for the tug and tow to have kept sufficiently far to the southward and eastward to go round or under the Blackfish Shoal to the Assateague anchorage, instead of crossing the shoal, as was done. The wind was blowing offshore; the light of Assateague was plainly in view and observed, as was also the existence of the shoal waters of Blackfish Bank, and either to have run on said bank, or the shoal thereof, or into such close proximity as not to have been able to avoid grounding thereon, was gross and palpable error, constituting within itself more than mere mistake in judgment, namely, a positive fault, which sufficiently accounts for the disaster that took place. Blackfish Bank is a charted shoal, of no mean proportions, well known and recognized by mariners, and to have run upon and over it in broad daylight, and in not especially unfavorable weather, was inexcusable. The course pursued by the McCaulley's navigator on the occasion in question is doubtless attributable to the removal of the Winterquarter Lightship from the place where it had long been stationed, to a distance of some $7\frac{3}{4}$ miles to the northward and eastward, of which fact the master of the McCaulley had only a general idea—that is, he knew that the lightship had been moved to some extent—but he thought something less than half the distance it had been actually moved, which accounts for his making the departure on his course as early as he did, to go into Assateague. Had he been $3\frac{1}{2}$ to 4 miles further on his course, it is most probable he would not have grounded, but safely passed under the lee of the shoal. Be this as it may, however, it will not serve to excuse the tug from liability for grounding the tow upon a well defined, charted shoal, especially when the shore marks, the lighthouse on the shore, and the sea on the shoal itself, one and all gave admonition of the fact that the McCaulley was plainly navigating in a place of manifest danger, instead of one of safety.

The suggestion that the McCaulley was not of sufficient size and power to have undertaken the towage service in which she was employed, is, in the opinion of the court, without merit. She had frequently rendered similar service; was built and equipped for the ocean trade, and there was no reason why she should not have safely executed her contract, but for the fault in her navigation aforesaid.

A decree may be entered for the libellant for the value of the cargo lost, with costs.

In re WENTWORTH LUNCH CO.

(District Court, S. D. New York. January 25, 1911.)

BANKRUPTCY (§ 114*)—RECEIVERS—JURISDICTION TO APPOINT—EXPENSES OF RECEIVERSHIP WHERE APPOINTMENT WAS ERRONEOUS.

A District Court has jurisdiction to appoint a receiver for the property of a corporation on the filing of a petition in bankruptcy against it by creditors, although it is afterward determined that the corporation was not subject to adjudication as a bankrupt, and it may in its discretion allow and pay the expenses of the receivership, including compensation to the receiver and his attorney from the funds in his hands where such services were beneficial to the estate.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 114.*]

In the matter of the Wentworth Lunch Company, alleged bankrupt. On motion for confirmation of report of special master on receiver's account. Report confirmed.

The following is the report of the special master :

To the Honorable United States District Court Judges:

I, Stanley W. Dexter, to whom was referred as special master the account of William Lesser, as receiver, and the report of services of Maurice P. Davidson, his attorney, for examination, testimony and report and further to report my opinion, whether as a matter, both of law and discretion, such allowances as may be made should be paid out of the funds in the hands of the receiver or by those creditors who moved for the appointment of said receiver and obtained an order therefor, do hereby report that I have been attended by William Lesser, Esq., receiver in person, and by Maurice P. Davidson, Esq., his attorney, and by Reno R. Billington, Esq., attorney for the alleged bankrupt and for the assignee and for the New York Central Warehouse Company, lienor, and have heard the proofs and allegations of the respective parties and the arguments and briefs of counsel and after due consideration, I report as follows:

An involuntary petition in bankruptcy was filed in this court on October 21, 1907, by Maurice P. Davidson as attorney for Nollman & Co., James T. Smith, and Max Waterman, creditors to the sum of \$622.60 alleging that the Wentworth Lunch Company is a corporation and engaged in "carrying on a restaurant business" at No. 88 Fulton street, in the Borough of Manhattan, and city of New York, and is not a wage earner or person engaged chiefly in farming or in the tillage of the soil, and is not a national bank or a bank incorporated under the state or territorial laws and owes debts to the amount of \$1,000 and over; that it is insolvent, and while insolvent and within four months committed an act of bankruptcy in that on October 17, 1907, it made a general assignment for the benefit of its creditors to one Gerard S. Witzen and further transferred property in payment of antecedent indebtedness with the intent to prefer. The petition was duly verified by the creditors mentioned and the same day, on the petition of Walter P. Nollman on behalf of Nollman & Co., showing that the alleged bankrupt had been dispossessed and that its property was perishable and on motion of Mr. Davidson, Mr. Lesser was appointed receiver with a bond of \$500 and the petitioning creditors were directed to give a bond under section 3 (e) in the sum of \$250. The receiver, on attempting to take possession of the Fulton street store, ascertained that practically all the property had been removed to the New York Central warehouse at No. 103 East 125th street, New York, except certain fixtures contained in another store at 45 New street, and claimed by the occupant, Strassburger. After an examination of witnesses under section 21a (Act July 1, 1898, c. 541, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3430]), the receiver was put in possession of facts, which enabled him to regain most of the property, and subsequently a sale thereof was ordered by the court, free of liens, realizing

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

\$917.78 gross, or net proceeds of \$816.40. He has also succeeded in recovering \$175 for the New street fixtures. Certain small collections and interest received increased total fund to \$1,075.08, as shown in his account. The only disbursements that the receiver has made out of the fund is an item of \$15 paid as indemnity for expenses of referee in charge, leaving a balance in his hands of \$1,060.08, which should be approved as correct.

The receiver has incurred, but not yet paid, the following expenses of administration:

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| To Thomas Alexander, services as special commissioner..... | \$15.20 |
| " C. A. Parsons, stenographer, testimony 21..... | 23.00 |
| " New York Times, advertising sale..... | 4.80 |
| " U. S. Fidelity & Guaranty Company, premiums on receiver's bond for 4 years, to October 22d, 1911..... | 20.00 |
| Total | \$63.00 |

These expenses are proper and should be allowed receiver as necessary costs of administration.

In addition to the foregoing the fund in the hands of the receiver is subject to a storage lien of the New York Central Warehouse Company, amounting to \$367.20, which by order of the referee has attached to the proceeds of sale.

Appraisers were appointed by the court, but no application has yet been made to fix their compensation.

I recommend, also, that the receiver be allowed \$100 as compensation for his services in collecting and conserving the assets and that \$100 be allowed to his attorney for legal services and assistance herein.

The remaining question referred to me under the order is: "Whether as matter both of law and discretion such allowances should be paid out of the funds in the hands of the receiver, or by those creditors who moved for the appointment of said receiver and obtained an order therefor."

It appears that the alleged bankrupt interposed an answer to the petition, alleging that it was engaged in carrying on a restaurant and saloon at 86 Fulton street, wherein it distributed foods and liquors at retail, and that said foods and liquors were consumed on the premises. That it is not and never has been engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits, and was not within the purview of the bankruptcy act.

On the answer and other affidavits, a motion was made to vacate the order appointing the receiver, which was denied by Judge Holt by order dated October 29, 1907.

The issues then came on for trial before the same judge, who handed down a decision on November 9, 1907, in the following words: "I think that a corporation which carries on the usual business of a restaurant is engaged principally in trading and mercantile pursuits within the meaning of the Act, although, of course, the authorities differ on this question. But a corporation might carry on a restaurant under such circumstances or while doing other business, so that it would not be so engaged. The answer is so drawn that the respondent is entitled to try the issue of bankruptcy if it wishes. But if it was intended by the answer only to raise the legal question, and that would be the result of a reference, I should direct an adjudication. The respondent may either take a reference or an adjudication." On November 12, 1907, an order was made directing the usual order of adjudication to be entered unless within two days the alleged bankrupt applied for an order of reference on the question of fact involved, to wit: "Whether the Wentworth Lunch Company carried on its restaurant business under such circumstances or while doing other business, so that it is not engaged principally in trading or mercantile pursuits, within the meaning of the act."

The company did not avail itself of this condition and the usual order of adjudication was made on November 15, 1907, designating the present master as referee in charge, but took an appeal to the Circuit Court of Appeals. Pending the appeal, the receiver sold the assets, recovered by him, without further interference on the part of the bankrupt, but on January 11, 1908, an

order was made by Judge Holt, on the bankrupt's application, staying all proceedings until the appeal was determined.

On March 6, 1908, the Circuit Court of Appeals by a divided court reversed the order of adjudication on the allegations of the answer, citing among other authorities the decision in *Re Chesapeake Oyster & Fish Co. (D. C., Colo.)* 7 Am. Bankr. Rep. 173, 112 Fed. 960, as involving the precise question. In *re Wentworth Lunch Co. (2d Circuit)* 20 Am. Bankr. Rep. 29, 159 Fed. 413, 86 C. C. A. 393.

A further appeal on writ of certiorari was taken to the Supreme Court and the decree of the Circuit Court affirmed April 18, 1910. *Matter of Wentworth Lunch Co.*, 217 U. S. 591, 30 Sup. Ct. 694, 54 L. Ed. 895.¹ The judgment was affirmed on the authority of *Toxaway Hotel Co. v. Smathers*, 23 Am. Bankr. Rep. 626, 216 U. S. 439, 30 Sup. Ct. 263, 54 L. Ed. 558, decided February 21, 1910. In that case it was for the first time authoritatively settled that an occupation that is not trading is not a mercantile pursuit, and that a corporation if not amenable to the bankruptcy act does not become so because it incidentally engages in mercantile pursuit. Prior to these decisions, the authorities were conflicting, as to whether or not hotels and restaurants were amenable to the act. *Re Chesapeake Oyster Co. (D. C. Colo.)* 7 Am. Bankr. Rep. 173, 112 Fed. 960, holding in the negative. *Re Barton Hotel Co. (D. C.)* 12 Am. Bankr. Rep. 335, holding in the affirmative.

Opinion.

It is a general rule of equity that the compensation and expenses of the receiver are payable out of the fund. The receiver does not act as the agent for either of the parties, but as the hand of the court. *Union Trust Co. v. Railway Co.*, 117 U. S. 434, 6 Sup. Ct. 809, 29 L. Ed. 963; *Central Trust Co. v. Wabash (C. C.)* 23 Fed. 863.

He is not appointed for the benefit of either of the parties, but of all concerned. *Davis v. Gray*, 16 Wall. 203, 218, 21 L. Ed. 447. The expenses which the court creates are burdens necessarily on the property taken possession of, irrespective of the question who may be the ultimate owner or who may invoke the receivership. *Kneeland v. Am. Loan Co.*, 136 U. S. 89, 98, 10 Sup. Ct. 950, 34 L. Ed. 379; *Atlantic Trust Co. v. Chapman*, 208 U. S. 360, 28 Sup. Ct. 406, 52 L. Ed. 528.

The only qualification of these familiar rules is that the court must have had jurisdiction of the subject-matter and that the appointment of the receiver involved no irregularity. *Atlantic Trust Co. Case*, supra. That the court had jurisdiction to hear and determine the issues of fact bearing on this bankruptcy cannot be questioned. It certainly had jurisdiction of the subject-matter so far as was necessary to enable it to determine the question whether or not the company was amenable to the act. *Hill Co. v. Supply Co.*, 24 Am. Bankr. Rep. 84, 89, 156 Ill. App. 270; In *re De Lancey Stable Co. (D. C., Iowa)*, 22 Am. Bankr. Rep. 406, 170 Fed. 860; In *re Bank of Belle Fourche (Eighth Circuit)* 18 Am. Bankr. Rep. 265, 152 Fed. 64, 81 C. C. A. 260; In *re Hill Co. (Seventh Circuit)* 20 Am. Bankr. Rep. 73, 159 Fed. 73, 86 C. C. A. 263.

If it had jurisdiction, the appointment of the receiver was proper in its discretion. If the adjudication was erroneous, it is not a nullity, but the error may be corrected on appeal. In *re N. Y. Tunnel Co. (2d Circuit)* 21 Am. Bankr. Rep. 531, 166 Fed. 284, 92 C. C. A. 202. The court will exercise an equitable discretion in compelling the fund to bear the expenses or in apportioning the same among others as justice requires.

I have no difficulty in determining on which side the equities lie. The company has made an assignment, and had transferred or attempted to remove its property, and has no further standing in the situation. It has become a mere question of administration. The company was given an opportunity to prove the allegations of its answer before a master, but chose the costly and dilatory method of appeal. In the meanwhile the receiver recovered assets, and has sold them under the order of the court. All liens thereon have been preserved, and all rights protected under the shelter of this court. The serv-

¹ Memorandum decision.

ices of the receiver and his attorneys appear to have been beneficial to the estate and to that extent should be compensated for out of the fund. *Randolph v. Scruggs*, 10 Am. Bankr. Rep. 1, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165; *Clark v. Brown*, 119 Fed. 132, 57 C. C. A. 76; *Re Lock Stub Check Co.* (D. C., N. Y.), 5 Am. Bankr. Rep. 106, note. The case of *In re Lacov* (Second Circuit) 15 Am. Bankr. Rep. 290, 142 Fed. 960, 74 C. C. A. 130, contains nothing at variance with these principles. An examination of the original record in the law institute library (U. S. C. C. A. Record, vol. 303) shows a peculiarly atrocious attack on a perfectly solvent debtor by creditors, instigated by an attorney since disbarred, and the petition was dismissed as unfounded. The equities were strongly in favor of the alleged bankrupt and the discretion of the court below in taxing the expenses against the guilty creditor was proper. The only question before the Circuit Court of Appeals was the right to enforce payment by contempt proceedings and the jurisdiction of the District Court to order the expenses paid by the creditors.

I therefore report and recommend as a matter of discretion and of law that the expenses and allowances above set forth and the master's fees and expenses herein, amounting to \$30, are proper charges against the fund and should be paid therefrom. The balance in the receiver's hands should be applied (1) to the payment of the storage lien, and (2) what remains to the assignee. On making these payments the receiver should be discharged and his bond canceled.

Maurice P. Davidson and Raymond V. Ingersoll, for receiver.

William Lesser, in pro. per.

Reno R. Billington, for alleged bankrupt.

HOLT, District Judge. Motion granted. Referee's report confirmed; \$5.00 allowed to each appraiser. In my opinion the appointment of the receiver was not without jurisdiction. It has been held to have been erroneous, but it is, in my judgment, a misuse of terms to say it was without jurisdiction.

HILL VENEER CO. v. MONROE.

(Circuit Court, M. D. Pennsylvania. August 7, 1911.)

No. 106.

1. SALES (§ 45*)—RESCISSION BY SELLER—GROUNDS.

Where a seller sold and shipped at different times eight car loads of veneer to a furniture company on credit, having been informed by the company before any sale that it was continuing its business only by virtue of an extension of time by its creditors, there was no such fraud or misrepresentation as entitled the seller to rescind the sale and reclaim the last car load, which was the only one unpaid for, on the appointment of a receiver for the purchaser.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 94; Dec. Dig. § 45.*]

2. SALES (§ 161*)—DELIVERY TO COMMON CARRIER.

The unconditional delivery by a seller of goods to a common carrier, to be transported and delivered to the purchaser, to whom the bill of lading was sent, constituted a delivery to the purchaser, which passed the title, even though the purchaser had not accepted the goods at the time a receiver in insolvency was appointed for it, who received them in its behalf.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 377-380; Dec. Dig. § 161.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. SALES (§ 1*)—DEFINITION.

A "sale" is the transfer of the property in goods to another for an agreed price, and generally the title or property in the thing transferred passes to the purchaser as soon as delivery is made according to the terms of the contract. It is not necessary that the price agreed upon be paid to constitute a sale; but credit may be extended for the agreed price, and the title will pass as fully and effectually as if the consideration had been paid before the delivery, if delivery is actually consummated, unless a different intention is manifested by agreement or otherwise.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 7, pp. 6291-6306; vol. 8, p. 7793.]

In Equity. On petition by the Hill Veneer Company against W. R. Monroe, receiver of the Hawley Slate Furniture Company, to reclaim property. Petition denied.

Wm. Chrisman and Neil Chrisman, for petitioner.

A. W. Duy, for respondent

WITMER, District Judge. The Hill Veneer Company, a corporation doing business at High Points, in the state of North Carolina, seeks to reclaim certain property delivered to the insolvent, the Hawley Slate Furniture Company, engaged in the manufacture of furniture at Bloomsburg, Pa., consisting of a car load of veneer.

[1] It appears that during the year eight car loads of drawer bottoms had been shipped by the veneer company to the furniture company. The proper credit was entered on each invoice, and all were paid but the last or eighth car. Before any credit was extended, the veneer company caused inquiry to be made concerning the financial standing of the furniture company, resulting in an unfavorable report. The furniture company furthermore reported, frankly admitting, amongst other things, that it was working under an extension of time granted by its creditors, and offering as reference a person alleged to be its largest creditor, having no interest in the concern other than as a creditor. The veneer company also obtained a similar report from its authorized agent, who sold the furniture company the first order of lumber after his investigation.

The information to hand was sufficient to aid any discreet business man to a proper conclusion. If not, it was at least sufficient to have put the veneer company upon further inquiry, if anything additional was needed, which could have been readily ascertained by following the direction of the furniture company's letter. There is no allegation that any false representations were made by the furniture company in this or any other letter written by it. Neither is it charged that it in any wise misrepresented its true financial status. This the veneer company, no doubt, well understood at the time it opened its account and took chances; and it is not now sufficient, after having to a large extent succeeded, for it to say that the insolvent should have continued to keep it informed of its financial doings. Such information could have been ascertained, no doubt, upon proper inquiry, had the veneer company been diligent as bound under the circumstances.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

At the time the first credit was extended, the veneer company was aware of the fact that the furniture company was doing business by virtue of an extension offered by its creditors, and that, if a renewal of such extension should be refused, the business could not be continued; but it chose to extend its credit, and therefore assumed the risk of loss, and is now in no better position than the other creditors.

"Buyer and seller under ordinary circumstances deal at arm's length. On one hand, the rule is *caveat emptor*; while, on the other, the buyer is not bound to disclose his pecuniary condition or his ability to pay. A man has a right to take chances, and to be sanguine as to his affairs; hence the law of most commercial states holds that even insolvency, although known to the buyer at the time of the purchase, need not be disclosed, and the concealment of it, by mere silence, without any active misrepresentation, is not such fraud as will avoid the sale."

"To constitute legal or constructive fraud, such as to entitle the vendor to rescind the contract of sale and reclaim the goods, there must be something more than the mere insolvency of the vendee and the knowledge upon the part of the vendee that he is insolvent. There must be a withholding of that knowledge from his vendor, and a resort to trick, artifice, false representation, or such conduct as reasonably involves a false representation." *Smith v. Smith*, 21 Pa. 367, 60 Am. Dec. 51; *Bughman v. Central Bank*, 159 Pa. 94, 28 Atl. 209; *Smelting Co. v. Temple*, 12 Pa. Super. Ct. 99.

In the absence of circumstances which tend to show trick, artifice, false representation, or, in the language of *Smith v. Smith* itself, "conduct which reasonably involves a false representation," there has not been sufficient shown to take the case out of the rule of the authorities cited.

[2] But it is argued that even if there was no fraud or deception, which might have induced the shipment, the title of the property had not passed, either to the insolvent or its receiver, and that the petitioner is now only seeking to recover its own property. The order was given November 26, 1910, and delivered into the hands of the common carrier, in North Carolina, December 31, 1910, and the bill of lading at once forwarded to the purchaser. The lumber arrived at Bloomsburg, Pa., on or about January 13, 1911, but was not accepted by the consignee, in order that the consignor might be enabled to "receive the full amount on invoice." The receiver, however, appointed January 19, 1911, paid the freight, and accepted the goods, and appraised it as part of the assets of the estate.

[3] A sale is the transfer of the property in goods to another for an agreed price, and generally the title or property in the thing transferred passes to the purchaser as soon as delivery is made according to the terms of the contract. It is not necessary that the price agreed upon be paid to constitute a sale; but credit may be extended for the agreed price, and the title will pass as fully and effectually as if the consideration had been paid before the delivery, if delivery is actually consummated, unless a different intention is manifested by agreement or otherwise. In the present case there was no different intention or agreement, expressed or implied. The sale was unconditional. There is no doubt that the delivery to the common carrier of the property in question was a delivery to the purchaser. All the requisites of a delivery were observed, whether determined by the law of Pennsylvania or North Carolina. The conclusion is the same.

Following a long line of cases, in *Phila. & C. R. Co. v. Wireman*, 88 Pa. 264, it is decided that:

"Where goods are left with a common carrier, to be delivered to the consignee without any qualification or restriction, the consignor parts with the goods and all control over them."

It is held in *Ober v. Smith*, 78 N. C. 313, and again confirmed in *Hunter v. Randolph*, 128 N. C. 91, 38 S. E. 288, that:

"Where goods are left with a common carrier, to be delivered to the consignee, without any qualification or restriction, the consignor parts with the goods and all control over them, and the passage of title is not prevented by failure of the vendor to send the vendee a bill of lading."

But it is not necessary to resort to the law as laid down by the state courts for authority respecting the delivery of the lumber in dispute since it is said (*In re Hess*, 14 Am. Bankr. Rep. 642):

"It has been established by numerous decisions that, in finding upon a question of common law and not of statute, the United States court will not be bound by state decisions."

The Supreme Court of the United States, in an opinion delivered by Justice White in *U. S. v. R. P. Andrews & Co.*, 207 U. S. at page 240, 28 Sup. Ct. at page 104 (52 L. Ed. 185) says:

"That as a general rule the delivery of goods to a common carrier for account of a consignee has effect as delivery to such consignee is elementary. That where a purchaser of goods directs their delivery for his account to a designated carrier, the latter becomes the agent of the purchaser, and delivery to such carrier is a legal delivery to the purchaser, is also beyond question. Certain, also, is it that, on the delivery of goods to the consignee or his order, the acceptance by the consignee of such bills of lading constitutes a delivery."

And it is not inconsistent with a proper delivery that the carrier has not been designated by the purchaser, but it is sufficient that the goods have been delivered to the carrier usually employed in the transportation of the goods from the place of the seller to that of the purchaser, as was done in the present instance.

True, the purchaser refused to receive the goods when they arrived, with the manifest intent of returning the goods to the vendor, so as to prevent any loss of the price to the consignor. This was done without any actual intent to defraud any one, but with an honest desire to protect the vendor. This action was not, however, communicated to it, and the contract could only be rescinded, altered, or revoked with its consent, no matter what action the vendee might have taken. A contract is always mutual between the parties, and one cannot in any manner revise a mutual contract without the actual or implied consent of the other. But the purchaser had a right to change its mind in this respect, at any time before communicating its intentions to the vendor. This was done by the receiver, who succeeded to all the rights of the insolvent company. Moreover, the proposed action for the return of the lumber would never have been thought of, had the creditors not refused an extension and thus postponed the receivership proceedings. It undoubtedly would have been accepted and used in conducting the insolvent's business.

Even if the refusal to receive the goods had been communicated to the consignor and been agreed to by it, the transaction would have been in fraud of creditors, and could not have been enforced. The drawer bottoms, being at that time the property of the furniture company, which was insolvent and about to fall into the hands of a receiver in pursuance to proceedings instituted in court by its certain creditors, were a part of the assets of the estate. Had the insolvent caused the return of the disputed goods to the vendor, it would have unconsciously committed a fraud by creating an unlawful preference. The petition is therefore denied.

UNITED STATES v. THOMPSON.

(District Court, W. D. Virginia. August 2, 1911.)

1. INDICTMENT AND INFORMATION (§ 163*)—SUFFICIENCY—DESCRIPTION OF OFFENSE—BILL OF PARTICULARS.

An indictment may be so expressed as to be good on demurrer which still does not give the defendant all the information which he should in fairness have to properly prepare for trial, and the omission may be supplied under the federal practice by a bill of particulars.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 525; Dec. Dig. § 163.*]

2. INTERNAL REVENUE (§ 47*)—OFFENSES—REMOVAL OF SPIRITS CONTRARY TO LAW—INDICTMENT.

Under Rev. St. § 3296 (U. S. Comp. St. 1901, p. 2136), which makes it an offense to remove any distilled spirits on which the tax has not been paid "to a place other than the distillery warehouse provided by law," an indictment states an offense where it charges the removal by defendant of fruit brandy from the distillery to a place other than "the designated place of deposit provided by law," since under the regulations of the department, made by authority of law, such brandy is not required to be removed to a distillery warehouse, but to a designated place of deposit required to be provided by the distiller.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 144-150; Dec. Dig. § 47.*]

3. INTERNAL REVENUE (§ 39*)—OFFENSES—REMOVAL OF SPIRITS CONTRARY TO LAW—CONSTRUCTION OF STATUTE.

Rev. St. § 3296 (U. S. Comp. St. 1901, p. 2136), makes it unlawful to remove any spirits on which the tax has not been paid except from a registered distillery to the designated place of deposit, and applies as well to removals from an illicit, as from a registered, distillery.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 97-106; Dec. Dig. § 39.*]

4. STATUTES (§ 245*)—CONSTRUCTION OF REVENUE LAWS.

Revenue laws are not penal laws in the sense that requires them to be construed with great strictness in favor of a defendant, but are rather to be regarded as remedial in character and intended to prevent fraud, and to be so construed as to carry out such intention and accomplish such object.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 326; Dec. Dig. § 245.*]

Criminal prosecution by the United States against Ned Thompson. On demurrer to indictment. Overruled.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Barnes Gillespie, U. S. Atty., and Thos. J. Muncy, Asst. U. S. Atty. Hairston, Willis & Hairston, for defendant.

McDOWELL, District Judge. The first count of this indictment reads:

"United States of America, Western District of Virginia, Danville Division.—ss.:

"In the District Court of the United States, in and for the Western District aforesaid, at the November term thereof, A. D. 1909. The grand jurors of the United States, impaneled, sworn and charged at the term aforesaid, of the court aforesaid, on their oaths present, that Ned Thompson on the ——— day of ———, in the year 1909, in the said district, and within the jurisdiction of said court, did unlawfully remove and aid and abet in the removal of certain distilled spirits, to wit, ten gallons, upon which the tax imposed by law had not been paid, from a distillery to the grand jurors unknown, to a place other than the designated place of deposit provided by law, to-wit Franklin county, contrary," etc.

The second, and last, count merely charges "concealing" in the same language.

1. It was objected that the indictment does not inform the defendant whether the charges relate to whisky or brandy. Except for the fact that "designated place of deposit provided by law" has been substituted for "the distillery warehouse provided by law," the indictment follows the form approved in *Pounds v. U. S.*, 171 U. S. 35, 38, 18 Sup. Ct. 729, 730, 43 L. Ed. 62, in which case it is said:

"The offense was purely statutory. In such case it is generally sufficient to charge the defendant with acts coming within the statutory description in the substantial words of the statute without any further expansion of the matter. *United States v. Simmons*, 96 U. S. 360 [24 L. Ed. 819]; *United States v. Britton*, 107 U. S. 655 [2 Sup. Ct. 512, 27 L. Ed. 520]."

[1] But to overcome any ground of complaint in the respect mentioned the district attorney has asked leave to and has filed a bill of particulars in which it is stated that the distilled spirits referred to in both counts of the indictment was brandy. An indictment may be so expressed as to be good on demurrer and which still does not give the defendant all the information which he should in fairness have in order to properly prepare for trial. The value of the well-settled federal practice of thus overcoming by bill of particulars such defects in indictments is well illustrated in this case. See *Bannon v. U. S.*, 156 U. S. 464, 468, 15 Sup. Ct. 467, 39 L. Ed. 494; *Dunbar v. U. S.*, 156 U. S. 185, 192, 15 Sup. Ct. 325, 39 L. Ed. 390; *Coffin v. U. S.*, 156 U. S. 432, 452, 15 Sup. Ct. 394, 39 L. Ed. 481; *Rosen v. U. S.*, 161 U. S. 29, 34, 35, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; *Kirby v. U. S.*, 174 U. S. 47, 64, 19 Sup. Ct. 574, 43 L. Ed. 809; *U. S. v. Bayaud* (C. C.) 16 Fed. 376, 382; *U. S. v. Bennett*, 24 Fed. Cas. 1093, 1098; *U. S. v. Adams Co.* (D. C.) 119 Fed. 241; *Rinker v. U. S.*, 151 Fed. 759, 81 C. C. A 379; *Wharton*, Crim. Pl. & Pr. (9th Ed.) § 702; 1 *Bishop*, Crim. Proc. (2d Ed.) § 643.

[2] 2. A ground of demurrer is that the language of the statute (section 3296, Rev. Stats.; 3 Fed. Stats. Ann. 671 [U. S. Comp. St. 1901, p. 2136]) has not been followed. Perhaps it would have been

better had the exact language of section 3296 been followed; but the pleader was simply thus seeking to advise defendant that the distilled spirits in question was brandy. In the Regulations of September 16, 1908 (No. 7) p. 208, made under authority of law, fruit brandy distillers are required to have and keep a "designated place of deposit" for brandy at which it is to be kept until payment of the tax has been made. Technically, therefore, brandy is required by law to be removed from its place of manufacture, not to a "distillery warehouse," but to a "designated place of deposit" provided by law. This departure from the exact language of section 3296 therefore means exactly what the language of the statute would have meant, and simply gives the defendant more information than he was in strictness entitled to, except by bill of particulars. The language used is substantially the language of the statute.

[3] 3. The point most earnestly insisted upon is that the statute does not apply to spirits (either whisky or brandy) produced at what is termed an "illicit distillery." A part of section 3296 clearly relates only to illegal removals of spirits from a warehouse provided by law. But the first four or five lines are not so limited:

"Whenever any person removes * * * any distilled spirits on which the tax has not been paid, to a place other than the distillery warehouse provided by law * * * he shall be fined," etc.

The argument is that there is no warehouse provided by law at the ordinary illicit distillery, and that consequently Congress had in view only removals from registered and bonded distilleries at which there always is a warehouse provided by law. I question if there is room for sufficient doubt as to the meaning of the statute to render it open to construction. "Where a law is expressed in plain and unambiguous terms, * * * the Legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction." *Lake County v. Rollins*, 130 U. S. 662, 670, 671, 9 Sup. Ct. 651, 652, 32 L. Ed. 1060. The language used in the statute most plainly makes it illegal to remove any untaxed spirits, and as by way of proviso it necessarily excepted removals from all distilleries to the warehouses provided by law at such distilleries. Therefore, as I read it, the statute forbids all removals of untaxed spirits except from a registered distillery to the warehouse at that distillery; and, in case of brandy, except from a registered distillery to the designated place of deposit, which is the distillery warehouse provided by law. No reason suggests itself why Congress should have intended that this statute should not apply to removals of untaxed spirits produced at an illicit distillery. The statute was enacted to facilitate the collection of revenue from distilled spirits. There was therefore reason for an intent to make such removals as entirely illegal as improper removals from registered distilleries. The statute (3296) was taken verbatim from (15 Stat. 140) section 36 of an "Act Imposing Taxes on Distilled Spirits and Tobacco and for other purposes," enacted in 1868. An intent that illicitly made and untaxed spirits could be removed freely, while untaxed spirits produced at registered distilleries should not be removed (except to the warehouse), cannot, as it seems to me, be

found in the statute. The act committed is within the language of the statute, and no reason suggests itself why this language should not apply.

The very fact that a quite thorough search, including 186 Federal Reporter and 218 U. S., has failed to discover a single case in which such contention has been made, is almost of itself sufficient for holding the contention unsound.

[4] It is argued that the statute should be strictly construed. Revenue laws are not penal laws in the sense that requires them to be construed with great strictness in favor of the defendant. They are rather to be regarded as remedial in character, and intended to prevent fraud, suppress public wrong, and promote the public good. They should be so construed as to carry out the intention of the Legislature in passing them and most effectually accomplish these objects. See *U. S. v. Burdett*, 9 Pet. 689, 9 L. Ed. 273; *U. S. v. Hodson*, 10 Wall. 395, 406, 19 L. Ed. 937; *Id.*, 154 U. S. 580, 14 Sup. Ct. 1212, 19 L. Ed. 941; *U. S. v. Stowell*, 133 U. S. 1, 12, 10 Sup. Ct. 244, 33 L. Ed. 555; *Arnold v. U. S.*, 147 U. S. 494, 13 Sup. Ct. 406, 37 L. Ed. 253; *U. S. v. Goldenberg*, 168 U. S. 95, 18 Sup. Ct. 3, 42 L. Ed. 394.

Counsel for defendant seemingly place reliance upon what was said in debate in Congress when the act of 1868 was passed. I do not myself find in such parts of the debates as are submitted in the brief anything that seems to relate to the point. See *Cong. Globe*, June, 1868, pp. 3379, 3397, 3400, 3401, 3456.

Chief Justice Taney said that in expounding a law "the judgment of the court cannot in any degree be influenced by the construction placed upon it by individual members of Congress in the debate which took place in its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself." *Aldridge v. Williams*, 3 How. 9, 24, 11 L. Ed. 469. See, also, *U. S. v. Railroad Co.*, 91 U. S. 79, 23 L. Ed. 224; *Knowlton v. Moore*, 178 U. S. 72, 20 Sup. Ct. 747, 44 L. Ed. 969; *American Co. v. Worthington*, 141 U. S. 473, 12 Sup. Ct. 55, 35 L. Ed. 821; *Bate v. Sulzberger*, 157 U. S. 42, 15 Sup. Ct. 508, 39 L. Ed. 601; *Dunlap v. U. S.*, 173 U. S. 75, 19 Sup. Ct. 319, 43 L. Ed. 616; *Merritt v. Welsh*, 104 U. S. 702, 26 L. Ed. 896; *Mitchell v. Great Works Co.*, 2 Story, 653, 17 Fed. Cas. 498, 499. The following are the only cases found which in any sense bear upon section 3296, Rev. Stats.: *Garnhart v. U. S.*, 16 Wall. 162, 21 L. Ed. 275; *U. S. v. Simmons*, 96 U. S. 360, 24 L. Ed. 819; *U. S. v. Chouteau*, 102 U. S. 603, 26 L. Ed. 246; *U. S. v. Britton*, 107 U. S. 655, 2 Sup. Ct. 512, 27 L. Ed. 520; *Stone v. U. S.*, 167 U. S. 184, 17 Sup. Ct. 778, 42 L. Ed. 127; *Pounds v. U. S.*, 171 U. S. 35, 18 Sup. Ct. 729, 43 L. Ed. 62; *U. S. v. Smith (D. C.)* 27 Fed. 854; *U. S. v. Three Copper Stills (D. C.)* 47 Fed. 495; *U. S. v. Sykes (D. C.)* 58 Fed. 1000; *Pilcher v. U. S.*, 113 Fed. 248, 51 C. C. A. 205; *U. S. v. Anthony*, Fed. Cas. No. 14,460; *U. S. v. Blaisdell*, Fed. Cas. No. 14,608; *U. S. v. Harries*, Fed. Cas. No. 15,309; *U. S. v. Hutchins*, Fed. Cas. No. 15,430; *U. S. v. McKee*, Fed. Cas. No. 15,688; *U.*

S. v. Nunnemacher, Fed. Cas. No. 15,902; U. S. v. Nunnemacher, Fed. Cas. No. 15,903.

The only conclusion I can reach is that the demurrer must be overruled.

DAM v. KIRK LA SHELLE CO.

(Circuit Court, S. D. New York. July 28, 1911.)

1. COPYRIGHTS (§ 87*)—INFRINGEMENT—COMPUTATION OF PROFITS.

On an accounting for profits made by defendant from the production of a play, which infringed a copyright of a story on which the play was based, owned by complainant, where defendant made its contracts by the season, each season should be taken as a unit in computing such profits; defendant not being entitled to credit against the profits of one season for losses incurred in another.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 81; Dec. Dig. § 87.*]

2. COPYRIGHTS (§ 87*)—INFRINGEMENT—ACCOUNTING FOR PROFITS.

On such an accounting defendant is not entitled to charge as an expense against the profits made the sum paid by it for the play, but only the reasonable value of an exclusive license for the time the play was presented.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 87.*]

3. COPYRIGHTS (§ 87*)—INFRINGEMENT—ACCOUNTING FOR PROFITS.

Defendant, a corporation having a capital stock of \$10,000, \$9,000 of which was owned by the widow of a former manager, is not entitled to credit on such accounting on account of a salary of \$25,000 per year which it contracted to pay her, in addition to a salary as manager for her services as president, and for certain other considerations which she did not furnish, but was entitled to credit for a reasonable salary for her services only.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 87.*]

In Equity. Suit by Dorothy Dorr Dam, administratrix, against the Kirk La Shelle Company. On exceptions to report of special master. Sustained in part.

Sur exceptions of both parties to the report of the special master stating an account of the profits derived by the defendant from a play called "The Heir to the Hoorah," which has been held to be an infringement of the dramatic rights of the complainant's intestate, as author of a story called "The Transmogrification of Dan." 166 Fed. 589; 175 Fed. 902, 99 C. C. A. 392.

Andrew Gilhooley, for complainant.
Hunt, Hill & Betts, for defendant.

WARD, Circuit Judge. Although the defendant and its immediate assignor purchased the play from the playwright, Paul Armstrong, in entire good faith and without notice of the complainant's rights, it is subject to the hard rule of having to account for all the profits it made by presenting it. Still the complainant's rights are not to be prejudiced by the allowance to the defendant of credits for unrea-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sonable payments, or for payments made without consideration to third parties.

July 8, 1905, the defendant was incorporated by Mrs. Kirk La Shelle (now Mrs. Hunt), the widow and sole legatee of a well-known theatrical manager, and two of her assistants, under the name of the Kirk La Shelle Company. The capital of the company was \$10,000, in 100 shares of \$100 each, all paid in by Mrs. Hunt in cash, who gave 5 shares to each of the other incorporators in consideration of their faithful services to her husband and to herself. The defendant had no notice of the complainant's claim until November 4, 1905. In the meantime, July 11, 1905, it made a contract for the purchase of the play from Mrs. Hunt for \$16,000 and the assumption of all losses in connection with its presentation previous to July 8, 1905, and payment of the sum in which the disbursements had exceeded the receipts of presentation to date, viz., \$5,424.70 (sixth finding of fact). There was also a separate agreement to pay Mrs. Hunt \$100 a week as manager for every week the play should be presented. The defendant also made another contract with Mrs. Hunt to pay her a salary of \$25,000 a year as president, including the right to use the name of her deceased husband and her agreement to finance the company from time to time (seventh finding of fact).

It is obvious that these contracts were not made for the purpose of defeating the complainant's claim, of which the defendant had then no notice, by exhausting the company's earnings. It is more likely that the purpose was to reduce the value of the 10 shares which Mrs. Hunt gave the other two incorporators. At all events, that was the effect, because the company never paid a dividend, and at the time of the accounting was in debt to her in a considerable amount for salary. It can hardly be believed that if the other two incorporators, who, with Mrs. Hunt, composed the board of directors, paid for their shares, they would have consented to this salary contract.

The complainant contends that Mrs. Hunt, owning 90 shares of the capital stock, is really the company, and in making the contract before mentioned was simply dealing with herself. But the special master has held that the company is a separate entity, and I shall follow him in this.

[1] The next question is whether the defendant's profits shall be ascertained by treating the whole period of presentation as one, or by resting at the end of each season, or of each week, or of each presentation. The special master fixed each season as a unit, and I think he was right in doing so. The defendant made its contracts for the season (twenty-third finding of fact), and kept its accounts in the same way. This is the natural way of ascertaining profits or losses. There might be cases, such as the building of costly separate machines, where each transaction could and should be considered separately. But the general business custom is to ascertain profits and losses annually.

These preliminary conclusions bring us to the question: What profits did the defendant make in each season it presented the play? The theatrical season is from September 15th to July 15th. The defend-

ant is entitled to credit against its earnings of each season all the direct expenses of the presentations of the play, together with such a proportion of its general expenses as is fairly to be appropriated to it.

[2] The special master allowed the defendant a deduction of the whole purchase price of the play, which he found to be \$16,000, to the playwright, and \$5,424.70, the sum by which the expenses of presentation by Mr. La Shelle in his lifetime and by his widow afterwards down to July 8, 1905, exceeded the receipts. I think the purchase of the play was, so to speak, a capital charge, and that only a fair charge for the use of it should be deducted from its earnings. The reasonable value of an exclusive license should be allowed for the times the play was presented.

The defendant should also be allowed (unless it be included in the exclusive license to use) the cost of the scenery, etc., which it obtained from Mrs. Hunt under the contract for the purchase of the play, and which I understand to be \$4,708.93 (fifteenth finding of fact).

The defendant presented the play but once in the season of 1904-05, viz., for the last week, ending July 15, 1905, and incurred a loss of \$730.49. This week is to be treated as a unit. The complainant gets no profits, and the defendant is entitled to no deduction from the earnings of the next season. For the same reason, the master should not have allowed the defendant any deduction for the loss in the season of 1907-08. Both these periods are to be entirely disregarded, unless upon a resettlement of the account in accordance with this opinion a balance of profits be shown.

The special master rightly refused to allow the defendant to deduct payments made to Mrs. Hunt as royalties for ownership of her late husband in connection with the play. This was necessarily included in the contract for the purchase of the play after his death.

[3] The special master also erred in allowing the defendant to deduct anything for the use of Kirk La Shelle's name, which was one of the considerations mentioned in the \$25,000 salary contract. The defendant, as a corporation, had the right to use its own corporate name, and as the purchaser of the play had a right to advertise the fact that it was originally presented by Kirk La Shelle. It seems to me that Mrs. Hunt gave nothing, and could give nothing, to the defendant in this connection. Moreover, if it be assumed that she did confer any right in the premises, there is no proof of its value. The testimony is pure speculation and wholly unsatisfactory. As for financing the company, the special master rightly held that Mrs. Hunt did none, and none was needed. The salary contract, in respect to the foregoing features, though binding between the parties, was unreasonable and without consideration as against complainant's claim. Still the defendant is entitled to a credit for reasonable salaries paid to its officials, and the special master having found (eleventh finding of fact) that the payment of \$7,500 to Mrs. Hunt for her services as president during the four theatrical seasons beginning with 1905-06 would be reasonable, and as during that period the defendant was presenting only two plays, it should have a credit of one-half that sum as appli-

cable to "The Heir to the Hoorah," to be equally divided between the four seasons.

The defendant, under its contract to pay Mrs. Hunt \$100 every week the play was presented for services as manager, did pay her for considerable periods during which she was absent in Europe. The special master allowed these payments as against the complainant, and I will follow him in this respect with some doubt.

The defendant was properly charged with the amounts received for licenses of the play in the seasons 1908-09 and 1909-10, but, as heretofore held, should not have been credited with losses in prior seasons.

The foregoing will perhaps enable the parties to agree upon the amount of the decree to be entered in favor of the complainant, with costs; but, if they do not within 10 days after this opinion is handed down, the matter is referred to the special master to restate the account in accordance with this opinion.

TOMLINSON v. MOORE.

(Circuit Court, S. D. New York. December 15, 1910.)

COURTS (§ 349*)—FEDERAL COURTS—COMPELLING ATTENDANCE BEFORE EXAMINER IN EQUITY CAUSES.

A person who does not reside within the district where a subpoena is issued and served may not be compelled, except under the provisions of Rev. St. § 863 (U. S. Comp. St. 1901, p. 661), for taking depositions *de bene esse*, to attend before an examiner as a witness in an equity cause in a federal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 925; Dec. Dig. § 349.*]

In Equity. Suit by John C. Tomlinson against George G. Moore. On motion by complainant to enforce obedience by defendant to subpoena, and by defendant to quash subpoena. Motion to quash sustained.

Wellman, Gooch & Smyth, for plaintiff.

Davies, Stone, Auerbach & Cornell, for defendant.

WARD, Circuit Judge. In this case a subpoena *ad testificandum* was served upon the defendant at the Hotel Manhattan December 10th at 4:15 p. m. just as he was about to leave and take the 4:30 train for his home in Detroit, requiring him to appear before an examiner appointed by this court and testify as a witness on behalf of the plaintiff on December 12th at 11 a. m. He disregarded the subpoena and went to Detroit. A motion is made on behalf of the complainant to enforce his obedience and on behalf of the defendant to quash the subpoena. There was no attempt to examine the witness *de bene esse* under rule 68 of the Supreme Court in equity and section 863 of the U. S. Rev. Stat. (U. S. Comp. St. 1901, p. 661). Had this course been taken he could have been compelled to testify without reference to his

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

convenience because he lived at a greater distance than 100 miles from the place of trial and was about to go out of the district to a greater distance than 100 miles from the place of trial. Testimony was about to be taken in the cause by the consent, express or implied, of the parties orally before one of the examiners of this court under equity rule 67, subdivision (2) and the complainant's purpose was to examine the defendant in this way.

The question presented is whether a person who does not reside within the district where the subpoena is issued may be compelled (except under U. S. Rev. Stat. § 863) to attend before an examiner as a witness in an equity cause. The provisions of rule 78 on the subject are expressly restricted to "witnesses who live within the district" and by implication witnesses residing elsewhere are not subject to this compulsion. It would frequently result in intolerable hardship if persons living at a distance could, when passing through any place where a cause was pending or where testimony was being taken in a cause pending elsewhere, be detained to testify at the convenience of the parties. Congress has provided two ways in which witnesses may be examined in equity, viz.: (1) By commission on interrogatories or orally before an examiner; (2) under the acts of Congress. All necessary testimony may be thus obtained without hardship to the witnesses except occasionally under section 863, U. S. Rev. Stat., in case of unwilling witnesses. Various provisions in the legislation of Congress indicate that the convenience of witnesses is a matter of solicitude, e. g. U. S. Rev. Stat. § 870 (U. S. Comp. St. 1901, p. 665), which provides that no witness shall be required to attend under a *dedimus potestatem* at any place out of the county where he lives or more than 40 miles from the place of his residence, and section 876 (page 667), which provides that witnesses cannot be compelled to attend court in civil causes who live out of the district in which the court is held and at a greater distance than 100 miles from the place of holding the same.

There is nothing to show that the defendant lived in New York other than the fact that he was found there when he was served with the subpoena. I think this quite insufficient. Some of the authorities relied upon by the complainant may be briefly considered. The question in the case of *Mutual Benefit Life Insurance Co. v. Robison*, 58 Fed. 723, 732, 7 C. C. A. 444, 471, 22 L. R. A. 325, arose under U. S. Rev. Stat. § 863. The witness subpoenaed was sojourning for his health at Asheville. The court said:

"The duration of his stay there was uncertain. It was not probable that he would return to his former place of residence or come within the jurisdiction of the court in time to take his deposition and therefore the act of taking it at Asheville was an eminently prudent and proper act."

In *Dreskill v. Parish*, 5 McLean, 213, Fed. Cas. No. 4,075, an action at law, it was held that a witness might be subpoenaed even if he lived out of the district where the court was held, provided he did not live more than 100 miles from the place of trial.

In *Spaulding v. Tucker*, 2 Sawy. 50, Fed. Cas. No. 13,221, an action at law, it was said that witnesses are amenable to the process of

a subpoena who live within the district though more than 100 miles from the place of trial.

In *Woodruff v. Barney*, 1 Bond, 528, Fed. Cas. No. 17,986, a judgment for costs upon discontinuance of an action at law was entered in favor of the defendant. He sought to recover witness fees and mileage for witnesses living out of the district and more than 100 miles from the place of trial, who attended voluntarily. This item was disallowed on the ground that they did not attend "pursuant to law." Leavitt, J., said:

"If he brings witnesses into court on process he must pay them for their attendance. He may relieve himself from this burden in part at least by causing them to be served with process after they come within the district. This, however, the defendants for reasons best known to themselves, failed to do and the witnesses therefore who attended can be regarded only as mere volunteers and their fees cannot be taxed against the plaintiffs as a part of the legal costs."

What was said about serving the witnesses after they arrived within the district was purely obiter, said of willing witnesses and so far as it implies that the attendance of unwilling witnesses in equity causes may be compelled if served within the district, without reference to their place of residence, I cannot assent to it. The motion to quash is granted.

IN re GRAVES.

(District Court, M. D. Pennsylvania. September 5, 1911.)

No. 1,449.

BANKRUPTCY (§ 408*)—RIGHT TO DISCHARGE—CONCEALMENT OF PROPERTY.

The transfer by a bankrupt, while insolvent, of the property which he occupied and continued to occupy as a hotel, to his wife, and its omission from his schedules, where there is evidence sufficient to satisfy the court that it is really held for his benefit and subject to his control, constitutes a concealment of the property from his trustee, and defeats his right to a discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 735; Dec. Dig. § 408.*]

In the matter of Clayton B. Graves, bankrupt. On application for discharge. Discharge denied.

Niles & Neff, for specifications.

Jos. R. Strawbridge and Ehrehart & Bange, for bankrupt.

WITMER, District Judge. The bankrupt is a hotel keeper, who conducted his business upon a property, the paper and record title to which is in his wife, having admittedly been purchased with funds donated to her by her husband some time previous. Her title to the same being questioned in another proceeding pending, the court will refrain from discussing this until the whole record is before it in the other suit.

According to the story of the bankrupt he has for some years intermingled his own property and estate with that of his wife, continu-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ously, to the time of his adjudication as a bankrupt. To what extent this was done he is unable, or unwilling, to inform the court, having kept no books of accounts, or records from which the state of his business relations with his wife might be determined, or his financial condition ascertained. This was done notwithstanding that he knew, or should have known, that he was a bankrupt, and having previously transferred his property in a manner calculated to stamp the transaction with suspicion of fraud. This is sufficient reason in itself to deprive the bankrupt of a discharge. In *re Greenberg* (D. C.) 8 Am. Bankr. Rep. 94, 114 Fed. 773. He, moreover, now comes and would have this court believe that by oral agreement with his wife he was to have the rental of the hotel property and outfit for payment of taxes and the dues (\$140) payable monthly to the building and loan association on account of a loan to his wife, secured by mortgage upon the property. He has, however, not succeeded in persuading the court that there was any agreement between them other than that possibly she was to have the benefits and profits of the business, while he would undertake to assume the burdens and liabilities, which he is now trying to shake off by the aid of the court. He is not here with clean hands, and must learn that the court cannot be used to further his chicanery. The federal bankruptcy law was not enacted or intended to aid and relieve the dishonest. It will allow him to continue to stagger under the load voluntarily assumed, without regard for injuries inflicted on the credulous and unwary.

The testimony taken and reported by the special master is ample to justify his conclusion that, even if the bankrupt is not the actual owner, he has at least an equitable interest in the hotel property, which he has concealed from the court, and that such concealment has been continuing. To entitle the bankrupt to a discharge, there must be entire good faith on his part. He must surrender his property fully. He cannot retain or conceal any part thereof which should go to his creditors. If the property, or a portion of it, belonging to the bankrupt, has been vested directly or indirectly in his wife, no matter when that was done, if the court believes from the evidence that it was done and continued fraudulently, and the property really was held for the bankrupt's benefit and subject to his control, the failure to mention such property, of whatever it may consist, in the schedule, and to inform the trustee in regard thereto, is concealment of property, and will prevent a discharge. This is a well-settled principle, requiring no reference to cases decided.

The application by the bankrupt for a discharge is refused, and the order of the special master, as to costs, is affirmed.

ST. PAUL ELECTRIC CO. et al. v. McCrum-Howell Co.

(Circuit Court of Appeals, Eighth Circuit. August 21, 1911.)

No. 3,491.

TRADE-MARKS AND TRADE-NAMES (§ 68*)—PROTECTION OF PROPERTY RIGHTS—UNFAIR TRADE.

The manufacturer of an electric suction cleaner, for domestic use, not protected by patent or trade-mark, *held* not entitled to a preliminary injunction to restrain as unfair trade the making and selling by defendant of a similar article at a much smaller price, merely because, for practical and economical reasons, the materials and form of the two articles were substantially alike, nor because defendant may have designed to obtain some advantage from complainant's advertising, where it was not shown that it attempted or intended to sell its machine as that of complainant, but plainly marked it by a plate giving it a different name.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 79; Dec. Dig. § 68.*]

Appeal from the Circuit Court of the United States for the District of Minnesota.

Suit in equity by the McCrum-Howell Company against the St. Paul Electric Company and B. B. Downs. From an order granting a preliminary injunction, defendants appeal. Reversed.

John E. Stryker, for appellants.

Hillary C. Messimer (A. C. Paul, on the brief), for appellee.

Before ADAMS and SMITH, Circuit Judges.

ADAMS, Circuit Judge. This is an appeal from an order granting a preliminary injunction against alleged unfair trade. As orders of this kind depend largely upon the judicial discretion of the trial judge, a strong showing of error, amounting to an abuse of discretion or a plain violation of some equitable principle, must be made to appear before we disturb them. In this case, however, the trial judge, as disclosed by his opinion, did not predicate his order upon a conviction that the facts of the case warranted injunctive relief. He strongly intimated the contrary, but paid respect to that comity which he thought should obtain in cases where a court of concurrent jurisdiction had already taken action. A preliminary injunction had before then been granted by the Circuit Court of the Northern District of Illinois in favor of this appellee against a party for doing practically the same thing complained of in the present case. That injunctive order, however, has since been reversed by the Court of Appeals for the Seventh Circuit. *Pope Automatic Merchandising Company v. McCrum-Howell Company et al.*, 191 Fed. 979. We therefore approach a decision of this case without any embarrassment arising from the exercise of judicial discretion by the court below.

The order appealed from enjoined the appellants, the St. Paul Electric Company and B. B. Downs, defendants below, from manufacturing, selling, or offering for sale certain electric suction cleaners in form, structure, and color like the device of complainant below, the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

McCrum-Howell Company. Complainant's cleaner was composed of a small motor, a fan, a suction nozzle, and discharge orifice communicating with a receptacle suitable for collecting the dust or waste taken up from the floor, together with a handle by which it could be driven over the floor; and the operative parts were inclosed in an aluminum case. The device was light, easily handled, and well calculated in form, material, and structure for convenient use by the housewife or maid. The complainant had no patent on the mechanism, or any feature of it, and claimed no infringement of any trade-mark. Its only complaint was that of unfair competition in trade. It had advertised and sold its cleaner under the trade-name of "The Richmond," in connection with its own corporate name, "McCrum-Howell Company," and had sold it at the price of \$65.

The defendants made no appropriation of complainant's trade or corporate name. They believed an effective cleaner capable of doing the work could be manufactured and sold at a price not exceeding \$35, and proceeded to construct one. They necessarily employed a motor, fan, and nozzle, with a discharging orifice, a receptacle for taking the dust and dirt taken up from the floor, and a handle. They quite employed an aluminum casing to cover the operative parts, quite similar in appearance to that employed by complainant. The handle of both was of a length to comfortably permit the operator to move it along over the floor, and the casing of both conformed to the contour of the motor and the fan. In short, it may be said the defendants employed practically the same elements, of the same color, and in the same combination, to accomplish the same result, as complainant did. They had as much right to do so as complainant had; the latter having acquired no monopoly in the elements, or any combination of them. This, however, did not confer upon defendants the right to so simulate the product of complainant as to deceive the public, or palm off their product as and for the product of the latter. The law imposed upon them the obligation of good faith and fair and honest competition. Did they violate this obligation? It is claimed they did, because their cleaner looked like complainant's cleaner. But this could not be reasonably avoided. If both were engaged in manufacturing the common house broom, it is apparent the product of both would look substantially alike. So in this case both were engaged in manufacturing a recognized type of electric cleaner, and obviously their product would carry a marked resemblance.

Again, it is said, because the defendants adopted substantially the same form, color, and size of parts as complainant had done, they thereby evidenced a purpose to defraud. This may well be answered in the language of Baker, Circuit Judge, in *Pope Automatic Merchandising Co. v. McCrum-Howell Company*, supra:

"In short, appellee [McCrum-Howell Company] uses the most efficient and most economically manufactured form into which the mechanical combination can probably be embodied. Not a line nor a curve, not a mark, not a bit of superfluous material, for embellishment or distinction. Nothing but the name-plate. If appellants should be required to give a square or hexagonal or other than cylindrical form to the outer surface of the casings, considerations of cost of the superfluous material and labor might prevent them from competing with appellee in the manufacture and sale of a mechanism that

was equally open to both. * * * Aluminum is the metal used. Its advantages in strength, in durability, in lightness of weight, and in freedom from tarnish have led to its adoption for various utensils and tools. Appellee can have no monopoly of its use for this tool. In both cleaners the metal is unpainted. If appellants should be compelled to paint their cleaner a distinctive color, they would increase their manufacturing cost, and would also lose one of the main advantages of a metal that was as open to them as to appellee, and that was obviously the best as a material as the cylinder was as a form."

It is claimed that defendants simulated complainant's brush in the nozzle of its cleaner; but the showing in respect of this matter was not sufficiently clear or specific to warrant a preliminary injunction.

Again, one of the affiants in behalf of complainant swore that "Mr. Downs," who was practically the owner of the St. Paul Electric Company, and who actually brought out and developed the defendants' cleaner, "thought it would be a good idea to have a machine like the 'Richmond,' but to be sold at a lower price, and that in this way they could get considerable advantage from the advertising the Richmond people were doing." It cannot escape observation that no wrongful act is here charged. At best a mental state only is disclosed; one which might or might not ripen into an act.

But, passing this somewhat critical consideration of the affidavit, and assuming Downs' purpose to have been to gain some advantage from complainant's advertising the merits of an electric cleaner, we do not think that fact would warrant injunctive interference. The motive of an act entirely lawful cannot in and of itself condemn the act. It was not only lawful, but eminently praiseworthy, to design and introduce into commerce an article of daily use like an electric cleaner, for a price greatly less than a competitor was charging, and thereby relieve the public from an excessive exaction for it. The mere fact, if it was a fact, that another had broadly advertised the merits of the article, does not deprive the last comer of his right to enter the field of competition. Otherwise extensive advertising of an article of common use by one would effectually prevent another from entering the field of competition with him, and the monopoly of the first comer would be as complete as even a valid patent or trade-mark could secure.

The foregoing are the main reasons argued in support of complainant's contention in this case. But they, in our opinion, are insufficient. This is especially true in the light of the further fact that there is no showing that defendants ever actually undertook to palm off any of their goods as those of the complainant. In fact, the defendants' goods were always advertised and sold as "The Downs" suction sweeper, and this truthful declaration of the origin of their goods distinctly appeared upon the face of their cleaner, upon a plate inserted there for that purpose. In view of all these facts, we think there was no such threatening or imminent trespass upon complainant's rights as to require the issue of a preliminary injunction before a full hearing could have been had upon the merits. We agree with the conclusion reached in the Seventh circuit.

The order made below is reversed, and the cause remanded to the Circuit Court for further proceedings in harmony with this opinion.

BALDWIN v. REYNOLDS et al.

(Circuit Court of Appeals, Sixth Circuit. July 13, 1911.)

No. 2,122.

1. **BILLS AND NOTES (§ 310*)—CONTRACT FOR SALE OF NOTES—CONSTRUCTION AND VALIDITY.**

Complainant became the owner through the death of her husband of certain notes for \$19,000, secured by a purchase-money lien on timber land. After her husband's death his brother, who was a lawyer, acted as complainant's agent and managed her affairs as he thought for her best interest. The maker of the notes having become insolvent and the sufficiency of the security being doubtful, he made a written proposal to the maker, which the latter accepted on behalf of a lumber company of which he was president, to sell the notes at a discount of \$6,000, part cash and part in payments, complainant to retain the notes and lien as security. Under such contract the lumber company made payments from time to time until but about \$4,000 of the agreed price for the notes remained unpaid, several of such payments being made after the time fixed for completing payment had expired. Complainant knew of the contract, that it was made with the maker of the notes, and provided that he might transfer his rights thereunder, and was also chargeable with knowledge that the payments were made by the corporation. *Held*, that it was an executed contract for the sale of the notes under which the title to the same passed at once to the purchaser; that as it contained no provision making it void on default in the payments complainant was estopped by accepting and retaining payments made afterward from insisting that it was executory, that time was of its essence and title to the notes did not pass, and that the payments should merely be applied thereon.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 742, 743; Dec. Dig. § 310.*]

2. **PRINCIPAL AND AGENT (§ 171*)—CONTRACT MADE BY AGENT—ESTOPPEL OF PRINCIPAL TO DENY AUTHORITY.**

Complainant's brother-in-law having died she appointed as her agent another lawyer who was somewhat familiar with her affairs, and several of the payments by the lumber company were made to him both before and after the company was in default. Later a further payment was made and a contract entered into between the agent and a representative of the company providing that complainant should bring a suit to foreclose the lien for the entire \$19,000, making certain other lien claimants parties to cut off their rights, and should bid for the property the full amount of the judgment obtained, and if she acquired the land should convey it to the company on its payment to her of the amount remaining due on the contract, while if it was purchased by others she should first receive such amount, the company should be paid the amount of its last payments, and the remaining purchase money should be divided between them. The suit was brought, but complainant subsequently denied the authority of her agent to make such agreement, and the right of the company to such share of the recovery. *Held* that, by the course of dealing between her and the agent, he had at least apparent authority to make the contract, and that in any event having received and retained the payments made by the company at the time she was estopped to deny his authority and was entitled in equity to no more of the recovery than the amount due her under the contract for the sale of the notes, with interest.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 171.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the Circuit Court of the United States for the Eastern District of Kentucky.

Suit in equity by Isabella C. Baldwin against Mary A. Reynolds and others. Complainant appeals. Affirmed.

A large tract of timber land in Rowan county, Ky., was sold by William H. Baldwin, his wife, Isabella, joining in the deed, on June 26, 1893, to Thomas J. Reynolds for \$30,000, \$5,000 of which was paid in cash and the balance was evidenced by eight promissory notes as follows:

| No. | Date of Maturity. | Amount. |
|-----|-----------------------------------|-------------------|
| 1. | On or before January 1, 1897..... | \$ 3,000.00 |
| 2. | On or before January 1, 1898..... | 3,000.00 |
| 3. | On or before January 1, 1899..... | 3,000.00 |
| 4. | On or before January 1, 1900..... | 3,000.00 |
| 5. | On or before January 1, 1901..... | 3,000.00 |
| 6. | On or before January 1, 1902..... | 3,000.00 |
| 7. | On or before January 1, 1903..... | 3,000.00 |
| 8. | On or before January 1, 1904..... | 4,000.00 |
| | | <hr/> \$25,000.00 |

All of the notes were dated July 1, 1895, with interest at 6 per cent. payable January 1st, and July 1st, of each year, to the order of William H. Baldwin at the Commercial Bank of Rochester, N. Y.

In the deed a lien was expressly retained upon all the property conveyed, "as surety for the unpaid purchase money therefor," the notes being described in detail.

The deed contained the following reservation: "The parties of the first part, however, except and reserve for themselves, their heirs and assigns, all gas, oil and minerals found in or on the lands hereby conveyed, with the right to go upon said lands to develop the same at any time." Also a provision that: "The grantee, his heirs, or assigns may at any time prior to January, 1896, pay off the whole of said lien so reserved and represented by said notes, or any portion thereof, and, if he shall so elect, he shall receive a discount on the amount of said debt so paid at the time such payment is so made."

On the same day Baldwin and his wife entered into an agreement with one Rodbourn covering the mineral rights so reserved. The agreement recites the sale to Reynolds and the retention of the mineral rights and also the lien to secure the \$25,000 balance of purchase money, the notes evidencing the balance being set out in the agreement at length. The agreement further provides: "Now, therefore, the said party of the first part [the Baldwins] in consideration of one dollar to each of them paid and other valuable consideration, the receipt whereof is hereby acknowledged, do hereby agree to deed or lease unto the said party of the second part, his heirs or assigns, or to whomsoever he or they may direct, the said oil, gas and mineral as reserved in said deed to Thomas J. Reynolds, aforesaid, with the right to develop the same upon the payment of twenty-five thousand dollars with interest, as in aforesaid lien reserved as part purchase money of said lands, and in said parties of the first part on receiving payment of such liens of twenty-five thousand dollars and interest above mentioned, shall at their own proper cost and expense execute and deliver to the said party of the second part, or to whomsoever he may direct, a good and sufficient deed or release of said oil, gas and mineral rights, as reserved in said deed to Thomas J. Reynolds."

Baldwin was a lawyer in Cincinnati, having an office with his brother, J. F. Baldwin, also a lawyer. Baldwin died June 8, 1898, at which time the first two of the Reynolds notes due January 1, 1897, and January 1, 1898, had been paid. A few days after his death his will was probated in Hamilton county, and his wife, Isabella C. Baldwin, the appellant, qualified as executrix, she being the sole devisee and legatee under his will.

J. F. Baldwin, after his brother's death, had complete charge of the

widow's business affairs and acted for her until his own death in December, 1899. She had full confidence in him.

The semiannual interest due July 1, 1898, is admitted to have been paid, and on January 1, 1899, there remained unpaid of the purchase money \$19,000 and six months' interest. The third note and such interest, amounting to \$570, were due January 1, 1899.

Reynolds was in the lumber business, and lumbered this land or a part of it. It is probable that he paid the first two notes out of the proceeds of lumber taken from the land. Reynolds had been concerned with the Hixon Rodbourn Lumber Company which became bankrupt, and in April, 1897, Reynolds then himself insolvent, organized the Standard Lumber Company, appellee, between which and Mrs. Baldwin the present controversy exists.

The assets of the Hixon-Rodbourn Company were turned over to the Standard Lumber Company. The capital stock of the new company was \$10,000 divided into 100 shares of \$100 each. Reynolds subscribed for 94 shares, E. A. Marsh, his attorney, of Rochester, N. Y., for 3 shares, the consideration of which was legal services connected with the organization of the company, and John De Witt, the manager of the company, subscribed for 3 shares, the consideration of which does not appear. The company did considerable business in lumber, a part, at least, of which came from this tract of land. It discontinued business in 1903 or 1904, the exact time not appearing. There was apparently no meeting of its board of directors from the time of its incorporation until shortly after the death of Reynolds, October, 1902, at which time a meeting was held, Mary A. Reynolds, appellee, appearing and voting as the owner of 94 shares of the stock, and Marsh as the owner of 3 shares, and Reynolds' son as the owner of the 3 De Witt shares. How Mrs. Reynolds and her son obtained title to these shares does not appear, nor does it appear that any administration was had upon the estate of Reynolds. At that meeting the affairs of the company were put in charge of E. A. Marsh. On the death of J. F. Baldwin the management of Mrs. Baldwin's affairs were intrusted to Edward A. Hafner, who had been for many years a young lawyer in the office of the Baldwins, and undoubtedly had their confidence. He managed her affairs in the same manner as her brother-in-law J. F. Baldwin had managed them, and there was no reason to suppose that she had less confidence in him than she had had in her brother-in-law. She intrusted her business to each of them successively, to do with it as they thought best. Before Mrs. Baldwin's affairs came into Hafner's hands, he was familiar with much of the details of them. Her business affairs involved other matters besides the sale of this land, but they were not many, and this transaction involved apparently the most important item. Mrs. Baldwin lived in Cincinnati until about a year after her brother-in-law's death and while her affairs were in Hafner's charge for about a year, during which time she occasionally came to his office. She then moved to New York and remained there until 1906, when she took her affairs out of Hafner's hands and put them in charge of Charles H. Stephens of Cincinnati, her present counsel.

When Hafner was discharged he turned over to Mr. Stephens all of Mrs. Baldwin's papers, including a copy of the contract of June 22, 1899, to which reference will be made.

The first two Reynolds notes were found by Marsh among the papers of the Standard Lumber Company. They were indorsed by William H. Baldwin without recourse. The other notes disappeared. Hafner was unable to find them, nor could Marsh find among Reynolds' and the Standard Lumber Company's papers the third note, which, under the facts, might be expected to be among the papers of the Standard Lumber Company.

There is a suggestion in the evidence that all of the notes had at some time been turned over to some bank by William H. Baldwin as collateral security or for collection. It is probable, though no direct finding of fact can be made on the subject, that all of the notes were indorsed by William H. Baldwin in his lifetime, though none of them were indorsed by his executrix sua manu, and it is not shown that J. F. Baldwin indorsed them, but Hafner did not.

Reynolds was undoubtedly the moving and managing force as well as the almost exclusive owner of the Standard Lumber Company, though it was a separate, distinct identity from him and carried on business after his death, a part of which, at least, was lumbering this tract. When the lumber company ceased business in 1903 or 1904, its debts were at least as large as its assets. Reynolds, a few days before his death, October, 1902, conveyed the real estate to his wife, Mary E. Reynolds, by deed. On January 1, 1899, there remained unpaid \$19,000 and six months' interest. The third note of \$3,000 and the entire interest amounting to \$570 were due January 1, 1899. On January 5, 1899, the following receipt found by Mr. Marsh was given the Standard Lumber Company:

"Cincinnati, January 5, 1899.

"Received from the Standard Lumber Company, of Rodbourn, Kentucky, three thousand and five hundred and seventy dollars, on account of purchase of notes, made by T. J. Reynolds, Esq., to the order of W. H. Baldwin amounting in the aggregate with interest January 1, 1899, to \$19,570.00, and if said company should fail to complete the purchase of said notes by July 1, 1899, the undersigned hereby agrees to deliver one of said notes due January 1, 1899, for \$3,000.00 as paid in full so far as the remaining notes are concerned. Also she agrees to indorse \$480.00 of the above sum, as paying all interest on the residue of said notes up to January 1, 1899, and leaving the balance due on said purchase \$11,000.00 and interest from January 1, 1899.

"Isabella C. Baldwin, Ex't.,

"By J. F. Baldwin."

The receipt is evidence that on that day the Standard Lumber Company paid Mrs. Baldwin for the third Reynolds note and the interest on all the notes to January 1, 1899, and it was agreed that, even if the purchase were not completed, yet that note was paid as to Mrs. Baldwin, and was to be kept alive as against Reynolds in the interest of the Standard Lumber Company. By this agreement the Standard Lumber Company would hold the third note against Reynolds and would buy the balance, \$16,000, for \$11,000, with interest from January 1, 1899, and as against Reynolds would have all the rights Mrs. Baldwin had to recover the entire \$19,000, making a saving of \$5,000. The company made no further payment, and this agreement was permitted to lapse or was abandoned, but under it the company became entitled to the third note for \$3,000 for which it had paid. However, before July 1, 1899, the following agreement was entered into:

"Whereas, there is now due from T. J. Reynolds, Esq., for one-half year's interest up to July 1, 1899, on purchase money for property sold to said Reynolds by the late General W. H. Baldwin, of Cincinnati, Ohio, the sum of \$330.00.

"And will become due January 1, 1900, the sum of \$3,000.00.

"And will become due January 1, 1901, the sum of \$3,000.00.

"And will become due January 1, 1902, the sum of \$3,000.00.

"And will become due January 1, 1903, the sum of \$3,000.00.

"And will become due January 1, 1904, the sum of \$4,000.00.

"And interest on all of said sums, payable semiannually from and after July 1, 1899.

"And whereas Isabella C. Baldwin, widow and executrix of said General W. H. Baldwin and sole owner of all of said sums of purchase money and of the purchase money lien reserved in the deed conveying said lands to said Reynolds, desires to settle said entire transaction and to collect as soon as possible all moneys coming to the estate of said W. H. Baldwin.

"Now, therefore, for the purpose aforesaid, said Isabella C. Baldwin hereby proposes to sell and convey to such person or persons or corporations, as said Reynolds shall name all of said purchase-money notes, and purchase money, and the lien reserved in said deed to secure the payment of said notes for the sum of \$10,330.00, payable as follows:

"\$3,130.00 payable in cash.

"\$3,130.00 payable January 1, 1900, with 6 per cent. interest, from July 1, 1899, and \$4,100.00, payable July 1, 1900.

"The above-mentioned notes and purchase-money liens to secure the same to be retained by said Isabella C. Baldwin until said last three named payments shall be made.

Isabella C. Baldwin,

"By J. F. Baldwin, Her Attorney.

"Dated June 22, 1899. In duplicate.

"I hereby accept the above proposition. Dated, June 22, 1899.

"T. J. Reynolds."

And on that day the following receipt was issued by J. F. Baldwin:

"Cincinnati, June 22, 1899.

"Received from T. J. Reynolds, Esq., check of the Standard Lumber Co., by T. J. Reynolds, No. 2,198, for the sum of \$3,130.00 which when paid is in full of the first payment on the within written contract, \$3,130.00.

"Isabella C. Baldwin,

"By J. F. Baldwin, Her Attorney."

Mrs. Baldwin was in Cincinnati at the time this agreement was made and afterwards knew of it, made no objection to it, and does not dispute the propriety of J. F. Baldwin making the contract in her behalf, and has accepted all payments made on account of the same, whether to J. F. Baldwin or to Hafner.

This cash payment of \$3,130 was the only money paid during J. F. Baldwin's lifetime. The receipt of the \$3,130 is indorsed on the contract in the handwriting of J. F. Baldwin as follows:

"Cincinnati, June 22, 1899.

"Received from T. J. Reynolds, Esq., check of the Standard Lumber Co., by T. J. Reynolds, No. 2,189, for the sum of \$3,130.00 which when paid, is in full of the first payment on the within written contract.

"Isabella C. Baldwin,

"By J. F. Baldwin, Her Attorney.

"Check drawn on the First National Bank of Huntington, W. Va.

"J. F. Baldwin."

Shortly after Hafner took charge there was paid to him on the agreement \$693 by check of the Standard Lumber Company as follows:

"Standard Lumber Co., Wholesale Lumber.

"Huntington, W. Va., Feb. 19, 1900.

"No. 2946. Pay to the order of E. A. Hafner, atty. for Isabella C. Baldwin \$693.00 six hundred and ninety-three dollars.

"To First National Bank, Huntington, W. Va.

"Standard Lumber Co.

"By T. J. Reynolds, Pt."

And on the contract is the following indorsement:

"Cincinnati, Jan. 1, 1900.

"Received of T. J. Reynolds check of the Standard Lumber Co. by T. J. Reynolds for the sum of \$693.00, which when paid is to be credited on the within contract on acct. of the amount due Jan. 1, 1900.

"Isabella C. Baldwin,

"Per E. A. Hafner, Her Atty."

This receipt so indorsed is, without doubt, a memorandum of the payment by the check of February 19, 1900.

The next payment is evidenced by the following receipt in Hafner's handwriting:

"Cincinnati, O., July 24th, 1900.

"Received from Standard Lumber Co., of Huntington, W. Va., one thousand and eighty-five 45-100 dollars to apply on contract for sale of T. J. Reynolds notes to W. H. Baldwin.

Isabella C. Baldwin,

"Per Edw. A. Hafner, Atty."

These payments were made when Mrs. Baldwin was living in Cincinnati and making occasional visits to Hafner's office.

The next payment, March 23, 1901, is by check of the Standard Lumber

Company to Hafner, attorney, for \$693, and payment indorsed by him on the copy of the agreement.

The contract of June 22, 1899, was in duplicate, each party taking one. Mrs. Baldwin's copy was in Mr. Hafner's hands and was lost, probably with the notes, but in 1906 he turned a copy, with the indorsements on it, over to her counsel, Mr. Stephens. It does not appear that she actually knew of the nature of the indorsements upon the copy, or that there were any indorsements until that time. The \$693 paid February 19, 1900, paid \$93 interest to January 1, 1900, on the note for \$3,100 due that day, and \$600 on the principal reducing that note to \$2,500 with interest from January 1, 1900.

The next payment was by check as follows:

"Standard Lumber Co., Wholesale Lumber.

"Huntington, W. Va., March 22, 1901.

"No. 4455. Pay to the order of Edward A. Hafner, atty. \$693.00 six hundred and ninety-three dollars, for

"To First National Bank, Huntington, W. Va.

"Standard Lumber Co.,

"By T. J. Reynolds, Pt."

There is no indorsement of this sum on the original agreement, but on the copy turned over by Hafner to Stephens there is an indorsement March 22, 1901, paid on within \$693. Why this exact sum of \$693 was paid at that time does not appear, for analysis does not disclose any particular application to interest or principal.

The \$1,085.45 paid the interest on the note due January 1, 1900, theretofore reduced to \$2,500 from January 1, 1900, to July 24, 1900, and \$1,000 on the principal which was thus reduced to \$1,500 with 6 per cent. running from July 24, 1900.

The next payment was as follows:

"Standard Lumber Co., Wholesale Lumber.

"Huntington, W. Va., March 30th, 1903.

"No. 7236. Pay to the order of Edward A. Hafner, Atty. \$1,164.00, eleven hundred and sixty-four dollars. For: Upon purchase Baldwin notes vs. Rowan lands.

"To First National Bank, Huntington, W. Va.

"Standard Lumber Co.

"By E. A. Marsh, V. Pt."

This is indorsed on the original agreement:

"Received of the Standard Lumber Company the sum of \$1,164.00 by check to apply on within.

"March 30th, 1903.

Edw. A. Hafner."

When this payment was made, Reynolds had been dead all of five months. Hafner knew of Reynolds' insolvency and death. Whether Mrs. Baldwin actually knew these facts does not appear. At that time the Standard Lumber Company was probably carrying on business, and certainly was making payments on the contract of June 22d. Hafner knew the payments were made by it on the contract. The last payment to be made under the agreement was \$4,100 payable July 1, 1900, so that the payments of July 24, 1900, March 22, 1901, of March 30, 1903, and of May 13, 1903, noted immediately below, were received by Hafner on account of this contract and turned over to Mrs. Baldwin by him after the time fixed for the last payment.

On May 13, 1903, Hafner received a check as follows:

"Standard Lumber Co., Wholesale Lumber.

"Huntington, W. Va., May 13th, 1903.

"No. 7342. Pay to the order of Ed. A. Hafner, Atty. for Isabella C. Baldwin \$600.00, six hundred dollars. For: On account of purchase money lien on the Rodbourn Land.

"To First National Bank, Huntington, W. Va.

"Standard Lumber Co.

"By E. A. Marsh, V. Pt."

The foregoing check is indorsed as follows:

"Pay to Isabella C. Baldwin or order

"Ed. A. Hafner, Atty. for Isabella C. Baldwin.

"Isabella C. Baldwin."

The Rodbourn land is another name for the timber land in question, so Mrs. Baldwin knew that at least \$600 of the moneys that were paid on that contract were paid by the check of the Standard Lumber Company without the intervention of T. J. Reynolds in any capacity. It is highly probable that she actually knew of Reynolds' insolvency and death. The payment of the \$600 is not indorsed on the original nor on the copy. The sum of these various payments, including the amount paid on the contract of January 5, 1899, was \$10,935.45, and they were paid by the moneys of the Standard Lumber Company.

Judge Cochran in his closely reasoned and painstaking opinion showed that the amount due Mrs. Baldwin under the contract on May 13, 1903, was \$4,315.03, the correctness of which, as a calculation, is admitted by appellant, who concedes that if that contract is binding on Mrs. Baldwin that amount and interest is the sum to which she is entitled.

On or about March 30, 1903, Marsh, knowing that Hafner had charge of Mrs. Baldwin's affairs, came to Cincinnati, had a conference with him, figured on the amount due Mrs. Baldwin on the contract of June 22, 1899, which was fixed at \$5,000. This was a mistake, as the calculation of figures shows. It should have been \$4,315.03 as the parties undoubtedly figured the \$693 paid February 19, 1900, as a different payment from that evidenced on the copy of the contract of the same amount as of January 1, 1900. March 30, 1903, Marsh paid Hafner \$1,164 by check on that day, and came to Cincinnati again on or about May 13th, at about the time the check for \$600 was sent, and at that time the following agreement was entered into between Marsh and Hafner:

"Whereas on or about the 26th day of June, 1895, W. H. Baldwin of Cincinnati, Ohio, deceased, sold to Thomas J. Reynolds, late of Huntington, W. Va., deceased, a tract of land situated in Rowan county, Kentucky, reserving in the deed to said Thomas J. Reynolds rights to all the oil, gas and mineral located on said land and the right to develop the same, and also reserving in said deed a lien on said lands securing the deferred payments of purchase money.

"And whereas, on or about the same day the said W. H. Baldwin, deceased, and Isabella C. Baldwin, his wife, executed and delivered to one James H. Rodbourn, of Erin, Chemung county, New York, a certain contract in which he agrees to deed or lease unto the said James H. Rodbourn, or as he may direct, all of the gas, oil and mineral found in or on said lands with the right to develop same, provided all of said deferred payments of purchase money should be paid to the said W. H. Baldwin by said Thomas J. Reynolds, and

"Whereas the Standard Lumber Co., a corporation, organized under the laws of the state of Kentucky, have advanced certain moneys, to wit, the sum of \$10,242.45 toward the purchase of said purchase-money lien on said lands, and

"Whereas, the said Thomas J. Reynolds has failed to pay said purchase money, and there is still due and owing on said purchase money lien to Isabella C. Baldwin, the widow and sole heir and devisee of said W. H. Baldwin, and to the said Standard Lumber Company the sum of \$——, and

"Whereas it is considered and agreed by and between the parties hereto that the said contract made by the said W. H. Baldwin to said James H. Rodbourn is of no force and effect as against the rights of the said Standard Lumber Company and Isabella C. Baldwin.

"Now, therefore, in consideration of the mutual covenants herein contained it is hereby mutually agreed that the said Isabella C. Baldwin shall bring a suit in foreclosure and foreclose the lien of the parties hereto for the unpaid portion of said purchase money of said lands, including all notes heretofore purchased by said Standard Lumber Company, which notes held by both parties amount, in the aggregate, to \$19,000.00, and interest from January 1, 1899,

and the said Standard Lumber Company in consideration of the agreements herein contained hereby assigns, transfers and sets over to said Isabella C. Baldwin all of said notes and indebtedness heretofore purchased by it. It is further agreed that the said James H. Rodbourn and his assigns shall be made a party to the suit of foreclosure and proper allegations made to cut off and determine the rights of said James H. Rodbourn and his assigns under and by virtue of the contract made between him and the said W. H. Baldwin and Isabella C. Baldwin.

"It is further agreed that the costs necessary to maintaining said action shall be shared equally by the Standard Lumber Company and said Isabella C. Baldwin; and it is agreed that in the event of Isabella C. Baldwin recovering a judgment against the parties to said suit and procuring an order of sale of said property free and clear of any rights or equities which the heirs or assigns of said Thomas J. Reynolds or the said James H. Rodbourn or his assigns may have or claim, then and in that event said Isabella C. Baldwin shall bid on said lands up to the full amount of the judgment obtained in said suit, and if the same is sold to her she shall convey to the said Standard Lumber Company or their successors or assigns all of the said lands sold to her at such sale, reserving to herself only the undivided one-half of all the oil, gas and mineral rights, covering iron, coal, fire clay and whatsoever other mineral and mineral clay may be found in or on said lands with the right to develop the same, and the right to ingress and egress over said lands, upon the payment to her of the sum of \$5,000.00, and interest from April 1, 1903, which said sum the Standard Lumber Company hereby agrees to pay. In case of the purchase of said lands by any person other than the parties to this contract at said foreclosure sale, it is hereby agreed that \$5,000.00 of the amount so collected and interest from April 1, 1903, shall be paid to the said Isabella C. Baldwin, and the balance thereof shall be divided between the said Isabella C. Baldwin and the Standard Lumber Company after repaying to the Standard Lumber Company the sum of \$1,764.00, paid by it at the time of making this contract, provided, however, that should the said Isabella C. Baldwin in said suit not succeed in recovering judgment for at least \$19,000.00, or should not succeed in recovering the judgment cutting off the rights of the said James H. Rodbourn and his assigns, then the said Standard Lumber Company shall be entitled to an assignment of all the rights; title and interest of the said Isabella C. Baldwin in said notes and lien on payment to her of the said sum of \$5,000.00 and interest from April 1, 1903, and costs of said foreclosure action.

"Witnesses the hands and seals of the parties this day of May, 1903.

"Standard Lumber Co.

"By E. A. Marsh, V. Pt.

"Isabella C. Baldwin,

"By Edw. A. Hafner, Atty."

The particular significance of the reference to the contract with Rodbourn for the gas, oil, and minerals in the tract of land lies in the fact that the contract was on record, and was a cloud on the mineral rights, and on the title of the land. Hafner wanted to get rid of those claiming under Rodbourn, as the mineral rights might be of some value. Mrs. Baldwin was pressing Hafner for money. He told Marsh he must have some money, and that he thought he ought to foreclose Mrs. Baldwin's lien. The question was debated whether the contract of June 22, 1899, was still in force; the payments not having been made on time. Marsh called attention to the payments actually made long after the date the last payment was to be made under the contract, and showed Hafner that the Standard Lumber Company had substantial rights which should be protected, growing out of the payment of the money. The agreement was the result of their conference. Hafner at that time evidently did not doubt his power to make the agreement with Marsh.

By mesne conveyances one Gillmor became the owner of such rights as Rodbourn had under his agreement with Baldwin. In pursuance of the agreement, a bill was filed in the Rowan, Ky., circuit court, entitled Isabella C. Baldwin, Widow and Heir at Law of William H. Baldwin, Deceased, Plaintiff, vs. Mary A. Reynolds, J. H. Rodbourn, Grace Rodbourn, Edwin Ripley, Ada C. Ripley,

George Gillmor, and Christian Glatzau, Defendants, in which the plaintiff claiming there was still \$19,000.00 with interest from January 1, 1899, unpaid on the Reynolds' purchase-money notes, prayed for a judgment against Mary A. Reynolds for that sum and interest, and, in default of payment, for an enforcement of the lien reserved in the deed to Reynolds and a sale of the premises to pay the amount due.

On October 2, 1900, Reynolds, being indebted to Buell in the sum of \$6,000, executed, his wife joining therein, a mortgage to Buell to secure that sum. October 27, 1903, the cause upon petition of Rodbourn and his wife, Ripley and his wife, Gillmor and Blatzau, was removed to the Circuit Court of the United States for the Eastern District of Kentucky.

Mrs. Reynolds answered, denying any sum of money was due from her to the plaintiff, and prayed that so much of the plaintiff's petition as sought a personal judgment against her be dismissed. On November 14, 1904, the parties at whose instance the cause was removed demurred to the bill for that it showed no cause of action against them, which demurrer was sustained November 17, 1904. The cause then stood between Mrs. Baldwin as complainant and Mrs. Reynolds as respondent.

On April 24, 1906, Gillmor filed a cross-bill by leave of court. He showed the deed to Reynolds, the deed by Reynolds to his wife, the reservation to Baldwin, his heirs and assigns of all gas, oil, and mineral rights, and the agreement of Baldwin and his wife with Rodbourn. He also showed the mesne conveyances through which he became the assignee of Rodbourn's contract and rights. He claimed that the \$19,000 balance of purchase money had been paid to Baldwin, that there was no lien upon the premises, and that Mrs. Baldwin and Mrs. Reynolds were conspiring to the end that they might assert large and unjust claims upon the property, and thus defeat his rights. He prayed for an accounting between Mrs. Baldwin and Mrs. Reynolds and for a deed from Mrs. Baldwin to him, and that, if any balance of purchase money were found still due Mrs. Baldwin, the property be sold to pay the same, and that a deed of the oil, gas, and minerals be made to him.

On April 24, 1906, complainant took an order to file an amendment to her bill or a supplemental bill, setting up the amount paid by her since the suit was brought for taxes, penalties, and interest assessed upon the mineral, oil, and gas rights in the land. Neither of these pleadings were filed, nor did she ever amend her bill in any particular. On the same day the cause was referred to J. C. Finnell as special master to ascertain and report the amount due complainant on the lien reserved in the deed, and on May 10, 1906, Mrs. Baldwin and Mrs. Reynolds were made parties respondent to Gillmor's cross-bill.

On June 4, 1906, Mrs. Reynolds answered the cross-bill, denying Gillmor's claim of interest in the premises, and denying the charge of conspiracy with Mrs. Baldwin, denied in substance all of the allegations in the cross-bill, and prayed to be dismissed.

July 2, 1906, Mrs. Baldwin filed a plea to the cross-bill of Gillmor. In the meantime, January 17, 1907, Buell filed an intervening petition setting up his mortgage. July 18, 1907, Mrs. Baldwin's plea was overruled. Various proceedings were taken, not necessary for consideration here.

December 16, 1907, Mrs. Baldwin answered Gillmor's cross-bill. She denied its allegations and that Gillmor has any interest in the mineral rights until the \$25,000 balance of purchase money from Reynolds was paid, and averred "that it is true that in her original bill filed herein she alleged that there was yet unpaid on the purchase price of the lands, sold as aforesaid to Reynolds and secured by a lien on said lands, the sum of \$19,000, with interest from the 1st day of January, 1899; that at that time this defendant was informed by her attorneys that said sum was due her and she believed such to be the fact; that she has since learned the fact to be that \$6,000 was paid on account of the purchase price of said lands and in discharge of said lien by Thomas J. Reynolds; that subsequent to that time further payments were made by the Standard Lumber Company, a corporation; that said corporation claims that the payments made by it were a part of the purchase of her lien on said lands, and not a payment in discharge of said lien; that giving credit

for the total amount received by this defendant from all sources on account of said lands sold to Reynolds there remained due to this defendant on the 1st day of January, 1907, approximately the sum of \$13,000; that, in addition to said sum still due on the purchase price of the said lands, the plaintiff has been obliged to pay large amounts for taxes both upon the surface rights and mineral rights in said lands, and penalties for delinquent taxes, amounting to more than \$2,500, and has incurred large expenditures in attempting to realize upon her security."

And she prayed that the equities of the case as presented upon the cross-bill and her answer be found to be with her. On the same day she answered the intervening petition of Buell, and avers that, if he has any lien, it is inferior to her purchase-money lien. In this answer she averred her want of knowledge as to the relation of the Standard Lumber Company to Reynolds as to whether or not payments made by the Standard Lumber Company were in part payment and discharge of the purchase-money lien, or were part of the purchase of the same as claimed by the Standard Lumber Company.

December 24, 1908, Finnell, special master, filed his report. He found the various payments made by Reynolds and the Lumber Company and made findings based upon two views—one, that the contract of June 22, 1899, was binding on Mrs. Baldwin and that her claim to the purchase-money notes, and interest must be based on it; and the other, upon the theory of her counsel that the contract was void, and that she was entitled to recover as if the contract had not been entered into. He found the amount due her on that theory as calculated by an expert bookkeeper to be July 1, 1908, \$15,306.91. This amount was reached by applying the payments first to the payment of interest due upon all the notes, and then to the notes in order of priority.

Marsh, upon learning of this report, filed by leave, March 31, 1909, the intervening petition of the Standard Lumber Company which alleges that prior to the 1st of January, 1903, the petitioner paid the complainant in part purchase of the purchase-money lien set forth in her original complaint, \$10,242.45, upon the agreement between her and the petitioner that the same was paid upon the purchase of the purchase-money lien in which the petitioner had thereby acquired an interest in that amount. The intervening petition also averred that the petitioner, the Standard Lumber Company, on or about March 22, 1903, paid the complainant \$1,164 and again on May 13, 1903, paid the complainant the sum of \$600 upon the agreement that said sum should apply upon the purchase of the complainant's purchase-money lien, and that said sums were received by her upon that understanding, and thereby the petitioner acquired further interest in the purchase-money lien in the sum of \$1,764 and interest from the dates of the respective payments amounting in all to an interest in the lien to the extent of \$12,006.45 and interest from the dates of respective payments. The petition averred the priority of this sum to any interest the other defendants might have, and averred that said sum and interest were part of the \$19,000 and interest claimed by the complainant, Mrs. Baldwin, in her petition, which prior to the commencement of her suit she had agreed with the petitioner to account for out of the proceeds of the sale, and averred that Mrs. Baldwin made proof of the amount due her without reference to the interest of the Standard Lumber Company in the purchase-money lien. The petition also tendered an issue on the claim of Gillmor that Reynolds through the Standard Lumber Company paid off the purchase money due Mrs. Baldwin, and that the Standard Lumber Company ceased to do business at the death of Reynolds, or that the estate of Reynolds became the beneficiary of the assets of the corporation, but averred that no part of the money paid to Mrs. Baldwin was paid by Reynolds through the Standard Lumber Company, and that the estate of Reynolds had no interest in the corporation, and prayed that the amount adjudged to be due upon the purchase-money lien set forth in complainant's bill be decreed to include the amount paid by petitioner and interest in addition to the sum due Mrs. Baldwin in her own right, and that the amount paid by the petitioner be paid out of the proceeds of the sale of the land.

Gillmor answered, denying the averments in the intervening petition of the Standard Lumber Company, and asks that the intervening petition be dis-

missed. April 22, 1909, Buell answered the intervening petition, put in issue its averments, and asked that it be dismissed. September 27, 1909, Mrs. Baldwin answered the intervening petition of the Standard Lumber Company. She admitted the payment to her prior to January 1, 1903, of \$10,242.45, alleges that she does not know whether it was paid by the Standard Lumber Company or by Reynolds. She denies any agreement between herself and the Standard Lumber Company, and that the amounts so paid were upon the purchase of the Reynolds notes and the purchase-money lien; denies that the Standard Lumber Company acquired a proportionate interest with her in the purchase-money lien to the amount of \$10,242.45. She avers "that her affairs after the death of her husband, and during said period" (when the various amounts were paid), "were managed first by her brother-in-law, J. F. Baldwin, and later by Edward A. Hafner, her attorney, and that she never personally made any such agreement as alleged or had any knowledge thereof." She further admits the receipt of the \$1,164 and the \$600, and denies any agreement was made upon the receipt thereof. She denies ever having made any such agreement, or that she authorized her attorney to make the same, and says she does not know whether the payments should be considered as having been made in part payment of the notes and lien which she held, or in part purchase of the notes and lien of the Standard Lumber Company, and denies that that company had any right to further pro rata with her the amount due on the Reynolds notes. She admits that the sums alleged to have been paid by the Standard Lumber Company are a part of the \$19,000 alleged in her original complaint to be due her, but denies that she agreed to account to it out of the proceeds of her suit thereafter, and alleges that, if any such agreement was made on her behalf, it was without her authority or knowledge, and that she never consented to the same. And thus the issues were made up.

Upon exhaustive consideration, the court below was of opinion that by the contract of January 5, 1899, the third note passed to the Standard Lumber Company, but subordinate in right of payment out of the land to the other purchase-money notes; that the contract of June 22, 1899, was an executed agreement; that the title of the Reynolds notes passed to the Standard Lumber Company upon its acceptance of the proposition of sale contained in the agreement; that Hafner had authority to act for Mrs. Baldwin in the agreement of May, 1903, though not to the extent of relinquishing her right to one-half or any part of the mineral rights in the land; that Buell's mortgage claim was valid, but subordinate to the payment of the purchase-money lien; that Gillmor had no interest until the entire \$25,000 balance of purchase money was paid; that this might never happen, and therefore Gillmor had no present interest; that there was a lien on the land for the sum of \$19,000 and interest, out of which the complainant was entitled to be first paid \$4,315.03, with interest from May 13, 1903, the balance to go to the Standard Lumber Company.

The intervening petition of the Standard Lumber Company not setting up exactly its claim as the court found it should be, leave was granted to amend its petition to conform to the findings of the court, the amendment to be filed before the decree was entered. Thereupon such amended intervening petition was filed, alleging among other things that the first two notes for \$3,000 each were paid by Reynolds; that Isabella C. Baldwin in consideration of \$11,628.45 paid to her in cash at different times by the Standard Lumber Company, sold all of the notes, except the first two which had been paid by Reynolds, five of which were for \$3,000 and one for \$4,000 she reserving a lien on the same for a portion of the purchase money, estimated by mistake as \$5,000 as of May 13, 1903, but which upon correct calculation turned out to be \$4,315.03 of that date. The petition averred that the agreement of May 13, 1903, between Marsh and Hafner was for the purpose of enabling Mrs. Baldwin in her own name and for the benefit of the Standard Lumber Company and herself to enforce the lien for the entire amount due to herself and the Lumber Company, namely, \$19,000 and interest from January 1, 1899, the proceeds of the sale of the lands to be applied first to the payment of the amount due the complainant, the \$4,315.03 as of May 13, 1903, and the remainder of the \$19,000 to be paid the Standard Lumber Company; that the suit

was brought by Mrs. Baldwin in her own name to carry out the terms of the agreement. Thereupon a decree was entered April 7, 1910, embodying the findings of the court theretofore made, and finding specifically, among other things, that Mrs. Baldwin and the Standard Lumber Company have a valid vendor's lien upon the land to secure the payment of \$31,476.66, being \$19,000 with interest from January 1, 1899, at the rate of 6 per cent. to December 11, 1909, and costs, of which sum \$6,018.10 being \$4,315.13 with interest from May 13, 1903, and December 11, 1909, was ordered to be first paid to Mrs. Baldwin and the remainder of the \$31,476.66 and interest to be paid the Standard Lumber Company. The decree awarded a lien to Buell of \$5,500, with interest amounting to \$8,534.16, to December 11, 1909, to bear interest from that date, but subordinate to the purchase-money lien, and directed the sale of the property if the money was not paid within a certain time.

From this decree Mrs. Baldwin alone appeals. Her contention is that the amount found due her is \$6,000 too small. This amount is the difference between the face value of the Reynolds notes and the figure at which Reynolds agreed to buy them under the contract of June 22, 1899.

Decree affirmed.

Charles H. Stephens and Charles H. Stephens, Jr., for appellant.

Frank Chinn and Ednor A. Marsh, for appellee Standard Lumber Co.

Before SEVERENS and KNAPPEN, Circuit Judges, and HOLLISTER, District Judge.

HOLLISTER, District Judge (after stating the facts as above). The case turns on the contract of June 22, 1899, between Mrs. Baldwin, by her attorney, J. F. Baldwin, and Thomas J. Reynolds, by which he or the person or corporation he might name agreed to pay for the last five of his notes aggregating \$16,000 and \$330 interest, the sum of \$10,330, she retaining the notes as collateral security. Mrs. Baldwin denies its binding force on the ground that it is an executory agreement, the terms of which were not complied with by Reynolds, or any one for him or in his stead. She repudiates also the agreement of May 13, 1903, between Hafner and Marsh under which this suit to enforce the lien for \$19,000 balance of the purchase money under the original agreement between W. H. Baldwin and Reynolds was brought by her in her name, but claimed by the Standard Lumber Company to be for its and her joint benefit; for the reason that Hafner had no authority to make it and by it extend the payment of the consideration of the agreement of June 22, 1899. She claims, therefore, that the amount decreed her by the court below was \$6,000 and interest less than the amount she is entitled to.

The issues in the case here are based on these claims, and are between Mrs. Baldwin and the Standard Lumber Company alone, as she is the sole appellant.

[1] The contract of June 22, 1899, is not on its face executory. It is presumptive evidence of an actual sale, the title to the notes passing at once. 24 Am. & Eng. Enc. of Law, p. 1051, and cases cited. This presumption is not affected by the retention by the seller of the possession of the notes as security. *Beardsley v. Beardsley*, 138 U. S. 262, 11 Sup. Ct. 318, 34 L. Ed. 928; *Morse v. Sherman*, 106 Mass. 430.

The offer to sell was drawn by J. F. Baldwin, Mrs. Baldwin's attorney. It was afterwards read to her, and she had full knowledge of its terms. Being thus prepared, it should be most strongly construed against her. *Robinson v. Alger* (C. C. A. 2d Cir.) 167 Fed. 968, 970, 93 C. C. A. 368.

But the real test to be applied to the instrument in ascertaining its character is not furnished by its form or language except so far as they may reflect upon the intention of the parties, for whether or not an agreement for a sale is effective to pass title of the subject-matter is to be determined by the intention of the parties gathered from the instrument itself and all the circumstances of the case. As said by Judge Warrington, speaking for this court in *Hoffman v. Gosslein*, 172 Fed. 113, 96 C. C. A. 318:

"Nothing, perhaps, is better settled than that the intention of the parties must be given controlling effect in issues concerning the passing of title to personal property."

The document consists of an offer to sell to Reynolds or any one named by him the last five of the Reynolds notes and of an acceptance the same day by him in writing. In it Mrs. Baldwin expressed a desire to settle the entire land transaction, and collect as soon as possible all moneys coming to the estate of her deceased husband (she at that time was the owner of the notes as her husband's sole legatee), and it is recited that the offer was made with that purpose in view. Doubtless most agreements by which a creditor agrees to take less than his debt are based upon similar reasons, though the writing between the parties may be silent on the subject.

The whole transaction from the beginning shows a willingness on the part of W. H. Baldwin in his lifetime, and after his death by Mrs. Baldwin represented by J. F. Baldwin with full authority, to accept a smaller amount in payment of the debt. The agreement of January 5, 1899, by which the Standard Lumber Company was to have a discount of \$5,000, provided in its very terms that, if the company should fail to complete the purchase by July 1, 1899, nevertheless the third Reynolds note for \$3,000 due January 1, 1899, was to be considered as paid as between Mrs. Baldwin and the Lumber Company, though it should continue in full force as to Reynolds, and perhaps subordinate in right of payment to the other Reynolds notes of later date.

Why that agreement was abandoned does not appear, but nine days before the time fixed for the completion of the purchase of all the notes by the Standard Lumber Company the new agreement of June 22, 1899, was made. From that agreement the third note due July 1, 1899, was omitted as if no longer outstanding even as between Mrs. Baldwin and Reynolds, and the balance on the original notes was fixed at their face \$16,000, with \$330 interest due July 1, 1899. It is probable, as suggested by Judge Cochran, that, when it appeared that the Lumber Company was unable to complete the purchase, Reynolds, as the owner of almost all of its stock and its president, sought and obtained further time and better terms for his company, which were embodied in the contract of June 22d, since the purchase price was

thereby reduced by a further \$1,000, making the entire reduction \$6,000, the amount in controversy between the parties here.

The final agreement of sale will be searched in vain for any indication that the parties intended that, if the deferred payments were not made at the times fixed, the agreement should be void. J. F. Baldwin drew the receipt of January 5th and the offer of sale of June 22d. In the preparation of the first he dealt with the possibility of failure on the part of the Lumber Company to complete the sale under its terms. In the second no mention is made in any way of a possible failure of Reynolds or the person whom he might name to perform what he agreed to perform. J. F. Baldwin was a lawyer known to the writer of this opinion as a careful, faithful practitioner at the Cincinnati bar. If he had contemplated the failure of a compliance by the purchaser with the terms of this sale and have intended that the payment of the consideration by the purchaser was a condition precedent to the passing of the title of the notes, or that the rights of the purchaser should be forfeited in the event of the failure to comply with the terms of the agreement, he would have incorporated such an intention in the paper itself. Indeed, any lawyer of ordinary experience would have done so. If the intention of the parties was as Mrs. Baldwin claims, then the \$3,130 paid on the day the offer and the acceptance were made would have been lost to the Lumber Company as the real acceptor of Mrs. Baldwin's offer, unless the deferred payments were also made. The company at that time being the owner of the third note would scarcely have made such a large cash payment on any other understanding than that thereby and by its promise to pay the balance it became the actual owner of the notes.

J. F. Baldwin undoubtedly supposed on the day the offer was made and accepted that the Lumber Company paying that day nearly one-third of the purchase price in cash would be able to pay the balance. The provision for the retention of the notes and lien as security is most significant:

"The above-mentioned notes and purchase-money liens to secure same to be retained by said Isabella C. Baldwin until said last three named payments shall be made."

She did not deliver the notes into the hands of the purchaser because she proposed to retain them, and did retain them, to secure to herself the fruits of the contract. The language, "until said last three named payments shall be made," does not limit the holding of the security to the time fixed for the deferred payments, and delivery when they were made, nor does it suggest a reverting ownership in the notes if the payments were not made when promised. The security was to be held until those deferred payments were made, whatever the time might be. Of course, if they were not made, Mrs. Baldwin could enforce her security by foreclosing the lien which secured the payment of the notes out of the land.

It is significant that the time of payment of the purchase money under the agreement evidenced by the receipt of January 5, 1899, was not of the essence of that contract, and it cannot be reasonably doubted that the payment of the \$11,000 consideration in that agree-

ment within a reasonable time after July 1, 1899, would have required Mrs. Baldwin to deliver the notes to the Lumber Company.

Further, 1899 was in a period of country-wide financial depression. Much of the timber had been cut off of the land, and there was probably no market for land of that kind. Mrs. Baldwin wanted money. Reynolds was insolvent and could not pay, but his lumber company could and did pay \$3,130 in cash. It was fortunate for her that any one was willing to buy those notes who could make a present payment of so much money on them. There was probably little doubt that the lands would not sell for nearly as much as the \$19,000 outstanding.

It is argued by counsel for Mrs. Baldwin, relying on the rule that the pledgee of negotiable promissory notes has no right upon the pledgor's default to sell the notes to pay the debt, but must await their maturity and collect them in due course, that the intention of the parties could not have been to enter into an executed agreement passing the title to the notes, for the reason that in such case Mrs. Baldwin would be bound to await the maturity of the notes and collect them as best she could, and would have gained by the agreement nothing in point of time in closing up the timber land transaction.

The answer to this is that the Reynolds note due January 1, 1900, would become due six months before the time of the last payment under the contract, and the Reynolds note due January 1, 1901, would become due only six months after that time, and she could, no doubt, upon default of either or both of the deferred payments, enforce the pledge of the Reynolds notes by foreclosing the lien securing them.

It is claimed, also, that the legal title to the notes did not pass because they were not indorsed, and therefore, if the parties had intended to pass the legal title, the notes would have been indorsed. There is no merit in the claim. The notes are lost, and it is not known what indorsements were on them. The first two notes taken up by Reynolds, found by Marsh, bear the indorsement of W. H. Baldwin without recourse. When Reynolds took them up, there was no occasion for the payee to indorse them. There is evidence suggesting that at one time W. H. Baldwin pledged all of the notes to some bank or left them there as collateral security. It is highly probable that at that time he indorsed them all. It may be that at the time the contract of sale June 22, 1899, was made J. F. Baldwin indorsed the notes as attorney for Mrs. Baldwin, executrix. No one can now say they were not indorsed. Be that as it may, and assuming that they were not indorsed, yet an equitable title would nevertheless pass, which the Lumber Company could enforce in a court of equity by setting forth the facts and praying that the lien which it in equity had might be foreclosed subject to Mrs. Baldwin's pledge. Inasmuch as the notes remained in J. F. Baldwin's possession, it is probable that it never occurred to any one concerned in the transaction to make a present indorsement for the purpose of passing the legal title.

But Mrs. Baldwin says that in any event the agreement of June 22, 1899, was not made with the Standard Lumber Company, but with Reynolds, and she makes this the basis of a contention that the transaction was a mere compromise with Reynolds for the payment by him

of a less sum than the debt, and, the terms of the compromise not having been complied with, his original debt to her is restored to its full amount. There is no merit in the claim.

When the receipt of January 5th was given the Lumber Company, and Mrs. Baldwin's ownership in the third \$3,000 note was transferred to that company, she knew that it had then bought, to that extent, her rights against Reynolds. She knew that on June 22d the cash payment of \$3,130 on the day her offer was made, and accepted, was made by the check of the Lumber Company.

It is claimed by Mrs. Baldwin that, in the statements made to her by J. F. Baldwin and Hafner of moneys collected for her, her attention was not specifically directed to the fact that any of the moneys actually paid by the Lumber Company were in fact paid by it. This claim has no force for the reason, among others, that in J. F. Baldwin's account beginning September, 1898, and ending January 13, 1899, there is an item: "Jan. 5, collected T. J. Reynolds' note due Jan. 19 (1899?) \$3,000.00." And on the same day: "Collected all interest to Jan. 1, 1899, \$570.00." These entries on their face would indicate that Reynolds had paid that note and interest; but that payment was in fact made by the Lumber Company under the contract of January 5, 1899. Mrs. Baldwin knew it and relinquished to that company her rights under the note. The payments afterwards of \$693, February 19, 1900, by check of the Standard Lumber Company, the check of the Lumber Company July 24, 1900, for \$1,085.45, the check of the Lumber Company of March 22, 1901, the check of the Lumber Company of March 30, 1903, \$1,164 were not, it is true, specifically shown in the statements as having been paid by any other than Reynolds or on his account, yet the check of the Lumber Company by E. A. Marsh, vice president, May 13, 1903, to the order of Hafner, attorney, for \$600 was sent to Mrs. Baldwin, she indorsed it, got the money herself, and knew that the Lumber Company had paid it. With actual knowledge that the Lumber Company had bought one of the Reynolds notes for \$3,000 and was holding it against him with his knowledge, with knowledge that the \$3,130 cash payment on the contract of June 22d was made by check of the Lumber Company, with knowledge that long after the date of the last payment to be made on the contract the Lumber Company itself paid at least \$600 and having in the meantime received several payments from somebody, it will not do for her now to say that she was not aware the Lumber Company had any interest in the contract of June 22d, or to claim, as she does, that all the moneys she received were from or for Reynolds or his estate in part payment of his original notes. The payments made to Hafner by the Lumber Company and transmitted to her were known by him to have been paid by it. He also knew of Reynolds' insolvency and of his death. Whatever may have been the limits of Hafner's authority, he was confessedly Mrs. Baldwin's agent to collect money, and the knowledge acquired by him during the discharge of such duties and pertinent to their proper discharge must be imputed to her. *Mechem on Agency*, § 718 et seq.

It is immaterial what Reynolds' motives were in accepting the offer

of sale himself. He had not the means to carry out the contract himself in any event. What Mrs. Baldwin wanted was to get money, and it was immaterial to her whether Reynolds paid the cash on the day her offer was made, or the Lumber Company paid it. That Reynolds might transfer his rights under the contract was expressly provided for by its terms.

It is not disputed that acceptance of a contract may be by conduct. The facts afford strong circumstantial evidence that on June 22d Reynolds named the Lumber Company as the beneficiary under the contract, but, in the absence of direct proof upon the point, it is held on all the facts that the Standard Lumber Company's assumption by the agreement was ratified by Mrs. Baldwin. Indeed, Mrs. Baldwin ought not now be permitted to deny acceptance by the Lumber Company. The cash payment and all subsequent payments were in fact made by the Lumber Company. All payments made after Reynolds' death in October, 1902, must have been paid by the Lumber Company, and Mrs. Baldwin is chargeable with Hafner's knowledge and of the source from which the several payments came, and she personally received the \$600 check from the Lumber Company.

Four payments were made extending over a period of nearly three years after the date the last payment was to be made under the contract. At no time while receiving these payments did Mrs. Baldwin inquire on what or whose account they were received. The Lumber Company certainly believed it was the acceptor of the offer to sell and made its payments during all those years with that understanding. It must be held that Mrs. Baldwin is estopped to deny that the payments were made by the Lumber Company as the actual acceptor of her offer to sell.

[2] The next subject to be disposed of is Mrs. Baldwin's claim of want of authority in Hafner to make the contract with Marsh of May, 1903, by which the claim of Mrs. Baldwin and the Lumber Company together amounting to \$19,000 was to be enforced and the lien on the land foreclosed in Mrs. Baldwin's name for joint account, the amount due Mrs. Baldwin under the agreement of June 22d to be first paid and the balance to be paid to the Lumber Company. Both Marsh and Hafner acted upon the agreement of June 22d as still in force. If their assumption in this respect was correct, the agreement worked no injustice to Mrs. Baldwin. She was to get all the money she was entitled to, and, in addition, was to have the troublesome mineral rights claimed by several persons holding under Rodbourn or his assignees disposed of. These claims were recorded in Rowan county, and were of such a character as to be a cloud upon her title, both to the minerals and the land itself. The purpose was to shut them out and divide the proceeds of the land in such a way that both parties would participate in substance as provided by the agreement of June 22d. The suit has, in fact, resulted in eliminating all those claims against the mineral rights.

It may be admitted that the acceptance by Mrs. Baldwin of payment on account of the Lumber Company's contract would not have estopped her from enforcing the lien securing the Reynolds notes

pledged with her, although it is probable she would have been required to give reasonable notice to the Lumber Company of her intention to enforce her security; but, assuming her right on the day in May, 1903, the Hafner-Marsh agreement was made, to have her lien enforced, inquiry will now be made into the extent of Hafner's authority and into the propriety of her now claiming that Hafner had no authority from her to make the agreement with Marsh (May, 1903) further extending the time of the payment of the balance of the purchase money under the contract of June 22d, and providing for the enforcement of the lien in the joint interest of the parties by bringing this suit (August 26, 1903).

Hafner's authority was no more restricted than J. F. Baldwin's. J. F. Baldwin made the receipt of January 5, 1899, and the contract of June 22, 1899, in Mrs. Baldwin's name. Of the latter she had express knowledge and ratified it, and from the fact that the third Reynolds note for \$3,000 was eliminated in the contract of June 22d as if paid she must have known of the contract made for her by him January 5, 1899, and acquiesced in it or ratified it. These, and other circumstances, show that Baldwin's authority was so broad that it included the execution of important contracts for her embracing large reductions in the Reynolds' debt; and, while she claims that Hafner had no authority to do anything but collect money for her, yet there is nothing to show that the scope of his authority was any less than the broad powers Baldwin had. On the contrary, she trusted Hafner as she had Baldwin, to do "as he thought best," and the record shows that it was the custom for Hafner to make contracts in his own name with other debtors of Mrs. Baldwin. His statements show that he accounted to her for the moneys received from them, and there is nothing to indicate any objection on her part to his acting in that way for her. When Hafner was in charge, much of the lumber had been taken from the land, and future distant value lay to a large extent in the promise shown by the second growth of trees. At all times, certainly during J. F. Baldwin's and Hafner's administrations, the payment of the notes must have been involved in some doubt, and the management of the matter for Mrs. Baldwin's best interests was always a problem of a kind most properly intrusted to a lawyer familiar with the transactions and who would be called upon frequently for services not strictly having to do with the collection of money, but of broad management of such a nature as to bring the best results for his client. Of such a character were the duties of Baldwin and Hafner.

Hafner indorsed some of the payments upon the contract which he held, as paid on the contract and transmitted the moneys to Mrs. Baldwin during a period of nearly three years after the time for the last payment under the contract was fixed. She made no inquiry during all that time, and Hafner had every reason to think he could make an agreement for her which would bring about the payment of the balance due her, as well as the elimination of the claims to the mineral rights, and her dealings with him, as they had been with J. F. Baldwin, were of such a nature as to lead him to think that he

could so act in her behalf. That he had the power, under the circumstances, to agree as he did with Marsh, can scarcely with reason be denied.

It is not necessary to decide whether he could agree to give to the Lumber Company a half interest in the reserved mineral rights or not. That question is not now before the court.

But, if Hafner did not in fact have actual power to make the agreement, yet in another aspect of the case justice requires the holding that Mrs. Baldwin cannot now be permitted to deny Hafner's authority to deal with Marsh as he did. The Lumber Company had paid prior to Marsh's first visit to Hafner in the spring of 1903 the cash payment of \$3,130, June 22, 1899, and \$1,085.45 July 24, 1900, indorsed on the original contract held by the Lumber Company as received for it to apply, when paid, upon the contract. This indorsement was made "Isabella C. Baldwin by Edward C. Hafner." The payment of \$693 March 22, 1901, was indorsed the same way. It paid, also, \$1,164 March 30, 1903, and the \$600 check to Hafner indorsed to Mrs. Baldwin and indorsed by her when she received the money. In the absence of any notice from her, Marsh was entitled to believe that Mrs. Baldwin not only knew that the Lumber Company was in fact paying these moneys, but by the receipts of the money so indorsed by Hafner during nearly three years after the time fixed for the last payment in the contract that she did not consider time of payment as of the essence of the contract. Her conduct and silence led the Lumber Company and Marsh to believe Hafner had authority to act for her as he had assumed to act, and had authority to foreclose the lien which by virtue of the contract of June 22d was held jointly for the purpose of enforcing the payment of the Reynolds notes. It cannot be supposed that the Lumber Company would have continued to pay large sums of money except with the understanding and belief that the payments were made on the contract.

If Mrs. Baldwin had offered to pay back the sums of money she has received after the date the last payment was to have been made, there might possibly be some shadow of propriety in her claim that the contract was not binding on her, but she has not repaid nor offered to repay these sums, and thereby restore the Lumber Company pro tanto to its former position. Even then the Lumber Company would be the owner of the third note for \$3,000, though possibly subordinate in right of payment to the other notes.

She knew also that Hafner in 1903, had filed a petition in her name to foreclose the lien securing the Reynolds notes, and made no objection to it or inquiry concerning it. It was through this petition that this suit was instituted.

In her petition she alleges the amount of the debt to her to be \$19,000 and interest, and prayed for a foreclosure of the lien to pay the same. She has known at least since some time in 1906, when Mr. Stephens took charge of her affairs, of the Lumber Company's claim, and has never amended or attempted to amend her petition setting forth the interest of the company, even to the extent of the amount she admits to be due it or is willing it should be paid. It

was on her motion, April 24, 1906, that the case was referred to a special master to ascertain the amount due her. No notice was given to the Standard Lumber Company of the fact. Nothing was done under the reference until June, 1908, when she gave her deposition, and, while the Lumber Company was not represented in the proceedings before him, yet the special master himself in his report, December 24, 1908, found from her testimony and the documentary evidence that there was another theory applicable to the contract of June 22d, other than her claim that it was not binding, and on that basis made separate findings of the amount due her; and it was not until after the findings of the master had shown that the allegation in her petition of sole ownership of the \$19,000 and the lien securing the same was not true, was the Standard Lumber Company notified that the interest it supposed by agreement it had in the litigation needed attention. It then of its own motion, without having been made a party to the case, filed its intervening petition, March 31, 1909, setting up its claim, and that the suit was brought in the first instance in her and its joint interest.

It is not intended here to attack Mrs. Baldwin's good faith, but to consider only the legal effect of her conduct as viewed by a court of equity. The litigation as a result of the agreement will bring about a sale of the property; will bring her as much as she is entitled to, and has eliminated the claimants to the mineral rights, and from May, 1903, until Marsh was notified of the special master's findings, at some time between the master's report, December 24, 1908, and the filing of the Lumber Company's intervening petition, March 31, 1909, Marsh had no reason to suppose that the agreement with Hafner was objected to by Mrs. Baldwin on any ground. Justice, as administered by courts of equity, requires the holding that, if Hafner did not have actual authority to make the agreement of May, he had apparent authority, which is quite as effective (*Mechem on Agency*, §§ 84, 86, 279, 282, et seq.; *Clark & Skyles*, 502), and that Mrs. Baldwin is estopped, both by the circumstances prior to its execution and the conduct and results of the litigation since the suit was brought, to deny Hafner's authority to make the agreement and the right of the Lumber Company to receive the fruits of it.

The decree of the Circuit Court is affirmed, and the cause will be remanded, with directions to the Circuit Court to carry its decree into effect.

WATSON et al. v. NATIONAL LIFE & TRUST CO. et al.

(Circuit Court of Appeals, Eighth Circuit. August 12, 1911.)

No. 3,485.

1. INSURANCE (§ 47*)—REINSURANCE—VALIDITY OF CONTRACTS.

A life insurance company organized under the laws of a state, which had taken over the business and assumed the contracts of a federal corporation having the same name, was not chargeable with inducing policy holders to assent to the transfer by fraud because of a statement made to them in a circular that it was a reincorporation of the old company where, although it might not have been such in a legal sense, the statement was true for all practical purposes; the new company having the same stock, stockholders, officers, assets, and offices as the old.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 47.*]

2. INSURANCE (§ 47*)—LIFE INSURANCE—REINSURANCE—RIGHTS OF POLICY HOLDERS—ELECTION.

A life insurance company cannot transfer its policy holders to another company without their consent; but, if such transfer is attempted, a policy holder must elect whether he will treat it as an abandonment of the contract and sue to recover the amount then due him, continue to pay premiums under protest, and keep alive his claim against the original insurer, or acquiesce in the transfer, and if, in the absence of fraud, he accepts the assumption certificate and continues to pay to the new insurer without objection, he cannot thereafter maintain a suit based on a repudiation of the new contract.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 47.*]

3. EQUITY (§ 423*)—RIGHT TO RELIEF—SUIT BY REPRESENTATIVE OF CLASS.

Where none of the complainants of record in a suit in equity are entitled to relief, the court cannot grant relief to unnamed persons on whose behalf, as well as the complainants, it is claimed the suit was brought.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 423.*]

4. INSURANCE (§ 50*)—INSURANCE COMPANIES—RECEIVERSHIP.

A large insurance company, while not a public corporation, is a public institution, and, where there is no apprehension as to its solvency, a court of equity will carefully consider all the facts before appointing a receiver for it or ordering an accounting at suit of individual policy holders.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 50.*]

Appeal from the Circuit Court of the United States for the Southern District of Iowa.

Suit in equity by Alexander L. Watson and others against the Security Life & Savings Insurance Company, National Life & Trust Company, National Life Insurance Company of the United States of America, a federal corporation, and National Life Insurance Company of the United States of America, an Illinois corporation. Decree for defendants, and complainants appeal. Affirmed.

Wm. H. Atwood (E. R. Mason, on the brief), for appellants.

Maurice E. Locke (Locke & Locke, on the brief), for appellees.

Before ADAMS and SMITH, Circuit Judges, and AMIDON, District Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

SMITH, Circuit Judge. The defendant the Security Life & Savings Insurance Company, hereafter called the "Security Company," was organized under the laws of Iowa as a life insurance company in December, 1900, with a capital stock of \$400,000, of which \$100,000 was paid in cash and the balance represented by the notes of stockholders. Under the laws of Iowa the Auditor of State then had, and still has, supervision of insurance companies. Frank F. Merriam was at that time Auditor of State and a stockholder, director, and president of the Security Company and so remained during the entire period of its activity. It commenced business soon after its organization. Its business consisted of the sale of endowment policies under which it agreed if all premiums were paid when due throughout the endowment period to pay the beneficiary at the end of 10 years the full face of his policy and his equitable share then apportioned from the savings fund. It was provided that the savings fund referred to should include: First, all excess of the net interest earnings on the reserve fund; second, the entire reserve on policies lapsed through nonpayment of premiums; third, all interest collected for reinstatement of lapsed policies; fourth, the balance of the reserve to the credit of lapsed or surrendered policies forfeited under the loan privilege. Its policies also provided for certain mortuary benefits.

In March, 1899, the National Life & Trust Company, hereafter called the "Trust Company," was organized under the laws of Iowa as a life insurance company with a capital of \$100,000, of which \$25,000 was paid in cash and \$75,000 was represented by the notes of the stockholders.

In May, 1900, by amendment of the articles of incorporation, the capital stock was increased to \$200,000, and it was provided that the new stock should be paid for 25 per cent. in cash and 75 per cent. in stockholders' notes. What amount of this new issue of stock was taken does not clearly appear.

While organized as a life insurance company, the actual business of the company consisted in the sale of endowment bonds. These bonds were quite similar to the policies issued by the Security Company. Each bond was to mature in ten years from date, and the annual premium was 10 per cent. of the face. At maturity the company agreed to pay the face of the bond and its share of the "accumulated profits" consisting of the profits of the company accumulated from the following sources: First, interest earnings; second, forfeitures under lapsed bonds; third, mortality savings; fourth, profits that accrue by reason of policies surrendered under loan or surrender privileges; fifth, miscellaneous sources. These bonds, like the bonds of the Security Company, provided for mortuary benefits.

On July 25, 1868, Congress passed an act, to incorporate the National Life Insurance Company of the United States of America. Act July 25, 1868, c. 239, 15 Stat. 184. This act fixed the capital stock at \$1,000,000 with leave to the stockholders to increase the same at pleasure. The act provided that the offices of the company should be located at Washington, District of Columbia, with leave to establish branch agencies elsewhere subject to the local laws. This company,

hereafter called the "Federal Company," transacted business from Washington for about 10 years, but in 1878 its charter and capital stock were acquired by parties in Chicago and its actual operative headquarters were removed to that city. Thereafter it did not actively seek new business until 1900, when its organization again changed and it actively re-entered the field for business.

In February, 1904, there was organized under the general law of Illinois the defendant the National Life Insurance Company of the United States of America, to be located at Chicago, Cook county, Ill., with a capital paid in cash of \$1,000,000. It is hereafter called the "Illinois Company."

Under a contract of November 6, 1902, the Security Company transferred all its assets of every kind, except its stockholders' notes, for 75 per cent. of its capital, to the Trust Company, and in consideration thereof the Trust Company paid \$92,000 and reinsured all the risks and assumed all the liabilities of the Security Company. This contract was approved by Frank F. Merriam, then Auditor of the State of Iowa, and stockholder, director, and president of the Security Company. May 12, 1903, the Federal Company reinsured all the risks and assumed all the liabilities of the Trust Company and took over all its assets including its capital stock but excluding the stockholders' notes for the portion of the capital not paid in. Upon the face of the contract the portion of the capital of the Trust Company which had been paid in cash was lost; but while the record is not clear it seems probable from it that this was paid by the Federal Company to stockholders of the Trust Company. About March 3, 1904, the Federal Company transferred all its assets to the Illinois Company except \$1,000,000, the amount of its capital, and the Illinois Company reinsured all the risks and assumed all the liabilities of the Federal Company.

On March 1, 1902, the Security Company sold its policy, No. 1,682, to the plaintiff Fred A. Olson. The premium was \$30 for the first year and \$15 on the 1st of March and September during the balance of the 10-year period. He paid \$30 to the Security Company at the issuance of his policy and \$15 to the Trust Company about March 15, 1903. He paid no more to any one, is not a witness, and there is no explanation of why he quit paying.

The Trust Company, among many others, sold the following bonds:

October 1, 1902, No. 21,717, to the plaintiff Dr. Alexander L. Watson, a dentist of Galesburg, Ill. The first annual premium of \$120 was paid, and thereafter it was paid in quarterly installments on the 1st of October, January, April, and July. He made nine of these quarterly payments, two to the Federal Company and seven to the Illinois Company.

April 1, 1903, No. 30,598, to intervenor George Rodecker. Annual premium, \$300. He paid the first installment to the Trust Company, the next two to the Federal Company, and five to the Illinois Company.

April 1, 1903, No. 17,336, to intervenor Frank R. Conklin. Annual premium, \$150. He made two payments to the Trust Company and six to the Illinois Company.

April 1, 1902, No. 17,337, to intervener Amelia M. Conklin. Annual premium, \$150. She paid two installments to the Trust Company and six to the Illinois Company.

March 1, 1902, No. 16,400, to intervener Dennis E. Sullivan. Annual premium, \$150. He paid two installments to the Trust Company and six to the Illinois Company.

January 1, 1901, No. 9,036, to intervener Russell T. Barr. Premium, \$120 a year, payable, first annual premium down and thereafter in monthly installments of \$10 each. After 18 months this was changed to quarterly installments of \$30 each. He made 29 payments, 9 to the Trust Company, 3 to the Federal Company and 17 to the Illinois Company.

This suit was brought by Dr. Watson in the district court of Polk county, Iowa, against the Security Company, the Trust Company, the Federal Company, the Illinois Company, and B. F. Carroll, Auditor of State of Iowa.

The petition was filed January 20, 1906, and alleged that the action was brought on his own behalf and for such other bond and policy holders of defendants as might elect to join; that there were thousands of persons similarly situated and a number who desired to join, but that it was impossible to join them all and impracticable for each to prosecute separate suits. B. F. Carroll, Auditor of State, was never served and did not appear and has long since retired as Auditor of State and become Governor of Iowa, being succeeded as Auditor by J. L. Bleakly.

Upon application the case was removed to the Circuit Court of the United States for the Southern District of Iowa. In the Circuit Court the plaintiff filed an amended bill in which Fred A. Olson was joined as plaintiff, to which defendants demurred, and pending the hearing on demurrer George Rodecker, Frank R. Conklin, Amelia M. Conklin, Dennis E. Sullivan, and Russell T. Barr intervened, alleging that they held bonds as heretofore stated and joined, with some modifications, in the prayer of the plaintiffs for relief. Defendants also demurred to the bill of intervention, and the Circuit Court sustained the demurrers both to the amended bill and the bill of intervention. Upon appeal this ruling was reversed. *Watson v. National Life & Trust Co.*, 162 Fed. 7, 88 C. C. A. 380. In the opinion on that appeal the amended bill and the bill of intervention are so fully set out that it is unnecessary to again do so here. After the reversal the defendants the Security Company, the Trust Company, the Federal Company and the Illinois Company filed their joint and several answers to which the complainants and interveners made replication. The cause was tried, and the Circuit Court in its decree found that the various transfers heretofore stated were with full and ample authority; that there was no fraud in any of said transfers or in the concealment thereof; that the Illinois Company is a solvent, going concern amply able to carry out its contracts executed and executory; and that the complainants and interveners each sustained contractual relations with the Illinois Company and with ample knowledge of the facts they acquiesced in the transfers, and it dismissed the bill of com-

plaint as amended and the bill of intervention and the complainants' and interveners' appeal.

On the brief of appellants Messrs. Atwood and Mason style themselves as solicitors for appellants and 134 other bondholders, but no one has come in and asked to be joined as a party herein except the two complainants and the five interveners.

It does appear in some cases by evidence and in others by unsworn statements that Bernard B. Smith, Christian Jensen, Anna K. Lindemeyer, Verna D. Horton, William H. S. Callender, and Lewis T. Hussey are in various ways supporting the complainants' contention. It appears that Mollie Ludwig, C. H. Wilson, and William Sipple were policy holders in the Security Company, and Clarence H. Martin, Anna Martin, and Clarence W. Martin were bondholders of the Trust Company.

Mr. Atwood stated, during the cross-examination of the witness Carter, that these six persons had also joined in this suit. Nothing more appears as to their claims, and as to the balance of the 134 nothing whatever appears.

The Security Company had issued 2,393 policies of which about 2,100 were in force at the time of the transfer to the Trust Company. The Trust Company had issued 30,061 bonds at the time of its transfer to the Federal Company, and of these many thousands only about 20 in any way appear to be complaining. It might well be inferred that the overwhelming majority of the policy holders and bondholders were not dissatisfied particularly, as it appears that the plaintiff Dr. Watson sent the following letter to those he was informed and believed to be holders or owners of bonds similar to his:

"Watson & Cabeen, Dentists.

"Galesburg, Ill., January 8, 1906.

"A Word to the Bond and Policy Holders of the Security Life and Savings Insurance Company, National Life and Trust Company and National Life Insurance Company, U. S. A.

"Brother Bondholders:

"While confidence in life insurance managers has been greatly shocked and shattered by developments in the New York investigations, nothing has been shown there which for pure rascality begins to compare with the systematic trafficking in companies and the combined assets of companies, to which you and I, as subscribers to the gold-brick bonds of the above companies, have been the victims, and have been obliged to submit. These companies, while at the summit of prosperity, with millions of assets received from us, have already sold out three times within two years, without cause or excuse, except speculation and graft for managers and stockholders, some of whom have become very wealthy, who only a few years ago were known as men without property, money or means. At this rate they have time for about ten more transfers before the bonds mature, and we have reason to believe negotiations have been pending for at least one more.

"The great wealth the officers now have, are the premiums paid to them by us bondholders, upon which they have agreed to make profits for us. It is now reasonably certain that they never intended to divide any profits with bondholders and that the bondholders who continue to pay tribute to those fellows, in the vain hope of even getting that money back, without any profit will be grievously disappointed; that such payments are simply gifts to said managers. I have good authority for saying, that unless all said companies and their assignees are now insolvent, that every bondholder, whose premiums are paid to May 12, 1902, or later, are entitled to recover all the money

they have paid, whether the same be one or more years, and having been encouraged to bring a suit, by many other bondholders offering to join therein, I have employed Wm. H. Atwood, of this city, an attorney of twenty-five years standing, who has given special attention to life insurance law, and have brought a suit in my own name, but for the benefit of myself and all other bondholders who will join. The suit is in Des Moines where the assets and a part of the defendants are, and all who desire to do so, can join on the same terms. A copy of agreement, which all will sign, is enclosed herewith. You can fill out the blanks, sign and mail it with your bond and receipts to Mr. Atwood, or to any bank here for him and a duplicate of the agreement signed by him will be returned to you, and your rights will be protected and enforced with as little delay as the forms of law will permit. Hoping that you will see your way clear to join with us and send in your bond, I remain,

"Very truly yours,

[Signed.] Dr. A. L. Watson.

"For information in regard to Mr. Atwood, you are referred to Galesburg National Bank, Kellogg, Drake & Co., leading dry goods house, O. B. Judson Co., leading furniture house, all of this city."

The copy of contract referred to in these circular letters was as follows:

"Law Office of Wm. H. Atwood,

"Suite 7, Mail Bldg.,

"Galesburg, Illinois.

"Collection Agreement.

"It is agreed between the parties hereto that National Life and Trust Co. bond No. Dated A. D. for \$. on which \$. have been paid, is delivered to Wm. H. Atwood, attorney at law, to be joined with others in suit to recover the amount paid thereon.

"The original complainants have already advanced all necessary costs, have now a deposit in the hands of the clerk to provide for accruing costs, and under the rules of the court will be required to maintain a deposit for costs in the hands of the clerk during the pendency of said suit.

"All costs are recoverable from the defendants, but should all defendants prove insolvent, the pro rata for each bondholder to contribute should not exceed five dollars in any event.

"Said Atwood agrees, that after having joined said policy bond in said suit, he will not dismiss or settle as to it for any less sum than the amount paid thereon by said bondholder, and that he will make no charge for his services except the sum of 25 per cent. of amount actually recovered. Said bondholder reserves the right to settle personally with the defendants, and have his bond returned to him, by mailing said Atwood a copy of the settlement papers, signed by him or her with the particulars of such settlement, and by paying to said Atwood 25 per cent. of the amount paid on said bond, as shown above, with his pro rata part of the costs made to that time, and not otherwise. That said sum shall be liens thereon, and that upon receipt thereof with said papers said Atwood agrees to return said bond without delay.

"Said bondholder, recognizing the rights and interests of other bondholders joining in said suit, agrees (as do they) to help in this mutual undertaking by saying or doing nothing to obstruct, hinder or delay the successful prosecution of said suit, and by sending to said Atwood at once all communications and conversations with the representatives of the defendants, that he may be promptly advised and better able to guard the rights of all his clients against any illadvised words attributed to any of them, and against the persistent and peculiar methods of certain unscrupulous traveling representatives in their plans to approach and persuade each one to betray and injure the cause of all, by trying to control them and their course in this suit.

"Witness our hands in duplicate this day of, A. D., in the presence of

....., Bondholder.

....., Witness for the Bondholder.

....., Attorney at Law.

....., Witness for Atwood."

Many of the allegations of this circular are untrue, or at least are not sustained by the evidence in this case.

It is contended by the defendants that this case was properly dismissed under the rule that he who would have relief in a court of equity must come with clean hands. Inasmuch as it is probable that this action by the complainant Watson could not be attributed to his coplaintiff Olson or to the interveners, it does not seem important to determine whether this conduct of Dr. Watson alone precludes recovery by him. It is, however, somewhat remarkable in view of this effort to stir up litigation that of the more than 30,000 policy and bond holders not 20 persons appear from the record to be complaining.

An examination of the facts shown may partially explain why almost none of the policy and bond holders have joined.

Twelve days before the contract between the Security Company and the Trust Company, M. Beehler, an examiner of the Iowa Insurance Department, reported to Frank F. Merriam, Auditor of State, that the total liabilities of the Security Company were \$419,985.40 and its total assets were \$405,638.37. In other words, its entire assets only exceeded its capital by less than \$6,000. It owed for salaries and sundry items outside of reserve and capital \$4,485.40. Its reserve liability was \$15,500. If its capital and sundry liabilities be deducted from its assets it had less than \$1,200 left to cover its reserve liability of \$15,500. Its capital was impaired \$14,347.03. In the period of its active existence of about a year and seven months it had taken in aside from payments on its capital stock \$167,523.56, and all of this had disappeared but \$5,638.37. Its total assets did not equal its capital stock and the interest thereon during the period of its active life. Clearly the company was insolvent.

It is somewhat difficult to determine the solvency of the Trust Company at the time of its transfer to the Federal Company. The only detailed statement as to its condition is as of December 31, 1902, between the purchase from the Security Company and the sale to the Federal Company. That statement shows assets and liabilities each of \$992,094.68. This statement in the schedule of liabilities only lists the capital stock at \$100,000; whereas, it had been increased to \$200,000 more than a year and a half before. No explanation is made of this discrepancy, but it leaves it in grave doubt whether the Trust Company was solvent or not at the time of the transfer to the Federal Company.

On December 30, 1902, the Insurance Department of the District of Columbia reported that upon a full examination made as of April 30, 1902, it was found that the capital of the Federal Company had been impaired \$617,016.03; that this was due to loans made on real estate years before when values were inflated and the total rejection of assets of \$230,066.70, from which more or less would ultimately be realized.

The Insurance Department further reported that the stockholders had voluntarily contributed of cash and approved securities to the full amount of \$617,016.03, and that the company was then placed in

the way of comparison as to financial strength favorably with any institution conducting its business on similar plans in existence.

The policies and bonds in question were issued on what is known as the "Preliminary Term Plan." That is, they provided that for the first year the reserve value should be computed for one year term insurance and for subsequent years such value for the age at issuance advanced one year. Many, if not all, the Federal Company's policies contained this preliminary term provision.

Rule 2, promulgated April 26, 1903, by the Superintendent of Insurance of the District of Columbia, requires the reserve to begin and be maintained during the existence of the policy from the time of its issuance to delivery regardless of any stipulation reserving the right of companies to value policies the first year or subsequent years as preliminary term insurance. There was no statute to that effect. Doubtless this ruling had its influence in the organization of the Illinois Company to take over the Federal Company. The Federal Company was licensed to do business in Iowa and Illinois, and there is nothing to indicate that after the capital was made good and it was so highly complimented by the Superintendent of Insurance of the District of Columbia it was at any time insolvent or threatened with insolvency. The Illinois Company has always claimed to be a mere reorganization of the Federal Company. It was organized under the same name, with the same stockholders holding the same shares of stock, with the same officers, the same capital, and was domiciled where the actual headquarters of the Federal Company had been for nearly a quarter of a century, occupied the same offices, took over the same assets, and assumed the same liabilities. It was in every sense a mere reorganization of the Federal Company in fact, whether it was such in law or not.

It is not necessary to determine whether in a legal sense a corporation organized under the laws of Illinois could be a reorganization of a corporation organized under an act of Congress.

There was neither fraud nor concealment as to any of these reinsurance agreements. The Trust Company gave its own number to each of the outstanding policies of the Security Company and sent by mail to each policy holder an assumption certificate. Such a certificate of assumption was sent to complainant Fred A. Olson on November 29, 1902. The Federal Company as of May 12, 1903, sent the policy holders of the Trust Company in one envelope a certificate of assumption and a letter announcing the transfer to it and directing the bondholder to attach the certificate of assumption to his bond, a special notice of where to pay premiums, and an advertising circular. For some reason these papers do not seem to have been mailed to George Rodecker. Some of the parties admit receiving these papers, some do not remember doing so, but none deny their receipt. The parties receiving them retained these certificates of assumption and made no objection or protest to the transaction for nearly two years, but paid their premiums as directed either to the Federal Company or its successor the Illinois Company. It is true some of these now swear they threw these certificates in the waste

basket, but do not indicate when, and they did not in any way advise the company of these acts of repudiation on their part.

The contract between the Trust Company and the Federal Company contained the following provisions:

"Second. The party of the first part further agrees that it will furnish to the Auditor of State of Iowa, whenever required by him, such information as may be necessary to enable him to ascertain the net cash value of every insurance and investment contract and of every bond and policy of the said party of the second part in force at the date of this agreement, such cash value to be computed as provided by the law of the state of Iowa; or will, at the option of the Auditor of State, make such valuation and furnish satisfactory proof of its correctness.

"Third. The party of the first part further agrees that it will preserve and maintain in the office of the Auditor of State of Iowa the deposit of securities, now with said Auditor, or others of like kind and character, to an amount equal to the net cash value of all the insurance and investment contracts, bonds, and policies of the party of the second part in force at the date of this agreement subject only to such diminution as may be caused by reduction of said net cash value; and that it will from time to time add thereto of lawful securities such amounts as may be necessary to make said deposit at all times equal to any increased net cash value of said contracts, bonds and policies.

"Fourth. The party of the first part further agrees that it will make and file with the Auditor of State of the state of Iowa, an agreement binding itself to preserve and maintain such deposit of securities, and to be controlled and governed by the laws of the state of Iowa in that respect as fully as though it were a corporation organized under the laws of the state of Iowa."

The Federal Company executed and delivered to B. F. Carroll, Auditor of State of Iowa, the agreement provided for in the article numbered fourth. He then approved the transfer, and on June 9, 1903, a letter signed by him, was sent to each of the bondholders explaining what had been done. On April 4, 1904, the Illinois Company sent a letter to each of the Federal Company policy and bond holders, in which it said:

"The company has recently rechartered itself under the laws of Illinois. Henceforth its home office will be in Chicago where its principal branch office has always been located. This will be a great aid in facilitating the handling of our growing business."

[1] It is strenuously urged that it is impossible as a matter of law for a company chartered by act of Congress to recharter itself under the laws of a state, and that therefore this letter, instead of being a notice of the actual transaction, was in fact a false statement and constituted a fraud upon the policy and bond holders.

Conceding for this case the correctness of the legal proposition that a company organized under an act of Congress cannot preserve its identity for all purposes with a company subsequently organized under the state laws, appellants put a very strained construction on the language used in the letter. It is no uncommon thing, when the controlling spirits in a corporation become dissatisfied with the laws or conditions surrounding them in the home of the corporation, to practically reincorporate in a foreign state by organizing a nominally new corporation there and turning over to such new corporation the entire business of the old even if for every purpose the identity of

the new corporation and the old cannot be maintained. If the absolute identity of such a new corporation with its predecessor cannot exist in law, it is still a common expression to say that the old company has reincorporated in the state in which the new company has organized. If it were possible to maintain the life of a corporation from state to state so that a literal rechartering in a foreign state were possible, the argument for appellants would be much stronger because it could then well be contended that, while it was possible for the statement in the letter to be literally true, it was not literally true in this case. Here was a practical rechartering for many purposes. A new company was organized under the laws of Illinois at the instance of the managers of the Federal Company. It had the same name, the same capital held by the same persons in the same relative shares. It had the same officers and the same actual headquarters. It was organized for the very purpose of succeeding to taking over and carrying on the business of the old company, and did so. It was in every detail as nearly a rechartering of the old company as was possible according to appellants' contention. It was what is commonly spoken of as a "reincorporation." Appellants first contend that nothing more in the way of rechartering was legally possible that they may then contend the letter used the expression in an impossible sense and the letter was, therefore, a fraud. The expression "has recently rechartered itself" cannot be held to have meant to assert that something impossible had been accomplished, but that in a practical sense the new company was a reorganization of the old, and such it was. The board of directors of the Illinois Company adopted a resolution reciting that that company was a mere reorganization and reincorporation of the Federal Company and binding and obligating the Illinois Company to the full performance of the agreements of the Federal Company with the Trust Company and the state of Iowa, and the Illinois Company notified Auditor Carroll of this action. Each one of these companies has during the entire term of its responsibility so to do kept securities to the amount of reserve required with the Iowa Auditor of State. Such securities covering the savings fund and profit fund have not been so deposited and the contracts did not require that they should be. The Illinois Company has kept the amount of these funds segregated on its books; but owing to lapses, reinstatements, and numerous other causes it is a daily changing amount. It has not kept the amount of such funds due the Security Company policy holders separate from the amount due the Trust Company bondholders, but it has in every instance promptly complied with every request of the Iowa Auditor of State for information concerning such matters.

[2] No one of these defendants was empowered to transfer its policy holders without their consent to another company; but it is equally true that, if a solvent person or corporation agrees to assume and pay obligations of another, that is in legal contemplation an agreement for the benefit of the creditor. Each policy holder in this case when an attempt was made to transfer him had at least three options:

First, treat the transfer as an abandonment of the contract and

bringing an action at once for an accounting and recovery of the amount then due on his policy or bond. *Lovell v. St. Louis Mutual Life*, 111 U. S. 264, 4 Sup. Ct. 390, 28 L. Ed. 423.

Second, continue to pay his premiums under protest and thus keep the contract alive as against the company by whom it was issued and against the assets transferred by it.

Third, acquiesce in the transfer and assumption of his claim and accept the new insurer.

But he could not at the same time ratify and repudiate the transfer. He could not retain an assumption certificate by the new company, pay his premiums without protest to the company taking over the business, and then after a long period of time hold the new company if it was then to his advantage to do so or repudiate it if that best served his purposes. He must elect his course, and, having once made a definite election, must abide by it in the absence of some new agreement. He was required to make his election with reasonable promptness, taking into consideration the fact that this was a business in which many were interested and conditions rapidly changing.

The complainant Olson was notified of the transfer from the Security Company to the Trust Company, presumptively received the assumption certificate, retained it, in no way repudiated the transfer at the time, but on the contrary paid thereafter without protest to the Trust Company his premium due March 1, 1903. He thus acquiesced in the transfer from the Security Company to the Trust Company. He lapsed September 1, 1903, before the transfer from the Trust Company to the Federal Company, has never made application for reinstatement, and has no concern with what the Trust Company did after he lapsed.

Dr. Watson says he got the certificate of assumption of the Federal Company, the circular letter of May 12, 1903, and the letter of Auditor Carroll of June 9, 1903, and retained them. He made no protest then or when he paid his next premium. He says he had no knowledge of the transfer to the Illinois Company until after his last payment, which was about October 7, 1905, and then learned of it from a current number of the Chicago Record-Herald. A search of its files shows that the only such announcement was on March 4, 1904. He paid without protest two installments of premium to the Federal Company and seven to the Illinois Company. He must be held to have elected to assent to the transfer and to the substitution of the Illinois Company as his insurer and has no right to relief here.

George Rodecker having paid two installments of premium to the Illinois Company lapsed March 1, 1906. After more than a year in default he made direct application to the Illinois Company for reinstatement on its regular blanks and was reinstated by it and has paid ever since. He has no right to maintain this action.

Frank R. Conklin says he first heard of the transfer to the Federal Company by the Carroll letter of June 9th and believes he received the assumption certificate of the Federal Company. He says he does not remember receiving the letter of the Illinois Company announcing

the recharter of the National Life, but cannot say positively that he did not receive it. He failed to pay his premium due April 1, 1906, but was reinstated March 30, 1907. He changed the Illinois Company's form of application for revivor to read to the National Life & Trust Company, but he presented it to the Illinois Company and paid the premium then in arrears and the one then due directly to the cashier of the Illinois Company. He had before this made one payment to the Federal Company and two payments to the Illinois Company. When he presented an application for revivor to the Illinois Company and asked his reinstatement, he certainly elected to continue the policy in force and could not later insist that the contract was terminated by the transfer by the Trust Company. When he made his first two payments to the Illinois Company, he gave no intimation that the assumption certificate was not accepted. By more than one distinct act he made his election, and it is irrevocable.

Amelia M. Conklin is the wife of Frank R. Conklin, and the history of her bond is substantially identical with that of her husband, who acted as her agent at least in securing her reinstatement after lapse. She remembers receiving a letter of the description of the one issued by the Federal Company to the bondholders of the Trust Company as of May 12, 1903.

Dennis E. Sullivan says he received the letter of May 12, 1903, announcing the transfer to the Federal Company, does not recollect the letter of June 4, 1904, announcing the recharter of the National Life, but cannot say he did not receive it. He retained the certificate of assumption of the Federal Company and has paid six installments of premium to the Illinois Company. Having made his election, he must abide by it.

Russell T. Barr was not a witness, and there is no denial that he received all the notices and no showing that he returned or in any manner repudiated the certificate of assumption by the Federal Company. He paid without protest three installments of premium to the Federal Company and seventeen to the Illinois Company. He lapsed December 1, 1906, and was reinstated November 30, 1907, upon his direct application to the Illinois Company. It is true he did not sign the form of application for revivor furnished him by the company, but based his failure so to do solely upon the ground that the application form furnished contained agreements and warranties not in the original contract. It is true some of the parties swear they threw the assumption certificates sent them in the waste basket, but do not indicate when they did so, whether before or after suit brought or before or after payments without protest to the new company. In any event, they gave no notice of such action to the reinsuring company, but went on paying premiums. It thus appears that all the plaintiffs and interveners are equitably estopped to maintain this action, and none of them are entitled to relief on their own behalf or on behalf of others.

On the former appeal this court said:

"Language is indeed employed which by fair import leads us to believe that all the complainants and interveners formally, at least, accepted provisions

made for and tendered to them in the several reinsuring contracts. But in view of the averments of the bill, anticipating and avoiding an expected plea of novation, we are unable on this demurrer to give force or effect to the import of the language in question. This is a proceeding in equity, where general relief is prayed for, and where the averments of the bill are admitted to be true. Accordingly, if an apparent novation occurred, but was brought about by fraud legally sufficient to avoid it, we cannot say that complainants, upon establishing such facts, would not be entitled to some relief. The proof upon final hearing must develop this phase of the case."

[3] The record fails to show that novation was brought about by fraud. Where a record shows that none of the complainants of record have any right to relief, the court cannot grant relief to those unnamed persons on whose behalf it is claimed the suit is brought. It is therefore unnecessary to pursue the inquiry as to the supporters of this proceeding not made parties. Suffice it to say the record has been examined with great care, and none of them are in any better position to maintain this action than the parties to the record.

[4] Insurance companies are not classed as public but as private corporations. They are not even styled quasi public corporations, but a large insurance company is a public institution, and, where there is no apprehension as to its solvency, a court of equity will consider all the facts as to the relative advantages of a receivership or accounting before granting relief of that nature at the suit of individual policy holders. Such a court takes all the facts into consideration in determining whether to grant such relief which rests largely in cases of this nature in the discretion of the court. *Equitable Life Assurance Society v. Brown*, 213 U. S. 25, 29 Sup. Ct. 404, 53 L. Ed. 682.

It was insisted on the oral argument that the decree entered would preclude the parties and the supporters of the complainants who have continued to pay and do continue to pay to the end of the full 10-year period from recovery at that time on their bonds. This is a misconstruction of the decree.

The Circuit Court was right, and its decree is affirmed.

BROTHERS et al. v. CUNNINGHAM et al.†

(Circuit Court of Appeals, Eighth Circuit. July 10, 1911.)

No. 3,036.

APPEAL AND ERROR (§ 179*)—PRESENTATION OF GROUNDS OF REVIEW IN LOWER COURT—OBJECTIONS TO EVIDENCE.

Where secondary evidence of titles, in case of loss of the original documents and destruction of the records by fire or otherwise, was made admissible by an act of the Legislature, the constitutionality of such act will not be considered by an appellate court, where the question was not raised by the objection made to the evidence in the trial court, which was based on formal grounds only.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1137-1140; Dec. Dig. § 179.*]

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied October 23, 1911.

Action at law by Jennie Brothers and Charles L. Brothers against Frank J. Cunningham and the Cunningham Land & Improvement Company. Judgment for defendants, and plaintiffs bring error. Affirmed.

Edward P. Johnson (H. L. Dyer, on the brief), for plaintiffs in error.

Charles B. Faris (Arthur L. Oliver, on the brief), for defendants in error.

Before VAN DEVANTER, Circuit Judge, and CARLAND and POLLOCK, District Judges.

PER CURIAM. This is an action in ejectment, brought to recover 160 acres of land in Pemiscot county, Mo. The facts necessary to a decision are: Prior to April 15, 1871, William H. Friend was the owner of the land in controversy. He died February 22, 1876. Plaintiff in error Jennie Brothers is his daughter and sole heir at law. The question of fact presented on the record is: Did Friend die seized of the land in controversy, or had he theretofore conveyed it? Both parties claim title from Friend as the common source—plaintiff in error Jennie Brothers by inheritance; defendant in error the Cunningham Land & Improvement Company by purchase. At the trial a jury was waived, and the court found as a fact Friend had conveyed the land in question on April 15, 1871, to one William J. R. Howard, and that by mesne conveyances the title so acquired by Howard had passed to defendant the Cunningham Land & Improvement Company.

The only question of merit presented by the record is the sufficiency of the evidence therein found to support the finding made by the trial court that Friend, the ancestor of Jennie Brothers, had conveyed the land in question to Howard April 15, 1871; for, if so, the judgment was right and must be affirmed.

The fact that the conveyance by Friend to Howard relied upon by the defense was lost or destroyed, as were the public records of the county, they having been destroyed by fire December 2, 1882, the maker of the conveyance being dead, the grantee therein being either dead or his whereabouts unknown, and the great lapse of time since the making of the alleged conveyance sought to be established on the trial, all conspired to render certain direct and positive proof of the existence of the document sought to be established a task of much difficulty. However, the record discloses a witness by the name of Crenshaw testified he had talked with Friend, the maker of the alleged conveyance, after the date of the deed sought to be established, who said he had conveyed the land to Howard and had received in part payment therefor the horse he was then riding. Aside from this evidence there was offered in support of the conveyance a certified copy of an abstract of the title to the property, prepared at or about the time the conveyance was alleged to have been made, by one Carlton, a careful, competent, and skillful abstractor of titles, which abstract showed the conveyance as claimed by the defense.

Aside from this evidence the record further discloses defendant, the Cunningham Land & Improvement Company, or its grantors, had been in possession of the property for many years prior to the institution of the action against it, asserting ownership thereof and paying taxes thereon, and that neither the plaintiff Jennie Brothers nor any one under whom she claimed had been in possession thereof for more than 30 years. The certified copy of the abstract of title offered and received in evidence to establish the existence of the conveyance relied upon by the defense from Friend to Howard was offered on two theories: First, that it was the best evidence obtainable under the circumstances of the case, hence competent at the common law; second, that it was made competent by what is commonly known as the burned record act of the state, approved February 27, 1907 (Laws Mo. 1907, p. 271), which provides as follows:

"Sec. 1. In all of the counties of this state in which, at any time heretofore, the official records and records affecting the title to real estate herein, shall have been by fire, war or other catastrophe, lost, destroyed, or injured so as to have become illegible, and whenever, hereafter, such records of any county, or (of) the city of St. Louis, shall have been so lost, destroyed, or injured, it shall be the duty of the judge of the circuit court of such county and of the circuit wherein such county is situated, in conjunction with the judges of the county court of such county, or, if in the city of St. Louis, the duty of the circuit judges thereof, to examine into the state of such records; and in the event that they find any abstracts, copies, or extracts therefrom, existing after such loss, destruction or injury, and that said abstracts, copies, minutes or extracts were fairly made, before such loss, destruction, or injury by any person, persons, or corporation in the ordinary and usual course of business, and that said abstracts, copies, minutes or extracts contain a material and substantial part of said records so lost, destroyed or injured as aforesaid, the said judges shall certify the facts in regard to the loss, destruction or injury of such records, and in regard to such abstracts, copies, minutes or extracts therefrom, as such facts may be found by them; and if they are of the opinion that such abstracts, minutes, copies and extracts tend to show a connected chain of titles to the lands in such county or city, they shall file such certificate, finding, or opinion with the clerk of the circuit court thereof, which certificate shall be signed by said judges and have impressed thereon the seal of the county court of such county, or if in the city of St. Louis, the seal of the circuit court thereof; and, thereupon, said abstracts, minutes, copies, and extracts, or authenticated copies thereof, shall be admissible as prima facie evidence in all courts and places of this state, and in all courts held in this state, and in all inquiries, wherein the facts shown by such abstracts, minutes, copies, or extracts may be pertinent. And it shall be the duty of the owner, owners, keeper or custodian of such abstracts, minutes, copies, or extracts, to furnish to all persons or corporations so requesting, upon being paid or tendered, the charges and fees herein provided for, certified copies of the same or any part thereof. Said certificate to be made by such owner, owners, keeper or custodian, shall state that the paper or instrument to which it is appended or attached contains a true and correct copy of the entries set out in the said abstracts, minutes, copies, or extracts (designating the same by the name of the compiler or maker thereof, when possible), to which the said filed certificate of the said circuit judge, or judges and county judges relates; said certificate shall be signed by the maker thereof and sworn to by him before some officer who is authorized by the laws of this state to take and certify acknowledgments to instruments for the conveyance of real estate. And it shall be the duty of the owner, owners, keeper or custodian of such abstracts, minutes, copies, or extracts, upon being paid or tendered the fees and charges herein provided for, to produce the same in court, and the courts of this state, and the courts held within this state

may compel the production of the same in court by subpoena duces tecum, as in other cases. In all cases in which any abstracts, minutes, copies and extracts, or copies thereof, which are made admissible in evidence under the provisions of this act, shall be required to be used in evidence, all deeds, conveyances, or other instruments appearing thereby to have been executed by any person or corporation, or in which they appear to have joined, shall (except as against any person or corporation in the actual possession of the lands described therein, at the time of the loss, destruction or injury of the said records of such county, claiming title thereto, and except also, as against infants and persons of unsound mind, at the time of the trial or inquiry), be presumed to have been duly witnessed, executed and acknowledged, unless the contrary appear therein; and all sales under powers of attorney, judgments, decrees or other legal proceedings, shall be presumed to be regular and correct, unless the contrary appear, and any person or corporation alleging any defect or irregularity in any such conveyance, sale, judgment or decree, or other legal proceedings, shall be held bound to prove the same: Provided, that nothing contained in this section shall be construed to impair the effect of said injured, lost or destroyed records as notice.

"Sec. 2. The certificate provided for by the next preceding section to be made and filed by the said judges of the circuit court and the judges of the county court, or by the judges of the circuit court of the city of St. Louis, shall be by the said clerk of the circuit court, entered and spread upon the records of the circuit court of the county, the said records of which have been so lost, destroyed or injured. Thereupon, the said clerk of the circuit court of such county shall make out from said circuit court records, and transmit to the recorder of deeds of such county a certified copy of such certificate, so made and filed by said judges, and the recorder of deeds shall, thereupon, record such certified copy of said certificate in the land record books of his office. And a certified copy of said judges' certificate under the hand and official seal of the circuit court of such county, shall be received in all of the courts of this state, and in all of the courts held within this state, and in all places and inquiries within the state wherein said matters and things may be pertinent, as prima facie evidence of the facts and recitals set out and contained in said certificate of said judges.

"Sec. 3. In all cases, and in all suits, trials and actions, in any of the courts of this state, and in any of the courts held in this state, in any proceeding relating to, or affecting title of lands, or any interest therein, or any lien or incumbrance thereon, any party to such case, suit, trial or action shall be permitted to offer and introduce as evidence therein, and all of the said courts shall receive as competent evidence therein, any abstract of title, or land title abstract book, or books which are fair upon their face, and which are shown to have been made by any person in the usual and ordinary course of business, prior to the loss, injury or destruction of the official records, or parts thereof, of the county wherein the lands affected by such suit, trial or action, lie: Provided, that before such abstract, or land title abstract books shall be admissible, the party desiring to offer the same, or his agent, or attorney, shall, orally, in court, or by an affidavit filed in the cause, state under oath, that the originals of the deeds, conveyances or instruments affecting the title, or some part thereof, are lost, destroyed, or so injured as to be illegible, or that the said originals are not within the power of the party to produce, and that the record of such deeds, conveyances and instruments has been lost, destroyed or burned."

Much of the argument against the admissibility of this evidence is devoted to the question of the constitutionality of the act, it being the contention of the plaintiffs in error the act is violative of that provision of the Constitution of the state which prohibits class legislation. However, a search of the record discloses the objection taken to the abstract of title was based on the manner of its certification, and not on the ground of the unconstitutionality of the act.

A comparison of the abstract of title and its certification with

the act itself leaves no doubt but that it was certified in accordance with the provisions of the act. Hence, as the question of the constitutionality of the act was not directly put in issue by an objection based on that ground, it will be unnecessary to give it elaborate consideration here. *Oxley Stave Co. v. Butler County*, 166 U. S. 648, 17 Sup. Ct. 709, 41 L. Ed. 1149; *Sayward v. Denny*, 158 U. S. 184, 15 Sup. Ct. 777, 39 L. Ed. 941; *Browning v. Powers*, 142 Mo. 322, 44 S. W. 224.

A consideration of the entire record leaves no doubt that there was substantial evidence to sustain the finding made by the trial court. It follows the judgment is right, and must be affirmed.

In re OREAR.

(Circuit Court of Appeals, Eighth Circuit. July 17, 1911.)

No. 110.

1. BANKRUPTCY (§ 395*)—PROPERTY PASSING TO TRUSTEE—EXEMPT PROPERTY.

Under Bankruptcy Act July 1, 1898, c. 541, § 6a, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3424), which provides that the act shall not affect the allowance to a bankrupt of the exemptions prescribed by the laws of the state, and section 70a, which provides that a trustee shall be vested by operation of law with the title of the bankrupt, as of the date of adjudication, "except in so far as it is to property which is exempt," to the property therein enumerated, the title to any property which was exempt at the date of adjudication does not pass to the trustee, and he cannot thereafter become vested with any right therein.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 395.*]

2. BANKRUPTCY (§ 396*)—PROPERTY PASSING TO TRUSTEE—LIFE INSURANCE POLICIES—MISSOURI STATUTE.

Under Rev. St. Mo. 1909, § 6944, which provides that any policy of life insurance "expressed to be for the benefit of the wife of the insured shall inure to her separate benefit independently of the creditors, executors and administrators of the husband," where a policy is made payable on the death of the insured to his wife by name as beneficiary, it is one expressed to be for her benefit within the meaning of the statute, notwithstanding the fact that by its terms, as in most modern policies, the insured is given the right to change the beneficiary or to enjoy certain collateral rights in his lifetime in the way of obtaining loans thereon or its surrender value, and such a policy, which was so payable at the time of the bankruptcy of the insured, whether it be regarded as the property of the wife or as exempt property of the husband, did not pass to his trustee, who cannot recover the same, even though the right of the wife may be subsequently extinguished, or though she does not set up any claim thereto.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 396.*]

Petition for Revision of Proceedings of the District Court of the United States for the Eastern District of Missouri.

In the matter of Jacob W. Derr, bankrupt. On petition by Celsus Orear, trustee, to review an order of the District Court. Petition dismissed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Joseph A. Wright, for Orear, trustee.

David Goldsmith, for Jacob W. Derr.

Before ADAMS and SMITH, Circuit Judges, and AMIDON, District Judge.

SMITH, Circuit Judge. This is a proceeding upon petition of Celsus Orear, as trustee in bankruptcy, to review and revise an order of the District Court of the United States for the Eastern District of Missouri.

January 28, 1908, Derr Bros., a partnership, and Jacob W. Derr and Charles C. Derr, composing said firm, were adjudged bankrupts by the United States District Court for the Eastern District of Missouri. March 15, 1908, petitioner, Celsus Orear, was appointed trustee in the bankruptcy proceedings and qualified as such. There had been issued eight policies of insurance for \$2,500 each by the Northwestern Mutual Life Insurance Company upon the life of Jacob W. Derr which were in force at the time of the adjudication in bankruptcy.

One of these policies, numbered 656,496, was issued January 27, 1906, two years before the adjudication of bankruptcy, and was payable to Myrtle L. Derr, wife of Jacob W. Derr. Various beneficiaries were named in the other policies. The District Court held that none of these policies passed to the trustee by the adjudication in bankruptcy. That holding was reversed by this court. *In re Orear*, 178 Fed. 632, 102 C. C. A. 78, 30 L. R. A. (N. S.) 990.

In the opinion the court said:

"Whether or not policy number 656,496, which is expressed therein to be for the benefit of the wife of the insured, is to be regarded as exempt under section 7895, Rev. St. Mo. 1899 (Ann. St. 1906, p. 3749), and whether or not anything has occurred to avoid an exemption of the policy under that statute, are questions which were not in any manner presented before the referee or the District Court, and have not been presented in this court; so we leave them undecided. The United States District Court for the Eastern Division of the Eastern District of Missouri is therefore directed to vacate its judgment of December 19, 1908, reversing the order of the referee made May 27, 1908, and enter a judgment affirming the same, but without prejudice to the right, if any, of the wife of the bankrupt to claim the policy expressed to be for her benefit as an exemption under the state statute before mentioned."

October 14, 1910, the District Court held that the trustee had no interest in the policy in question and was not entitled thereto, that the same was exempt and not subject to the claims of creditors, and ordered the trustee to make no claim thereto, and the trustee brought this proceeding to reverse and review its action.

The policy in question by its terms is payable, "Unto Myrtle L. Derr, wife of Jacob W. Derr, the insured, of St. Louis in the state of Missouri, subject to the right of the insured to change the beneficiary or beneficiaries as hereinafter provided." The policy contains the following:

"Nomination and Change of Beneficiary. Fifth. The insured may nominate a beneficiary or beneficiaries hereunder and may also change any beneficiary or beneficiaries nominated by him or named in the policy. A beneficiary or beneficiaries in succession to be known as contingent beneficiary or benefi-

aries may be nominated by the insured or if not nominated by him by the beneficiary or beneficiaries if of lawful age. Contingent beneficiary or beneficiaries may be changed by the insured or the person or persons nominating same."

The policy also contains the usual modern provisions as to surrender value and the negotiating of loans after three years.

[1] The bankrupt act provides:

"Sec. 6. Exemption of Bankrupts.—a. This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."

The same act contains the following:

"Sec. 70. Title to Property.—a. The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property; (2) interests in patents, patentrights, copyrights and trade-marks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him; provided, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property."

Whatever title the trustee takes to any property he takes under the last-quoted section. It will be observed that the law by section 6 fully recognizes all exemptions given by the state law, but to avoid all possible doubt by section 70a it expressly excepts all exempt property from the property vested in the trustee. If this property was exempt on the date of adjudication, it did not pass to the trustee. *Holden v. Stratton*, 198 U. S. 202, 25 Sup. Ct. 656, 49 L. Ed. 1018.

Under the form of policy formerly used it was well settled that the rights of a beneficiary in a life insurance policy vested at the date of the issuance of the policy and not at the date of the death of the insured. *Bank v. Hume*, 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370; *Blum v. New York Life Insurance Co.*, 197 Mo. 513, 95 S. W. 317, 8 L. R. A. (N. S.) 923. It has, however, for a number of years become the practice in such policies to provide that the insured may change the beneficiary, thus giving him more control over the policy during his lifetime.

Under substantially all modern policies the insured has certain valuable rights with reference to loans or surrender value. In other words, the insured has certain rights or benefits as well as the one styled the beneficiary. It cannot be said that it is finally settled when

the rights of the named beneficiary vest under this modern form of policy. It has been held that under such policies the rights of the named beneficiary do not vest until the death of the insured. *Atlantic Co. v. Gannon*, 179 Mass. 291, 60 N. E. 933. Upon the other hand, it has been held that under such a policy the rights of the named beneficiary vest at the time of the issuance of the policy conditionally and subject to be divested by a change in the beneficiary named made by the insured. *Wirgman v. Miller*, 98 Ky. 620, 33 S. W. 937, 17 Ky. Law Rep. 1174. It is not necessary to pass on that question here. From 1879 to 1899, section 5981, Rev. St. 1879, was in force in Missouri. It read:

"Any policy of insurance heretofore or hereafter made by any insurance company on the life of any person expressed to be for the benefit of any married woman whether the same be effected by herself, or by her husband, or by any third person in her behalf, shall inure to her separate use and benefit, and that of her children, if any, independently of her husband, and of his creditors and representatives, and also independent of such third person effecting the same in her behalf, his creditors and representatives; and a trustee may be appointed by the circuit court for the county in which such married woman resides, to hold and manage the interest of any married woman in such policy, or the proceeds thereof. In the event of the death of such married woman before her husband, the said policy shall inure to the children of such marriage, to the exclusion of creditors and executors and administrators of said husband, any technical words or phrases in the policy to the contrary notwithstanding."

[2] In 1899, and after the introduction of the modern form of policies, the Legislature of Missouri revised this statute and ever since that time it has read as follows:

"Policy for Benefit of Married Woman.—Any policy of insurance heretofore or hereafter made by any insurance company on the life of any person, expressed to be for the benefit of the wife of the insured, shall inure to her separate benefit, independently of the creditors, executors and administrators of the husband; provided, however, that in the event of the death or divorce of the wife before the decease of the husband, he shall have the right to designate another beneficiary, upon written notice to the company, but such notice shall not be effected, unless endorsed upon the policy by the president or vice-president and secretary of the company issuing the policy. But when the premiums paid in any year out of the funds or property of the husband shall exceed the sum of five hundred dollars, such exemptions from such claims shall not apply to so much of said premiums so paid as shall be in excess of five hundred dollars, but such excess shall inure to the benefit of his creditors."

This provision is now known as section 6944 of the Revised Statutes of Missouri for 1909, and is the same section referred to in the quoted portion of the opinion of this court. It has been declared to be in the nature of an exemption statute (*Haven v. Home Co.*, 149 Mo. App. 291, 130 S. W. 73); but it has also been held that when a policy was issued during the life of the prior statute, and the right of the beneficiary became vested, and subsequently the amendment was made authorizing the change in the name of the beneficiary in cases of divorce, this provision was invalid as applied to such policy. *Blum v. New York Life Insurance Co.*, 197 Mo. 513, 95 S. W. 317, 8 L. R. A. (N. S.) 923.

Substantially three points are relied on by the trustee:

First. That, as the policy in question gave to the insured certain benefits in his lifetime and authorized him to change the beneficiary at his pleasure, the policy was not expressed to be for the benefit of the wife of the insured within the meaning of the Missouri statute.

Second. That, while said Myrtle L. Derr was the wife of Jacob W. Derr at the time of the issuance of the policy and so remained until after the adjudication of bankruptcy, on October 1, 1908, she secured a divorce from said Jacob W. Derr, and that thereby the exemption, if any, was lost.

Third. That the exemption, if any, was personal to Myrtle L. Derr and no one but herself could set it up, and, as she has not appeared and claimed the exemption, it cannot be considered.

If the first point should be sustained, it would practically nullify the statute, revised and re-enacted as late as 1899, because, as already stated, substantially all modern policies give the insured the right to change the beneficiary and confer upon him a right of surrender and to borrow upon the policy. In this particular case the policy had not run long enough at the adjudication of bankruptcy for any right of surrender or to borrow to have accrued and no such right could accrue without further lapse of time and further payments of premiums. If these provisions, which have for several years appeared in substantially every policy, would preclude the operation of this statute, then when last enacted it was a mere idle form of words and referred only to an obsolete kind of policy.

The primary purpose of such policies is still to insure against death and usually for the benefit of those dependent upon the insured, and when a modern policy is made, as in this case, payable upon the death of the insured to his wife by name as beneficiary, the fact that the insured may have the right to change the beneficiary or enjoy certain collateral rights in his lifetime does not make it any the less a policy of insurance made by an insurance company expressed to be for the benefit of the wife of the insured within the meaning of the statute in question, and to hold otherwise would be to hold that the Legislature of Missouri enacted a statute with reference to a kind of policy no longer used.

The second proposition of the trustee is equally without merit. Section 70a of the bankruptcy act expressly limits the property passing to the trustee to the property of the bankrupt as of the date he is adjudged a bankrupt, "except in so far as it is to property which is exempt."

This policy by the Missouri statute, if it belonged to the bankrupt in any sense, was declared to inure to the separate benefit of Myrtle L. Derr independently of creditors of the husband and was not, therefore, of such a character as to pass to the trustee even if the act did not expressly exempt it and if the seventieth section did not expressly exclude all exempt property from the grant to the trustee. The trustee could take nothing save as of the date of the adjudication of bankruptcy, and he either took this property then or never. What the trustee took he obtained under section 70a, and the fact that nine

months afterward Mrs. Derr obtained a divorce would not vest in the trustee property not covered by the grant to him.

The Missouri statute, it is true, provides that upon the divorcement of the parties the husband may change the beneficiary; but this right was expressly reserved to him when he took the policy by its very terms. There is nothing to indicate that he has attempted up to this time to change the beneficiary either under this statute or the power reserved in the policy. The divorce itself did not operate to change the beneficiary. *Conn. Mutual Life Insurance Co. v. Schaefer*, 94 U. S. 457, 24 L. Ed. 251.

It is finally contended that exemption is a personal privilege which can only be set up by the party entitled thereto, and as Myrtle L. Derr has not appeared and claimed the policy on her own behalf it should be awarded to the trustee. This involves several errors.

The trustee is seeking to obtain property the title to which he never took. This is not an ordinary claim of exemption. The trustee, it is true, is seeking to obtain exempt property; but the trouble with his claim is that he has no title to the property he seeks to hold.

That of course ends his contention. The property is not only exempt, but never passed to him and is not his. The statute, while in the nature of an exemption law, is more than that. It declares that this property shall inure to the separate benefit of the wife. Ordinary exemption laws leave the full right and title to the property in the debtor. This law declares that this policy shall inure to the separate benefit of the wife of Jacob W. Derr.

The trustee devotes much of his brief and argument to showing how large is the interest of Jacob W. Derr in this policy, and then contends that, notwithstanding the trustee never took any interest whatever in this policy and has no right whatever to it, he can obtain affirmative relief as against Jacob W. Derr who has a considerable interest because Myrtle L. Derr has not appeared and set up an exemption in her own behalf. The trustee must fail without reference to the apportionment of the interest between Jacob W. Derr and Myrtle L. Derr upon the ground that he asks affirmative relief and has no title whatever upon which to base his claims.

The petition for review is dismissed.

SCHNITTER v. LAU.

(Circuit Court of Appeals, Eighth Circuit. July 27, 1911.)

No. 3,509.

MORTGAGES (§ 597*)—SUIT TO REDEEM—RELEASE OF EQUITY OF REDEMPTION.

A letter written by complainant to defendant, to whom he had assigned a contract for the purchase of land as security for a loan, stating that he could not pay his notes, and that if defendant wanted anything he would have to take the land, was not a sufficient conveyance or release of complainant's equity of redemption under the law of Minnesota, and did not estop him from subsequently maintaining a suit to redeem

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and for an accounting, where defendant took possession of and used the land without foreclosing his lien.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1742-1752; Dec. Dig. § 597.*]

Appeal from the Circuit Court of the United States for the District of Minnesota.

Suit in equity by Nelson J. Lau against Frank Schnitter. Decree for complainant, and defendant appeals. Affirmed.

Benjamin I. Salinger (Louis H. Salinger, on the brief), for appellant.

Stiles W. Burr, for appellee.

Before SANBORN and SMITH, Circuit Judges, and WM. H. MUNGER, District Judge.

WM. H. MUNGER, District Judge. From the facts in this case it appears that on January 21, 1891, Nelson J. Lau was the owner of a certain land contract for the purchase of 160 acres of land situated in the state of Minnesota, for the principal sum of \$1,360, \$700 of which had been paid; the remaining \$660 of principal was payable in four annual installments, with interest. On said date he borrowed of Frank Schnitter, appellant, and one Conrad Meis, doing business as partners under the firm name of Meis & Schnitter, the sum of \$500, for the payment of which he executed to them his promissory notes of that date for \$300 and \$200, due respectively October 25 and November 25, 1891. To secure the payment of said notes he executed a chattel mortgage upon the crops thereafter to be raised on said land, and also executed to them an assignment of said land contract. There was at that time but about 30 acres of land broken and under cultivation. On account of a crop failure for that year, Lau realized from the crop but \$21.60, which he paid upon his notes. He then removed from the state of Minnesota, abandoning the occupation and possession of said land. Meis & Schnitter subsequently dissolved partnership, and Meis assigned his interest in the notes and land contract to Schnitter. After the notes became due, Schnitter wrote to Mr. Lau, about January, 1892, relative to their payment, and received from Lau a letter, which he testified was destroyed, and in which he testified Lau stated that he could not pay the \$500; that if they wanted anything they would have to take the land. In 1893 Schnitter went into possession of said land by tenants and has since occupied the same, paid the balance due upon the land contract, and upon his final payment received a deed from the grantor. Schnitter has paid the taxes upon the land, broken it up, and cultivated it since.

Nothing more was heard from Lau until about April 18, 1895, when Lau wrote to Schnitter, in effect and substance demanding a conveyance of the land and an accounting for the rents. Correspondence was had between Schnitter and Lau, relative to the adjustment of the matter. Nothing resulted therefrom until Lau commenced this action to redeem said land and for an accounting of the rents and profits.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

By the decree of the Circuit Court it was found that Lau was entitled to the relief asked, an accounting was had, and a decree entered that, upon the payment by Lau to Schnitter of the amount found due in said accounting, Schnitter should convey the land to Lau. From the decree Schnitter has appealed.

Appellant claims:

(1) That the letter of Lau, of January, 1892, in which he stated that he could not pay the \$500, and if they wanted anything they would have to take the land, was in legal effect a conveyance or relinquishment of his equity of redemption.

(2) That the action is barred by the statute of limitations.

(3) That appellee is guilty of laches.

(4) That under the facts shown he should be estopped from now claiming the land.

That the assignment of the contract to Meis & Schnitter was as security for the payment of the two notes of \$300 and \$200, respectively, and that the relation between the parties was that of mortgagor and mortgagee is beyond dispute.

In *Peugh v. Davis*, 96 U. S. 332-337, 24 L. Ed. 775, it is said:

"A subsequent release of the equity of redemption may undoubtedly be made to the mortgagee. There is nothing in the policy of the law which forbids the transfer to him of the debtor's interest. * * * Without citing the authorities, it may be stated as conclusions from them that a release to the mortgagee will not be inferred from equivocal circumstances and loose expressions. It must appear by a writing importing in terms a transfer of the mortgagor's interest, or such facts must be shown as will operate to estop him from asserting any interest in the premises."

In *Niggeler v. Maurin*, 34 Minn. 118, 24 N. W. 369, it was said that plaintiff's interest as mortgagor could only be divested or barred by release properly executed, unless the circumstances constitute equitable estoppel.

In *Marshall v. Thompson*, 39 Minn. 137, 39 N. W. 309, it was said:

"Though a mortgagee may purchase the equity of redemption, yet, when the relation of mortgagor and mortgagee is once established, the court scrutinizes with great jealousy the acquisition of the equity of redemption by the mortgagee in any other way than regular foreclosure."

In this case we do not think the loose expression contained in the letter referred to, that Lau could not pay the \$500 and if they wanted anything they would have to take the land, constituted a release or conveyance of the equity of redemption. It was a statement in effect that he could not make payment and they would have to obtain payment out of the land by foreclosure.

The evidence does not disclose a state of facts which would warrant the doctrine of equitable estoppel. Schnitter, it is true, went into possession of the land as mortgagee, and broke and cultivated the same from 1893 until the bringing of this action in 1903. No buildings or other improvements were placed upon the land. The court, in its accounting and decree, credited Schnitter with the amount due from Lau, with the amounts paid upon the contract, taxes, etc., and interest thereon, and charged him with the net profits from the land, thus doing justice between the parties. The land in question being in Minnesota, the right of redemption is governed by the law of that

state. The Supreme Court of that state, in *Bradley v. Norris*, 63 Minn. 156, 65 N. W. 357, and *Backus v. Burke*, 63 Minn. 272, 65 N. W. 459, construing the statute laws of that state, held that the right of redemption existed during the period of 15 years.

The evidence does not show such laches on the part of plaintiff as to deprive him of the right to recover. *Broatch v. Boysen*, 175 Fed. 702-707, and cases there cited.

The decree is affirmed.

WHEELER et al. v. JAMES.

SAME v. MURRAY.

(Circuit Court, E. D. New York. August 5, 1911.)

PATENTS (§ 328*)—VALIDITY—CLAIMS BROADER THAN INVENTION—CARBURETERS.

In the Schebler patent, No. 806,434, for a carbureter, while the specification and drawings may disclose a patentable invention, claims 1, 2, and 3 are invalid, as broader than the actual invention so disclosed and in view of the prior art.

In Equity. Suit by Frank H. Wheeler and George M. Schebler, doing business as Wheeler & Schebler, a partnership, against William James, trading as Generator Valve Company, and same against John A. Murray, trading as Monarch Valve Company. On final hearing. Decrees for defendants.

Kerr, Page, Cooper & Hayward (Drury W. Cooper, of counsel), for complainants.

Henry D. Williams, for defendants.

CHATFIELD, District Judge. The complainants have brought action against two defendants who are making and selling carbureters containing the same elements as are described in complainant's Schebler patent, No. 806,434, issued December 5, 1905, upon an application filed October 30, 1903. The defendants' carbureters are both almost exact copies of the patented device, and no question of infringement, apart from that of validity, exists as the record now stands. The complainant was allowed four claims, of which three must be considered herein; the fourth claim being merely as to a form of throttle valve, which has no bearing. Claims 1, 2, and 3 are as follows:

"1. A carbureter consisting of a main casing having an air-passage therethrough with an induction-opening and an eduction-opening, an air-inlet structure, a throttle-valve structure, and means for securing either of said structures to either the induction or eduction openings.

"2. A carbureter consisting of a main casing having an air-passage therethrough with an induction-opening and an eduction-opening, and an air-inlet structure provided with a yielding check-plate normally obstructing the passage therethrough.

"3. A carbureter consisting of a main casing having an air-passage therethrough with an induction-opening and an eduction-opening, an air-inlet structure provided with a yielding check-plate normally obstructing the passage

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

therethrough, a throttle-valve structure, and means for securing the inlet structure and the throttle-valve structure to either the induction or eduction openings."

The interchangeable feature shown in claims 1 and 3 is claimed not to be infringed by one of the defendants (Murray) who uses different size screws for the attachments at the opposite sides of his carbureter, thus voluntarily doing away with the possibility of exchanging the point of attaching those parts to fit different positions of the engine. But it appears that, if the patent be valid and the defendants' structures infringe claims 1 and 2, they (or either of them) cannot escape the charge of infringement of claims 1 and 3 by some purely mechanical variation which interferes with the full benefit of the complete device. He cannot contend that he does not infringe because he does not seek every advantageous use that an infringing structure or the patent itself may be capable of, and which would be available by a purely mechanical alteration of the size of screw. Hence the validity of all these claims must be considered.

Upon final hearing the defendants have introduced a large number of patents in addition to those presented upon the argument for a preliminary injunction under claim 1 (which was denied). They endeavor to show that the claims of the Schebler patent, Nos. 1, 2, and 3, are so general in their language as to be anticipated, and hence invalid, or that, if the Schebler patent be limited to the matters as to which the possibility of invention existed as shown by the specifications and drawings of the patent, the complainant cannot recover because of his attempt to claim broad ideas, old in the art, and only generally fitting the drawings and specifications, which show such a limited form or combination of elements that the discovery should have been confined to an exact statement of the device. The general ideas of a basic patent were not (and should not have been claimed as) the invention of the patentee.

The patents of the prior art are so many in number, and their ideas depend so much upon the particular method of construction or control, that, aside from the general language contained in the Schebler claims, they, in most instances, are easily dismissed from consideration. Many of them have been discussed on the application for preliminary injunction. The development of a carbureter for automobiles was accomplished in a very short time, owing to the rapid growth and spread of the automobile industry at just about the period when Schebler applied for his patent. A number of patents cited by the defendants were applied for within the same six months in which Schebler attempts to show that he was working on his invention, and just prior to the time when he filed his own application. So many individuals were working at the same idea and along somewhat similar lines that it is impossible to entirely dismiss Schebler's claim of being the first inventor by saying that in the presence of so much proof his testimony as to priority must be absolute in order to be convincing. It is impossible to deny Schebler's priority of invention, if his testimony does show that he, even by a short time, reached a patentable idea, in such a way as to make others, who

soon after perfected devices which might teach the Schebler invention, subsequent or nonavailable as citations against him. The patents cited show that a number of inventors had appreciated the desirability of using a single casing or structure with a float-feed, thus bringing the immediate supply of fuel, in small quantity, close to the engine and mixing chamber, but remote from the general tank of the automobile. The stability of level and added safety furnished thereby was developed by Le Blon, No. 685,993, of November 5, 1901, and by Schebler himself, No. 711,005, of October 14, 1902, in the use of a bowl-shaped casing, which gave much greater simplicity and compactness. In this earlier patent Schebler also disclosed the idea of a tube or air-passage through the bowl, which should act as a mixing chamber, into which the valve or spraying device would directly enter. Schebler also disclosed in that patent the advantage of locating the nozzle or spray at approximately the center of the bowl, and of having the air pipe pass through this center portion while terminating at opposite and differing points of the exterior. The earlier Schebler patent (as well as that of Inman, No. 633,320, September 19, 1899, Baker, No. 291,128, January 1, 1884, Bates, No. 660,482, October 23, 1900, and others cited) show a symmetrical structure which could be reversed as a matter of course. Other patents such as Bollee, No. 584,666, June 15, 1897, Bates (*supra*), Dawson, No. 668,953, February 26, 1901, Inman, No. 700,777, May 27, 1902, Frenay, No. 24,974, March 20, 1902 (British), show the same sized connection for inlet and outlet of the air and mixture, thus allowing for reversal of direction of the flow without affecting operation. But symmetry does not mean reversibility in the sense of gaining advantage by the change of direction, nor do any of these patents (except Schebler's own earlier patent to some extent) show an appreciation of the gain in providing for the change of connection without reversing the carbureter. Nor do these patents teach or disclose this advantage so as to invalidate the claim thereof by Schebler in his second patent. Hence, the first and third claims of the patent in suit would seem to be valid except in so far as they are open to the objections raised because of the wide scope and general character of the language used therein. The idea of automatically controlling the supply of mixture according to the demands of the engine has been the source of much invention. Many of the patents cited, such as Rolfson, No. 509,828, November 28, 1893, Davis, No. 583,982, June 8, 1897, Bollee (*supra*), Dawson (*supra*), Krastin, No. 687,840, December 3, 1901, Johnson, No. 4,064, December 21, 1901 (British), regulate the flow of oil or gasoline by a valve control which varies to meet the demand for mixture. Others, such as Krebs, No. 734,421, July 21, 1903, and Pidgeon, No. 8,930, January 8, 1903 (British), recognize the idea of increasing or diminishing the quantity of mixture by providing for the inlet of a greater amount of air to be acted upon by the vapor supplied in the mixing chamber, and have an inlet and outlet structure for the control of air and mixture, but neither of them teaches or shows a single air-passage which of

itself allows for a varying quantity of air into the mixing chamber so as to thereby control the suction of oil and the volume of mixture. Pidgeon says the additional "air, partly by diluting that which passes through the carbureter, and partly by reducing the suck in the carbureter, can be so proportioned as to automatically keep the mixture approximately correct for all speeds." Krebs says that by his invention "the admission of air is varied" by letting in additional air through another inlet, and that by this means "the composition of the explosive mixture is kept constant." Thus Krebs and Pidgeon have the idea worked out in the Schebler carbureter, so far as the reason for the structure is concerned, and express this idea more nearly than Schebler, who says he wishes to provide means for "automatically varying the proportions and the character of the mixture" by increasing the size of the air inlet at high speed "so that the mixture produced will be less rich." Thus Schebler (while stating exact application and proper use of the parts of his carbureter) evidently did not appreciate or carefully state the result of his correct and practical theory, and it becomes less difficult to see why the language of his claims is so vague and actually defeats his attempt to "distinctly claim and particularly point out the improvement or combination" (R. S. 4888) which he did invent. A number of the patents cited apply heat as well as regulation to the air, the oil, or the mixture, but these patents do not anticipate the idea of Schebler, nor does the fact that in one type outside heat is also used by Schebler throw any light on the issue.

The form of air inlet and also the use of a throttle valve as described and applied by Schebler are old and several of the patents cited, such as Bates (*supra*), Frenay, British (*supra*), show an air-passage which fulfills the purpose of the air-passage which Schebler carries through his casing, but none of these suggests the form of Schebler with the advantages of the compact, symmetrical, and practical structure which he gains thereby, and for which he seems able to claim invention. The benefit of attachment at the side and top (or at points in different horizontal and vertical planes) is also new in Schebler, although (as has been pointed out) some of the symmetrical or reversible structures of the other patent could be used in that way by forced mechanical change. This idea is plainly claimed by Schebler, and seems to be sufficiently a part of his original idea in making a compact and variable carbureter, to be allowed as invention. At this point it may be well to consider the date of invention by Schebler and the dates of application for other patents, such as Krebs, who followed closely on Pidgeon.

The testimony shows that on July 1, 1903, Schebler assigned his earlier patent and agreed to assign improvements made after that date. Other testimony would indicate that Schebler had perfected the idea of the patent in suit before that time, and that his application for this patent in October of that year was, therefore, within his rights. He would seem to be thus able to claim invention before the issuance of the Krebs patent, but not before the Krebs application.

No interference proceeding was possible, and Schebler was granted his claims with the Krebs patent actually issued. Thus Schebler is entitled to claim as invention what may be valid in the light of disclosure by Krebs (and still more so as to Pidgeon), but the action of the Patent Office in limiting Schebler to a casing with an "air-passage therethrough" shows that Schebler cannot maintain the position of inventor of the broad principle of controlling operation by regulating the entrance of air alone. The Schebler carbureter proved practical and convenient. Its sales have been large and began immediately, and this is some evidence in support of the patent as issued. *Potts v. Creager*, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275.

It would therefore seem that, viewing the patents of the prior art from this examination, Schebler had a patentable idea with reference to the combination of a more or less spherical bowl as a casing, the conduction of air by a continuous air-passage (inside the casing), from the entrance of that passage to the point where it leaves the casing, in such manner as to inject into the air tube the gasoline or other fluid from a small supply regulated by a float valve, by such means and at such a point as to increase or diminish the supply of gasoline, and also the quantity of air, solely through the demand upon or suction of the mixture by the engine, this latter demand depending upon speed or other conditions which have to be met, but which need not be examined as to cause. Schebler also seems to have discovered the possibility of adjusting the supply of air in the manner described (by the use of the inlet which he employs) and of controlling the quantity of mixture by the effect of the suction (resulting from the use of a throttle valve) upon the pressure within the carbureter (with an automatic regulation of the flow of gasoline from the effect of that pressure) all combined in one structure. But Schebler did not attempt to limit his claims merely to the application of these principles (which can separately be found in one or another of the prior patents), nor does he seem to have tried to patent the particular device or combination of devices constituting his style of carbureter, as indicated by his drawings and specifications, and thus to make patentable use of the principles well known, so far as cause and effect are concerned, in similar patents. He showed by his drawings and specifications that his invention was of this nature. When he reached the point of stating his claims, after more or less correspondence with the Patent Office, he stated that his invention consisted in the discovery of the broad ideas shown in a number of patents, and he failed to limit whatever invention he may have made, or whatever ideas he may have reached, to the improvements in the structure which he describes in the specifications and drawings. In his specifications he says:

"In the construction of automobiles of the gas-engine type a carbureter is an essential element; and the object of my present invention is to provide an efficient carbureter of the type shown in my patent No. 711,005, which is exceedingly compact and the parts of which may be rearranged with relation to each other in order to adapt the apparatus for use in different types of machines."

Also:

"A further object of my invention is to provide means for automatically varying the proportions and the character of the mixture produced and to provide such improvements in details of construction as are hereinafter pointed out."

But, when he sets forth what he claims, he does not specify a float-feed nor a bowl casing. He provides for no gasoline nozzle or supply at all, much less one located at the center of the bowl and in the air-passage. He describes the basic claim of a compact carbureter with a regulation of the supply and mixture by the inlet and outlet, and couples this broad idea with those of the air-passage "therethrough," and with interchangeable attachments; but even these are not differentiated from the opposite sides of a merely symmetrical structure, nor described as being at the ends of an L-shaped passage. He does not refer to the specifications and drawings, nor suggest that his distinct claim is an improvement of the type described or a combination of the elements specified as making up his structure. In short, he merely adds to his earlier patent the inlet and throttle valve, with the interchangeable character of the parts. Can such claims be held valid?

The inlet and throttle valve were not new except in his particular combination. The interchangeability is not infringed by the defendant Murray, and was not patentable except as applied to the particular device or combination which Schebler describes in his specifications, so as to accomplish a definite benefit. If he had claimed a combination of old parts in such a way that a new method was involved, then he might claim the method as a result of the use of those or any equivalent parts. But Schebler does not seek to do this. He has tried to claim as invention the general idea of a carbureter of any type (although his type was plainly taught in his earlier patent) with the ideas patented by Krebs and Pidgeon (to say nothing of Dawson and Krastin), and to protect this wide basic proposition by adding interchangeability. Did he thereby get a valid patent even for the idea of interchangeability? It seems impossible to so hold. The details of the drawings and specifications are not even alleged to be invented by him. He has stated them as premises, and they might have been invented by any one. He then claims, not these parts or their method of use or their combination, but, on the other hand, general ideas which were unpatentable, and claims which would be infringed by many devices patented long before. Apparently such claims should have been refused by the Patent Office. He should have been compelled to state what he described, and what he really seems to have invented and intended. He cannot now be heard to say that his broad claims are really limited and explained by the drawings and specifications which are not by reference or description made a part thereof.

From another point of view, he seems to try to claim the idea that a carbureter can be successfully made out of nothing but a casing, an air-passage, with inlet and outlet structures (to regulate air at the inlet and mixture at the outlet), and with these structures re-

versible. He throws away the bowl idea, the float-feed, and the gasoline nozzle. Such a device would not be a carbureter at all if limited to these parts, and without a gasoline supply. On the other hand, if it be taken that Schebler claimed to have invented the method of operation or idea that a carbureter could be made of nothing but these parts, then his earlier patent had already shown the same structure with less parts and probably less availability. The later patent showed merely that a better carbureter could be made of the early device with additional parts, and the successful mercantile carbureter is an improvement or a device made out of the old by the added attachments. It is not a new general invention of the ideas indicated by Schebler's claims.

The scope of a claim is set forth in *White v. Dunbar*, 119 U. S. 51, 7 Sup. Ct. 72, 30 L. Ed. 303, in which it is held that the context—i. e., the specifications—"may be resorted to for better understanding the meaning of the claim, but not for the purpose of changing it and making it different from what it is." This patent is not like those in *McCarty v. Railroad Co.*, 160 U. S. 110, 16 Sup. Ct. 240, 40 L. Ed. 358, or *U. S. Repair & Guaranty Co. v. Assyrian Asphalt Co.*, 183 U. S. 591, 22 Sup. Ct. 87, 46 L. Ed. 342, where the claims were narrower than the specifications, and an attempt was made to show that the patentee had really invented everything covered by the specifications. In these cases the court held that infringement of the claims could not be found because of infringement of the ideas which they had been intended to cover. The case of *Evans v. Eaton*, 7 Wheat. 356, 5 L. Ed. 472, is more nearly in point. As, also, *Consolidated Bunting Apparatus Co. v. Metropolitan Brewing Co.*, 60 Fed. 93, 8 C. C. A. 485, *Excelsior Needle Co. v. Morse-Keefer Cycle-Supply Co.*, 101 Fed. 448, 41 C. C. A. 448, and *Edison v. American Mutoscope Co.*, 114 Fed. 926, 52 C. C. A. 546. In these cases it was held that a patentee could not after using broad claims show that a narrower construction was meant or could be surmised from the specifications, nor could the court work out the real invention so as to define the inventor's meaning as he should have stated it. See, also, *Walker on Patents*, p. 170, par. 181, and 2 *Robinson on Patents*, pp. 139, 140.

A reissue would seem to be necessary before Schebler can prove infringement of any valid claim, and, as the case stands, the defendants should have decrees.

GRAFF, WASHBOURNE & DUNN v. WEBSTER et al.

(Circuit Court, E. D. New York. July 26, 1911.)

1. PATENTS (§ 252*)—INFRINGEMENT—DESIGNS.

Whether a design infringes a design patent cannot be determined solely by looking to the elements or the details in carrying out the parts of the design, but the test is whether or not the person desiring to obtain

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

an article bearing the original design would be deceived or induced to purchase the imitation because of its similarity.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 394-396; Dec. Dig. § 252.*]

2. PATENTS (§ 252*)—INFRINGEMENT—DESIGN.

Infringement of a patent for a design for silver plates, dishes, etc., is not avoided by piercing the border of the plate or dish in certain parts of the pattern, which was a well-known decorative means, where the patented design would apply as well whether pierced or not, and where the patentee also in practice used such piercings.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 394-396; Dec. Dig. § 252.*]

3. PATENTS (§ 173*)—DESIGNS—DOUBLE PATENTING.

An inventor may patent a component detail of a design, and at the same time an arrangement of that design with the addition of a particular style of chasing, without either patent being open to attack as invalid for double patenting.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 173.*]

4. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—DESIGN FOR SILVERWARE.

The Graff design patents, No. 39,992, for a design for silver plates, dishes, etc., and No. 40,009, for a detail of a border section of the same design, do not show a case of double patenting, nor is either invalid as not the invention of the patentee; both also *held* infringed.

In Equity. Suit by Graff, Washbourne & Dunn against Frederick H. Webster and Hawley T. Webster. Decree for complainant.

Philipp, Sawyer, Rice & Kennedy (C. J. Sawyer, of counsel), for complainant.

Nicholas M. Goodlett, Jr., for defendants.

CHATFIELD, J. The complainant is an extensive manufacturer of solid silverware, while the defendants have a large factory producing principally plated silver. This action has to do with two design patents, for which applications were filed at the same time, but which were issued a few days apart, for reasons which have nothing to do with this case.

It appears from the testimony that late in the spring of the year 1907 Mr. Graff, president of the complainant company, learned of a demand for a design for solid silver dishes, which would furnish an attractive and handsome series of articles without using high relief and the elaborate engraving of patterns previously produced by the complainant. A flat pattern known as the "French design," and which has been applied to plates, platters, compotes, and various other dishes, was produced within the next few months. The process of production seems to have been to make a sketch of the general outlines and parts of the design, then to model this in some plastic material which would show the proportions and relations of the details, and, after the modeling indicated a satisfactory result, to proceed with the making of dies for the actual stamping and cutting of the silver. The making of this particular design was proceeded with in secrecy until it was placed upon the market, and it was then treated as the private property of the complainant until the year 1909, when the defend-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ants, having observed the popularity of this French design, and also believing that it could be reproduced in plated silver, prepared certain articles which were copies of the complainant's solid silver articles of the same sort, with this so-called French design. An intimation of this copying reaching the complainant's ears and two years not having elapsed since the design was first conceived of, Mr. Graff applied for the design patent referred to.

One phase of the case can be disposed of upon the preceding statement. No claim of unfair competition enters into the case. The use of the design in solid silver was not of such a nature, nor had it been so well recognized by the public, that any question of deception or substitution for the complainant's article would be involved in making a plated article of a similar sort, nor had any trade-mark rights been acquired. The complainant therefore sought to protect itself in the only way open to it; that is, by patenting the design. Upon learning of this action, the defendants decided that they did not desire to copy the design of another party when the issuance of a patent showed that they did not have the right to use it, and they also wished to avoid the possibility of an infringement suit. The defendants therefore deliberately, after consultation with their advisor, had made up the design now used by them, which was subsequently patented by their designer, and which has been applied to plates, platters, and dishes throughout the same general class of work as was already upon the market in solid silver but with the complainant's design. The testimony shows plainly that the complainant's design was made up of many old ideas and methods of ornamentation. Designers such as Graff and his employé, Saunders, were cognizant of the general use of scrolls, leaves, festoons, garlands, flowers, and piercings, either in parallel lines or in concentric circles. It was also old to use these elements in such combinations that they could be reproduced around the rim or edge of a plate or dish, and, when so used, it was well known in the art that some connecting design or member of the combination would be necessary if the separate parts of the design did not entirely fill the space desired to be decorated. Further, it appears that each designer has certain individual characteristics, and that a tendency to use certain curves or direction of turn in scrolls, certain shapes of leaves in festoons or garlands, and definite systems of shading or modeling will be present in the work of each designer or modeler, and that a mere change because of this personal peculiarity in the method of carrying out the design is not always a change in the design itself, if the appearance and effects are substantially the same. The defendants, knowing these facts, made their design from elements that could be used by any one, but endeavored to combine them in such a way that they would be free from the charge of having produced a design like that protected by the patent, but yet so that the pattern would be salable in a plated or cheaper product to serve the identical purpose and meet the fancy or taste of the purchasers who would be attracted by the French design of the complainant, and who might appreciate the ability to secure it at a lesser price, at a sacrifice of the personal satisfaction or vanity involved in possessing it in solid

silver. The complainant from this also alleges that the sale of the solid silver articles is hindered or defeated by the idea of intending purchasers that they do not desire a pattern in solid ware that can be obtained by others in plated silver.

[1] Hence, to determine whether a design infringes a design patent, we cannot look solely to the elements nor the details in carrying out the parts of the design, but the test, somewhat like that applied in the case of unfair competition, is whether or not the person desiring to obtain an article bearing the original design would be deceived or induced to purchase the imitation because of its similarity, and whether there is likelihood of users or casual observers not noticing the distinction. Or, again, whether purchasers, not having in mind the details of the design, but having their attention called to either the original or the imitation, would fail to carry away those details in their memory, and having been pleased with the general appearance would, upon seeing the similar pattern, conclude that the plated ware or the imitation design, of a generally similar appearance and at a cheaper price, was a copy of the solid pattern. *Hutter v. Broome* (C. C.) 114 Fed. 655; *Gorham Mfg. Co. v. White*, 14 Wall. 511, 20 L. Ed. 731.

The testimony of experts or of ordinary witnesses as to their opinion of the likelihood of deception may be some guide in furnishing statements as to the points of similarity which must be compared by the court. But the determination as a matter of law that one design is so near like another patented design that it constitutes an infringement of the latter, must be passed upon by the court, and it would be more helpful to have the testimony of the experts confined to the various elements or details which would make for or against deception, rather than to merely state their conclusions as to what the court should decide. Hence many of the questions in the present record can be used by the court, but cannot be taken in the precise form in which the answer is stated. A comparison of two designs does not produce entirely the same result as a comparison of two dishes, one solid and one plated, and the customers or the public who are to be considered customers must deal with the dishes upon which the design is used, while the court has to pass upon the information disclosed by the patent containing drawings and specifications of the design. But it can also consider that information as exemplified by the specific objects constructed after the patent or in alleged violation thereof.

In accordance with the ruling of the Patent Office and the decision of the courts (such as *Dobson v. Dornan*, 118 U. S. 10, 6 Sup. Ct. 946, 30 L. Ed. 63; *Cheney Bros. v. Weinreb*, 157 Off. Gaz. Pat. Off. 1002), design patents no longer attempt to describe in literary parlance the effect of the ocular sensation conveyed by the drawings, and the court in the present instance must limit the scope of the complainant's design patent to the discovery or teaching shown in the patent, and must examine the exhibits; that is, the silver dishes themselves, with this fact in mind.

[2] The testimony of the complainant's witnesses has pointed out that the use of a border, flat, richly ornamented, and yet conveying the

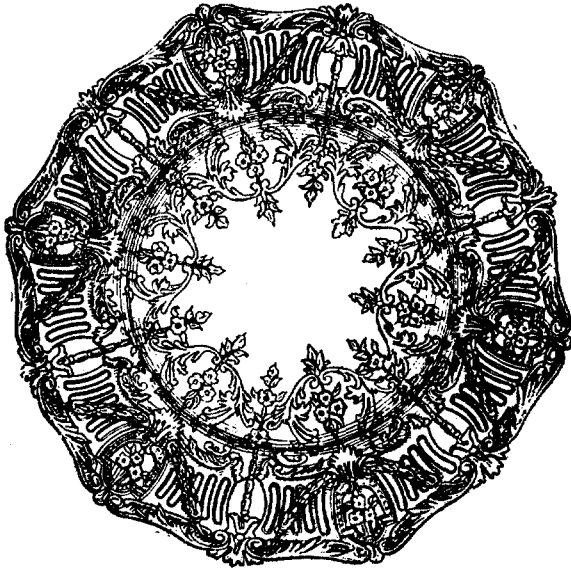
impression of a light, attractive design, has been made particularly effective by the use of the piercings which were already well known as a decorative means both in porcelain and metals, in all kinds of designs, including borders. The complainant's design patent does not mention in the specifications anything about piercings. The drawings are not consistently exclusive of a smooth flat surface, instead of a pierced section, nor do they satisfactorily indicate that the complainant intentionally endeavored to describe and retain to its own advantage both the method of piercing and of using instead depressed or raised flat surfaces. The design, therefore, as disclosed by the patent, has to do with an arrangement of lines or parts (some of which might be perforated or might have solid smooth surfaces, instead of perforations). In practice the complainant has always used piercings, and the defendants as well (both in the original copy, which was discontinued, and in the new design which was made up to serve the purpose) use nothing except what has been considered as a pierced border. It would seem that either customers or casual observers would carry in their minds an openwork pierced design as a distinguishing element, in connection with the idea of a silver or metallic substance which such a plate would suggest to them. To say, therefore, that the defendants' design does not infringe because they merely use the same form of the design which the complainant uses, would be like holding that an engine patent could not be infringed because both the patentee and the alleged infringer confined the use of that engine to a motor boat, when according to the patent it might be applicable for a number of other purposes.

The court must conclude, therefore, on this point, that if the use which the defendants make of the design is an infringement of the design, whether pierced or not, they cannot escape because their use is exactly the same as that of the complainant, and because the complainant in describing its patent made it possible to give the design a double significance, and in effect to cover two distinct styles, in reality alike in every detail except the piercing, which was not new and which could be used on any design, even if thereby it were made so attractive as to be more readily salable.

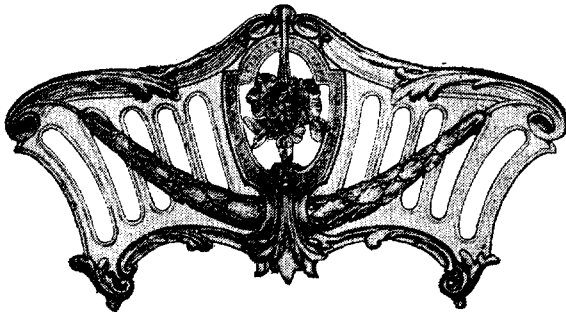
The defendants also suggest that, as has been indicated, their completed dish, with their design applied, may resemble in general appearance the complainant's completed dish with the complainant's design applied, but that their design does not resemble the complainant's printed design as shown in the patent. *Soehner v. Favorite Stove & Range Co.*, 84 Fed. 182, 28 C. C. A. 317. This is but another form of presenting the same argument which has just been considered. The court must look to the form allowed by the Patent Office for the teaching of the patent, but within a legitimate application of that patent, and within the use of the design shown thereby, similarity between the products, when used in the same way, would indicate that the design was infringed, and not that the application of the design by both parties was a change from the patent.

The defendants attack the complainant's patents, however, in a more serious manner by pointing out that the first patent of the com-

plainant, No. 39,992, granted May 18, 1909, of which the following is a general reproduction of the actual design:



—was patented to be and expressly stated to be a design for a plate or dish made up of the border section which has been referred to in the testimony as the French border, with a chased or engraved design, beginning at the inner scroll of the border and extending over the concave rim, into the body or surface of the plate or dish. It would appear that the use of an inside scroll and also of chasing or engraving so as to conceal and embellish the curved rim to the dish part of the piece of silver was new in the Graff design, and some of the elements of attractiveness of the French border silverware seem to have come from the use of this scroll and of engraving where engraving was employed. But the second Graff patent, No. 40,009, granted May 25, 1909, of which the following is a sketch:



—describes what has been referred to as a border section; that is, one of the uniform portions of the border, repeated as often as necessary around the circumference of the dish.

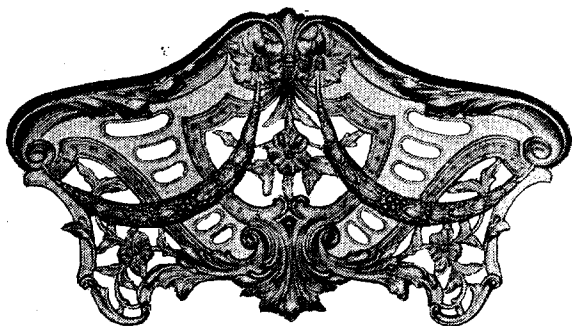
[3] The defendants claim that even if the applications were filed at the same time, and admitting that the issuance of a design patent does not establish priority of rights (inasmuch as this is controlled by the Patent Office and not by the patentee), nevertheless when Mr. Graff applied for a design for an entire plate, showing as a part thereof a complete section, which could be used for repetition in any way desired in the same way that a painted landscape or head could be taken from a composite design and reproduced in places where such a detail was desired, he anticipated his second application, even though by only a moment, and that the second application—that is, the patent for a detail or section of the design to be used in making up the border—is therefore invalid as double patenting. *Miller v. Eagle*, 151 U. S. 186, 14 Sup. Ct. 310, 38 L. Ed. 121; *Palmer Pneumatic Co. v. Lozier*, 90 Fed. 732, 33 C. C. A. 255.

It can be seen that the idea of using such a design as a border section was not new nor patented by Graff. His border section patent was intended to cover solely the design of that section, and this design was the same as the design of the various sections in the other patent. If the plate design patent had been issued, and then Graff had suddenly seen that some part of it was applicable for use as a border, when the design patent showed that was already being used as a border, it would not be patentable, unless some invention were applied to the use indicated in the new patent, or some invention occurred in the design itself. Neither of these elements is present in this case, and yet it would seem that a man could patent some component detail of a design, and at the same time could patent an arrangement of that design with the addition of a particular style of chasing, and not have either patent open to the attack of invalidity, in so far as they did not conflict with each other. Hence neither of the Graff patents renders the other invalid, but each must be taken as disclosing solely the invention claimed; that is, the border section patent protects nothing but the design for use as a section. The plate design patent protects nothing but the arrangement of sections and chasing designs in a plate like or substantially like from the standpoint of design, the one shown in the patent.

[4] Considerable testimony was devoted to an investigation of the defense that Mr. Graff was not the actual inventor of the French border, but that Saunders, who was then in the employ of the complainant and did the modeling for the design, really produced the ideas of the design itself. This testimony shows that Saunders was a man of considerable ability and of much originality and independence. He has had considerable experience in modeling and in certain kinds of designing, and since leaving the employment of the complainant has been engaged in sculpture work and designing colossal monuments. His ability to design the French border might readily have been admitted, if he had actually conceived the idea. It would follow that if he had designed the border, and Graff had claimed the invention, Graff, Washbourne & Dunn, as assignees, would not be entitled to the sole use of the design, for the patent would be open to attack as not the invention of the patentee. Certain lines in the design, the shape of the scroll ends, and general contour of detail are testified to by some

of the witnesses to show the handiwork of Saunders, but, inasmuch as the working out of the design and the actual modeling was done by him, his handiwork ought to appear therein. He undoubtedly submitted on request a number of sketches to Graff, and they talked over what the design should be, but a reading of the testimony of both Graff and Saunders, and also of the other witnesses, leads the court to conclude that the idea for the French border was formulated in the mind of Graff, and that his sketches or suggestions embodied the valuable points of this idea to such an extent that, while Saunders may have deserved credit, he was not deprived of the right to patent the design as his design, and that he is only entitled to be given the credit which is due in the way of reputation for working out such a successful commercial article, and for grasping the desired idea, with the elements of the design as sketched by Graff.

A further defense is presented by the use of a design on silverware furnished to Black, Starr & Frost, a large jewelry house in Manhattan. This design is known as "Line 59," and is manufactured by Graff, Washbourne & Dunn solely for Black, Starr & Frost. The evidence shows that, as between the complainant and Black, Starr & Frost, the right to use this design, even for the purpose of furnishing an exhibit in this case, was completely controlled by Black, Starr & Frost under their contract. The design known as Line 59, which is illustrated by the following border section:



—was prepared after the patenting of the French border so as to give Black, Starr & Frost an exclusive pattern of a similar nature to the French border, and yet one which would suit the particular customers of Black, Starr & Frost, who might feel that they were willing to pay for the knowledge that no other firm sold silverware like the pattern in question.

It is contended by the complainant that this pattern, Line 59, does not resemble the French border. But it must be held that if the defendants' design, made up of component parts which the defendants had a right to use, infringes the patents of the complainant, then Line 59 resembles the patented design enough to limit the patent to a much more narrow scope, and, in effect, confines it to the essential details, rather than to any design approximately similar in appearance. Its general conformation and appearance indicate immediately its source,

and it is hard to see how purchasers could avoid having some difficulty in distinguishing the complainant's French border from Black, Starr & Frost's Line 59, unless they were endeavoring to find some way of deciding which was sold by Black, Starr & Frost, and which was not. In other words, the Line 59 design is easily identified, if identification is desired, but in general appearance and in the likelihood that one would be taken for the other when made of solid silver the complainant's patent is certainly affected by the general similarity. The defendants claim the use of Line 59 as an unpatented design is an abandonment of the patent, except as limited to an exact reproduction in all details. The Line 59 design appears not to have been used until after the defendants had placed their product upon the market and after the patent had been issued. The complainant has marked all of its own goods with the number of the design patent. It has not intentionally or knowingly given the right to the public or to any individual to use this design, as limited by the use of Line 59, without protecting that use by the presence of the notice required by statute. It disputes the claim of the defendants that Line 59 makes use of the same design, but also contends that the defendants cannot urge the free use of Line 59 as a defense herein, even if the patent be limited thereby.

Whether Black, Starr & Frost, or some one acting for them, might insist on the right to use the pattern known as Line 59 without hindrance on the part of the complainant, is not a defense unless the complainant has, by giving this right, allowed the use of the design contained in the patent so as to indicate an abandonment of the patent, whether that action was conscious or unconscious on the complainant's part. The general resemblance between the complainant's silverware (either in the form of dishes or of a plate like the Design Patent No. 39,992), the defendants' silverware, and the silverware of the design known as Line 59, at first impression appears to be great. If the defendants' border had been made up to imitate Line 59 rather than the patented border, the resemblance would seem to be sufficient to relieve the defendants from the intent, at least, to make use of the patented border; but the testimony shows that such was not the case. The defendants' border was planned to fill the wants of customers who would be attracted by the beauty of silverware like the patented design. The perforation or piercing as used both by complainant and by the defendants (and as justified by the patent) with an inner and outer scroll border, and even more when united with chasing upon the surface of the plate, causes a resemblance so great that the difference in detail would escape the eye of the casual observer. The piercing in Line 59, however, is differently arranged, and of itself constitutes a greater departure from the patent than is shown in the defendants' border. The flat features of the design and the use of the scroll are substantially the greatest points of resemblance between the complainant's border and Line 59, and to that extent the complainant seems to have abandoned its patent or limited its scope. But to hold that the complainant is not entitled to an injunction against the defendants, who use a design that imitates in so many features the complainant's pat-

ent, because Line 59 (subsequent to the creation of the imitation but prior to the termination of the suit) limited the complainant to one style of the design, would not be justifiable in a strict consideration of the parties' rights in view of the three designs. The defendants' design, so far as it infringes, has enough separate elements of injury to the complainant's rights and of differentiation from the relinquishment of those rights shown by the design Line 59 to entitle the complainant to a decree, even though the defendants' border has been partially freed from the charge of infringement by the complainant's own act in making the Line 59 design.

The use of piercing, as has been said, is justifiable as a part of the patented design, and is not such an undisclosed dominant feature as was made the basis of the decision in *Ashley v. Samuel C. Tatum Co.* (C. C. A.) 186 Fed. 339. The ornamentation produced by piercing is shown both in the drawings of the patent and in practice in all three designs, and it cannot be said that the resemblance in the defendants' border is created by something not specifically claimed in the drawings of the patent, solely because, as has also been pointed out, the complainant did not limit its drawing to the use of piercing, to the exclusion of an alternative solid surface.

On the whole case, therefore, it must be held that, while the complainant's rights have been materially narrowed by its own act in the production of the Line 59 design, yet sufficient infringement has been shown and sufficient of the patent still retains validity to hold that the defendants should be enjoined from producing the particular border section with reference to which this action has been brought.

The complainant may have a decree.

THOMPSON & NORRIS CO. v. MOXIE NERVE FOOD CO.

(Circuit Court, D. Massachusetts. August 8, 1911.)

No. 632.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—KNOCKDOWN PAPER BOX.

The Lewis patent, No. 674,009, for a knockdown paper box, was not anticipated as to claims 1 and 3, which specify "stiff, cellular paper fabric" as the material, nor as to claims 2 and 4, which specify only "stiff paper," and discloses patentable invention; the box shown being superior to any in the prior art. Also *held* infringing.

In Equity. Suit by the Thompson & Norris Company against the Moxie Nerve Food Company. On final hearing. Decree for complainant.

Louis W. Southgate, for complainant.

Mitchell, Chadwick & Kent, for defendant.

BROWN, District Judge. The bill charges infringement of letters patent No. 674,009, May 14, 1901, to C. W. Lewis, for a knockdown paper box. The claims are as follows:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"1. A knockdown box made from stiff, cellular paper fabric, in three separable or distinct parts folded and telescoped together, each of the six sides of said box consisting of two nonadherent plies or thicknesses of said cellular fabric, and said plies having their corrugations crossing at right angles.

"2. A box made from stiff paper in three separable, distinct parts, the outer part being in the form of a rectangular, open-ended tube, the intermediate part composed of sides or sections hinged together, the ends of said part being free or disconnected, and the inner part, telescoped within and crossing the intermediate part, said inner part being composed of sides or sections hinged together and having its ends free or disconnected, said intermediate and inner parts having cover and tucking flaps.

"3. A square, knockdown box made from stiff, cellular paper fabric in three separable parts or pieces, namely, the tubular outer casing *A*, the folded intermediate part *B*, having a tuck or tucking-flap at one end, and the folded inner part *C*, telescoped within and crossing the part *B*, said part *C* having two inner cover-flaps *c*¹, substantially as set forth.

"4. A knockdown box made from stiff paper in three separable or distinct parts, the outer part being in the form of a rectangular tube, hinged at its corners so that it may be flattened for packing, the intermediate part, composed of sides or sections hinged together so that the part may be flattened for packing, and the inner part, telescoped within and crossing the intermediate part, said inner part being composed of sides or sections hinged together so that the part may be flattened for packing, said intermediate and inner part having a cover and tucking flaps, substantially as set forth."

Infringement is not disputed, and the only question is as to the validity of the patent.

In claims 1 and 3 "stiff cellular paper fabric" is specified as the material. In claims 2 and 4 "stiff paper."

Though the prior art is represented by many patents on knockdown boxes, it is conceded that no one of these patents shows the identical box of the patent in suit. The Lewis box, whether made of stiff paper or of "stiff cellular paper fabric," is of novel construction. This box is made in three sections, and of three strips of material. The ends of one strip are connected by a pasted hinging-strip, forming a rectangular tube which can be flattened for shipping. This outer section *A* forms four sides of the box. Into this is telescoped an intermediate section *B*. The third strip forms an inner section *C*, and is telescoped inside of *A* and *B* at right angles to *B*. The result is a box each side of which is formed of two nonadherent plies of material. It is easily assembled without the use of fastening means, and is simple, strong, and durable, and economical in its use of material.

This new form of box, however, is specially valuable when the parts are composed of "stiff cellular paper fabric." When each section is made of cellular paper with its corrugations running lengthwise, the assemblage of the three sections results in the disposition of the corrugations at right angles. There is thus formed a box with two plies of material on each of the six sides, the corrugations being crossed on each side. The corrugations being crossed the box has the strength which results not alone from the use of two plies of material, or from the use of cellular paper, but from the particular disposition of the corrugations in relation to each other and their co-operation in resisting strain from blows upon any part of the box.

While corrugated paper is old, and its use is shown with its corrugations crossed, and while former patents point out that strength re-

sults from such construction, (see patents to Thompson, 479,999; to Chapin, 484,627; to Warner, 659,943), the application to use shown in the box of the patent in suit is manifestly superior to that shown in any of the structures of the prior art.

The testimony of the patentee as to his experiments supports the argument for invention. The various patents cited as illustrating the prior art—Friend, 305,067; Bowman, 448,813; Beer, 114,752; Bauer, 392,421; Howett, 453,169; Craw, 371,925; Hayes, 2,894; Colby & Ward, 106,663; Andrews, 137,752; Pike, 414,077; Swan & Finch, 142,299—relate to the prior art of knockdown boxes or like structures made of material other than corrugated board.

The foregoing eleven patents are said to represent the prior art so far as it relates to the general form of the parts and to matters other than the use of the particular material.

I am of the opinion that none of these anticipates the structure claimed in claims 2 and 4 of the patent in suit, which are not limited to the use of corrugated paper, and which do not contain the feature of gaining strength through crossing of the corrugations at right angles.

The following patents are cited to show the use of cellular board: British patent to Lake, 1,037; Cole, 355,140; Thompson, 479,999; Chapin, 484,627; Higham, 641,207; Warner, 659,943; Ruehs, 536,761. The patent to Chapin, 671,012, is later than the patent in suit.

Defendant's expert admitted that he did not find in the prior art the structure of claims 2 and 4 in any single prior patent, and also admitted that he did not find in any single prior patent a knockdown box in which each of the six sides consists of two nonadherent plies having corrugations crossed at right angles.

The complainant argues that the various examples of prior constructions show that after many years of effort nothing had been evolved approaching the Lewis box in strength, simplicity and economy. The following decisions concerning paper box patents are cited by complainant: *National Folding Box & Paper Co. v. Elsas*, 86 Fed. 917, 30 C. C. A. 487; *Whitney v. Gair* (C. C.) 91 Fed. 905; *National Folding Box & Paper Co. v. Robertson* (C. C.) 112 Fed. 1013.

While the prior art is very full of approximating devices, at the oral hearing, with the exhibits and drawings before me and explained by counsel on both sides, I was impressed with the superiority of the Lewis box over any of the structures of the prior art. The large number of examples of approximating devices illustrating the attempts of various inventors to produce a practical article, instead of showing anticipation, strongly tends to show that the patentee's structure resulted from invention as distinguished from mere mechanical skill. When the parts of the box are made of cellular corrugated fabric, the mode of their assemblage with their corrugations crossing at all points on all six sides of the box, presents what may be termed an example of sound engineering skill in construction. While the idea of cross-corrugations is old, it is not applied in any of the structures of the prior art throughout all parts of the structure, and so as to give the box not only the strength which results from a double thickness of

material on each of the six sides but the strength which results from the co-operation of the corrugations of one thickness with the corrugations of the other thickness on each side, whereby the box as a whole resists strains from a blow on any part thereof. When the material is ordinary stiff paper without corrugations this special feature disappears; but nevertheless the box then exhibits a structure, not anticipated by any of the patents of the prior art, wherein strength is given by the reinforcement of each of the six sides with economy of material.

Emphasis has been laid upon the proceedings in the Patent Office, but I find no concession made by the patentee which in my opinion invalidates the claims.

The defendant further relies upon the exhibits—X, an illustrated catalogue issued by the Hinde & Dauch Paper Company, January, 1902; Y, a second catalogue in 1903; and Z, a three-piece paper box—in connection with the testimony of J. L. Skelley to the effect that he went to work for Hinde & Dauch Co. in March, 1900, and that the telescopic or sliding box illustrated on page 11 of catalogue X of January, 1902, was an illustration of the form of box manufactured by Hinde & Dauch in 1900. I am of the opinion, however, that this testimony is insufficient to establish priority, in view of the testimony of Mr. Lewis, with its corroboration by the records of the complainant, showing that the invention was made as early as December 27, 1899.

The defendant has further shown that many of the boxes sold by the complainant were not marked as required by the statute, and that there is no allegation or evidence of any actual notice to the defendant. This defense goes only to the question of damages, and does not affect the right of the complainant to a decree enjoining infringement.

Under *Dunlap v. Schofield*, 152 U. S. 244, 14 Sup. Ct. 576, 38 L. Ed. 426, it would seem that there is force in the defendant's objection that this is not a bill for damages. The complainant contends that upon the testimony it appears that the defendant continued infringement after the filing of the bill, which in itself was notice. The question whether this would justify a decree for an accounting for the period subsequent to the filing of the bill, when no such issue has been raised by bill and answer, may be reserved for consideration on the presentation of a draft decree.

I am of the opinion that the patent is valid and infringed as to each of its claims in suit.

The complainant may have a decree for an injunction against infringement. The question of his right to a decree for damages for infringement subsequent to the filing of the bill is reserved.

UNITED STATES ex rel. KLEIN et ux. v. WILLIAMS. Immigration Com'r.

(Circuit Court, S. D. New York. August 10, 1911.)

ALIENS (§ 32*)—EXCLUSION—POWERS OF IMMIGRATION OFFICERS—REVIEW BY COURTS.

If there is no evidence that an alien immigrant is within one of the excluded classes, the immigration authorities have no power to exclude him, an order for his deportation is a nullity, and he is entitled to discharge from detention thereunder on a writ of habeas corpus.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 32.*]

Petition by Isidor Klein and Karola Klein against William Williams, Commissioner of Immigration at the port of New York, for a writ of habeas corpus. Writ granted.

Benjamin Levison, for relators.

Henry A. Wise, U. S. Atty., and Robert Stephenson, Asst. U. S. Atty., for Com'r of Immigration.

HOLT, District Judge. This is a writ of habeas corpus to test the legality of the detention of Mr. and Mrs. Isidor Klein, who are held at Ellis Island under an order for their deportation. Mr. Klein is an engineer by profession, 36 years of age. His wife is an actress well known in Hungary. Both are educated persons of good address. Before coming to this country they lived at Budapest, Hungary, and became indebted to creditors in an amount of about \$800 or \$1,000, caused by an unsuccessful theatrical venture. When they concluded to come to this country, friends advised them that if they came openly and under their own names their creditors might arrest them, or interfere in some way with their coming, and that they had better come under an assumed name. Mrs. Klein's sister, Bertha Toth, gave her a passport which had been taken out in the sister's name. Mr. Klein had a friend, Daniel Rozsa, who also had a passport, which he gave to Mr. Klein. Mr. and Mrs. Klein thereupon came to this country under the respective names stated in the passports, and, when examined on landing, asserted at first that they were not married, and that the name of each was that stated in his or her passport. Circumstances indicated that they were living together, and, as they denied being married, the immigration authorities ordered that they be deported; Mr. Klein for bringing an alien woman into this country for an immoral purpose, and Mrs. Klein as coming here for such a purpose. Thereafter Mr. and Mrs. Klein admitted that they were not the persons mentioned in the passports, and that the names under which they had come were assumed, and furnished clear proof, by the production of their marriage certificate and by other evidence, that they were legally married. Thereupon a further hearing was had, and during the course of that hearing the commissioner of immigration received a letter from the consul general of Austria, inclosing the following cablegram, which had been received by the consul general:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"Austro-Hungarian Consulate-General:

"Neither in Budapest nor in Zitah is there any information reported against Isidor Klein and wife, who resided at No. 32 Eotvos Str. (Budapest). Isidor Klein was arrested by this police department for fraud and forgery on March 12, 1911. Police Department."

The evidence on that hearing showed that Mr. Klein had about \$60 and his wife about \$70 when they arrived in this country, and that all but about \$39 of it had been spent in procuring counsel to defend themselves on the hearing and for other purposes. The board of inquiry recommended their deportation, on the ground that the money in their possession was insufficient to meet their requirements until such time as they might become self-supporting, and because, in view of the communication from the Austrian consul, the board was satisfied that the hurried departure of Mr. and Mrs. Klein from Budapest was due to some crime or misdemeanor involving moral turpitude. They were excluded, however, as persons liable to become a public charge.

Thereafter a further hearing was ordered, and upon such hearing it appeared that Mr. and Mrs. Klein had in their possession valuable jewelry and theatrical costumes and dresses, which they valued at several thousand dollars. An expert diamond dealer, David Zaiden, who had been for many years in business in New York, examined the diamonds and jewelry before the board and testified that it was worth \$640, and there is nothing in the case tending to cast doubt upon his evidence. William Knoerr, who described himself as a contractor for the Hollis Press, at 312 East Twenty-Third street, tendered a written offer to employ Mr. Klein for a period of three months at \$12 a week. Armin H. Heltai, who described himself as manager of the Hungarian Theatrical Company, also submitted a written agreement to employ Mrs. Klein as an actress in his theater and pay her \$60 a month for a period of six months. There is nothing to impeach the character of the men making these offers, or the genuineness of the offers. The board thereupon again recommended the exclusion of the aliens in the following language:

"These aliens left Hungary in a surreptitious manner, under assumed names, carrying passports to which they were not entitled. The stories and explanation of same carry with them an inference and presumption that one or both had committed an act or acts which brought them into conflict with either the civil or criminal authorities of Hungary. Additional color is lent to this by reason of the cablegram, which is already of record, stating that one Isidor Klein, whom we believe is the alien before the board, was arrested and charged with forgery. The statement of this Klein is that he left Hungary solely to avoid creditors. It seems to us unusual that a man with available assets amounting in all, as he testifies, to the sum of \$3,000, should leave Hungary in the manner stated to avoid the payment of debts, aggregating according to his own testimony but \$800. If permitted to land, we believe there is a likelihood of them becoming involved in proceedings, either civil or criminal, that would consume all the assets they have at present in their possession. We do not take seriously the offers of employment made in behalf of these aliens, the board being of the belief that they are made solely for the purpose of effecting their landing. The aliens have impressed us with their undesirability, and, considering all the circumstances, we are unanimous in the opinion that their deportation should take place."

The first ground upon which they were ordered deported, that they were coming here under immoral relations, has been admittedly abandoned by the immigration authorities. They state that they are convinced that they are man and wife. The ground subsequently taken was simply that they were liable to become a public charge, because they had but a small amount of cash left. It appears, however, by uncontradicted evidence, that they have property in their possession worth more than \$600; that they are people in the prime of life, with professions in which they can earn money; and that both have offers of immediate employment from specific persons at remunerative rates. In view of these facts, the board, in its final report, states in substance that it suspected that Mr. Klein was guilty of some crime or fraud before leaving Hungary, and that, if they are admitted, whatever property they have will be consumed in defending in this country supposititious criminal or civil proceedings based on the imaginary offense which they committed in Hungary. There is no evidence that they ever committed any crime or fraud before leaving Hungary. The suspicion that they did so is based on the cablegram received by the Austrian consul. In the first sentence of that cablegram the police department states that:

"Neither in Budapest nor in Zilah is there any information reported against Isidor Klein and wife, who resided at No. 32 Eotvos Str., Budapest."

It then adds:

"Isidor Klein was arrested by this police department for fraud and forgery on March 12, 1911."

The petitioners deny that Mr. Klein was ever arrested by the police department for fraud and forgery, and assert that the Isidor Klein mentioned in the second sentence is another person. Undoubtedly these aliens are the persons who resided at 32 Eotvos Str., and if the Isidor Klein who was arrested is the same person as this Isidor Klein, it seems incredible that the police department should have reported that there is not any information reported against him. Moreover, if the Isidor Klein who was arrested on March 12th was this alien, how does it happen that he embarked for this country in June, unless he was discharged or acquitted upon some proceeding? No proceedings have been instituted by the Austrian consul against him since the receipt of that cablegram, and, in my opinion, there is no evidence in this case that he ever did commit any crime or fraud in Hungary.

Nor is there any evidence that he and his wife are likely to become public charges. The evidence that they own property of sufficient value to prevent the probability of their becoming a public charge is clear, and the theory finally assumed, that their property is likely to be used up in defending future criminal or civil suits brought in this country by reason of their supposed offense in Hungary, seems to me strained, far-fetched, and almost fantastical. Undoubtedly, under the authorities, if there is any evidence in a case proving or tending to prove that an alien is within one of the excluded classes, the decision of the immigration authorities is conclusive, even if there is very weighty evidence to the contrary, and the courts have no jurisdiction

to interfere. But if there is no evidence that an alien is within any of the excluded classes the immigration authorities have no power to exclude him, and the order excluding him is a nullity.

In my opinion, there is no evidence in this case that either of these aliens is within any of the excluded classes, and I direct that an order be entered releasing them from detention.

ROBINSON v. FURBER et al.

Ex parte FURBER.

(Circuit Court, S. D. Texas. August 8, 1911.)

No. 218.

APPEAL AND ERROR (§ 459*)—SUPERSEDEAS—SERVICE OF WRIT OF ERROR AS CONDITION.

Rev. St. § 1007 (U. S. Comp. St. 1901, p. 714), provides that, "in any case where a writ of error may be a supersedeas, the defendant may obtain such supersedeas by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. But if he desires to stay process on the judgment he may, having served his writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judgment, or afterward with the permission of a justice or judge of the appellate court." *Held* that, in an action at law, in which the judgment is reviewable only by writ of error, unless such writ is issued and served within 60 days, a judge of an appellate court has no power to grant a supersedeas, and that the allowance of an appeal by the trial court will not warrant a grant of supersedeas more than 60 days after judgment.

[*Id.* Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2218-2221; Dec. Dig. § 459.*]

At Law. Action by C. W. Robinson against W. A. Furber and others. On petition by defendant Furber, for writ of supersedeas. Denied.

Ring & Monteith, for plaintiff.

Gaines & Corbett, for defendant.

SHELBY, Circuit Judge. This is a petition for a writ of supersedeas. The petitioner, W. A. Furber, seeks to supersede a judgment rendered against him by the Circuit Court of the United States for the Southern District of Texas. The petition shows that the judgment was rendered in an action at law for damages for a breach of contract. This fact appears in the recitals of the judgment, which is made an exhibit to the petition. The judgment was rendered March 30, 1911. The petition for supersedeas was sworn to by the petitioner on July 27, 1911, and was presented to a judge of the Circuit Court on July 28, 1911—that is, more than 60 days after the date of the judgment. It appears from the petition that no writ of error was applied for, issued, served or lodged "in the clerk's office where the record remains" within 60 days after the rendition of the judgment. The

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

case is governed by section 1007 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 714), which is as follows:

"Sec. 1007. In any case where a writ of error may be a supersedeas, the defendant may obtain such supersedeas by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days. Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. But if he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judgment, or afterward with the permission of a justice or judge of the appellate court. And in such cases where a writ of error may be a supersedeas, executions shall not issue until the expiration of ten days."

A writ of error does not operate as a supersedeas unless it is filed in the clerk's office within the time fixed by the statute. The time is computed from the date of the judgment. The 60 days have expired, no writ of error being issued within the time. It is well settled that, in such case, after the expiration of the 60 days, neither a justice of the Supreme Court, the Circuit Court, nor a judge thereof, nor a judge of the Circuit Court of Appeals has the power to allow a supersedeas. 4 Fed. Stat. Ann. 618 (U. S. Comp. St. 1901, p. 714), and cases there cited.

The petitioner calls attention to the fact that when the judgment was entered against him he gave notice of an appeal. The following recital appears in the judgment:

"To which judgment of the court, the defendant, W. A. Furber, then and there in open court excepted and gave notice of appeal to the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana, which notice was allowed by the court, and upon application of the defendant, W. A. Furber, 120 days from the date of this judgment is allowed in which to file bills of exceptions and to otherwise prepare said cause for appeal."

The remedy of the defendant—petitioner here—to review the judgment was not by appeal but by writ of error. If he had perfected and taken an appeal it would have conferred no jurisdiction on the appellate court to review the judgment. *De Lemos v. United States*, 107 Fed. 121, 46 C. C. A. 196, and cases there cited. The statute applies the 60 days' limit to both appeals and writs of error, but the writ must be used or the appeal be taken as required by federal appellate procedure.

Peugh v. Davis, 110 U. S. 227, 4 Sup. Ct. 17, 28 L. Ed. 127, relied on by petitioner, was a case in equity, and it was held that if a court in session allows an appeal which is entered of record without taking bond within 60 days, a justice or judge of the appellate court may, in his discretion, grant a supersedeas after the expiration of the 60 days. There the appeal was the proper remedy and was taken within the 60 days, notice being given by its being taken in open court. In that case, the court, referring to earlier cases, said (110 U. S. 228, 4 Sup. Ct. 18 [28 L. Ed. 127]):

"The rule established by these cases, when accurately stated, is therefore no more than that to give a justice or judge of the appellate court authority to grant a supersedeas after the expiration of the 60 days, a writ of error must have been issued and served, or an appeal allowed within that time."

That is, a writ of error must have been issued and served in cases where a writ of error is applicable, or an appeal taken in cases where appeal is the remedy; and in either case, the limit is 60 days to secure supersedeas. In *Peugh v. Davis*, the appeal was taken in time—in 60 days—and the justice subsequently allowed bond to be given and granted the supersedeas. In the instant case, a writ of error is the appropriate remedy to review the judgment, and 60 days have elapsed without its issuance and service. Under the circumstances, a judge of an appellate court has no power to grant a supersedeas. The issuance and service of the writ is clearly required by the words of the statute. R. S. U. S. § 1007. Note the words which precede the paragraph:

"Or afterward with the permission of a justice or judge of the appellate court."

The permission to give the security required by law can be granted to him only who, "having served his writ of error as aforesaid"—that is, within the 60 days. It seems to me that I could not grant the supersedeas without coming in conflict with the words of the statute, and with its construction in *Kitchen v. Randolph*, 93 U. S. 86, 23 L. Ed. 810.

The petition for a supersedeas is denied.

WITTEKOPPE v. NEW YORK & P. S. S. CO.

(District Court, S. D. New York. May 18, 1911.)

1. SEAMEN (§ 11*)—INJURY IN SERVICE—MEDICAL TREATMENT.

When a steamship was on a voyage from St. Lucia to Bahía Blanca, South America, libellant, a seaman, fell from a ladder and broke his wrist. There was no surgeon on board, and the master, who knew the wrist was broken, attempted to set the bones, but did so imperfectly, and serious injury to libellant's arm and hand resulted. The vessel passed near Para and Pernambuco, in both of which places there were adequate hospital accommodations, but the master did not stop, the vessel being 13 days in completing the voyage. *Held*, that it was the duty of the master to put libellant ashore and send him to a hospital at Para or Pernambuco, and that his failure to do so rendered the owners liable for the resulting injury.

[Ed. Note.—For other cases, see *Seamen*, Cent. Dig. §§ 39-44, 187; Dec. Dig. § 11.*]

2. SEAMEN (§ 11*)—INJURY IN SERVICE—MEDICAL TREATMENT.

Where a seaman is seriously injured on a voyage, the master is not justified in failing to furnish him such proper surgical or medical treatment as the injury requires, even though the seaman does not request it, or acquiesces in the treatment given him.

[Ed. Note.—For other cases, see *Seamen*, Cent. Dig. §§ 39-44, 187; Dec. Dig. § 11.*]

Rights and liabilities of seamen as to medical treatment, see note to *The Cuzco*, 83 C. C. A. 186.]

In Admiralty. Suit by William Wittekoppe against the New York & Pacific Steamship Company. Decree for libellant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Hunt, Hill & Betts (George Whitefield Betts and Robert McLeod Jackson, of counsel), for libelant.

Convers & Kirlin (John M. Woolsey and George A. Washington, of counsel), for respondent.

HOLT, District Judge. This is an action in personam against the owner of the steamship *Charcas*, brought by a seaman. The libelant claims to recover damages for an assault, a balance due for wages, and damages for the neglect of the officers of the steamship to afford him proper medical attention for injuries suffered on the voyage. In my opinion, the evidence shows that no assault was committed, and therefore there can be no recovery on that ground. I think that the libelant is entitled to recover for whatever amount of wages is due him. I do not think the defense is established that he was guilty of desertion. The circumstances of his injury were such that, in my opinion, he was justified in staying in Baltimore for medical attention at the time when the ship sailed from there. The respondent claims that only four shillings and eight pence is due him on account of wages. I think he is entitled to that amount, and that, if he claims that more is due him, he is entitled to a reference to ascertain the amount actually due for wages.

[1] The principal question in the case is whether the owner of the steamship is liable for neglecting to afford him proper medical and surgical attention. The libelant, while going up a ladder from the hold, fell from the ladder to the bottom of the hold. As a result of the fall, his wrist was broken, and he was badly bruised. The ship, at the time this accident occurred, was on a voyage from St. Lucia to Bahia Blanca, South America. She had been about three days out from St. Lucia. It was evident that the bones of the wrist were broken. The captain did up the arm in splints, gave him a separate room, and afforded such medical attention as was within his knowledge and power. The ship was 13 days in reaching Bahia Blanca. The bones of the wrist did not properly unite, but formed what is called a callous union, the result of which has been that the libelant's hand and arm became atrophied, and his hand for a long time afterwards lost its grasping power, and is still deficient in that respect. The steamer on the voyage to Bahia Blanca passed near Para and within sight of Pernambuco, in both of which places there are adequate hospital accommodations. The steamer also met on the voyage 12 to 15 other large vessels, most of which probably had a competent surgeon on board, who would presumably, if requested, have gone to the *Charcas* and properly set the broken bone. The question in this case is whether the master of the *Charcas* owed a duty to the libelant, under the circumstances, to land him at Pernambuco or Para, or to endeavor to obtain proper surgical assistance from a passing ship.

[2] The general principle is well settled that an injured seaman is entitled to receive at the expense of the vessel proper medical or surgical attention if ill or injured while in the service of the ship. The vessel is not bound to deviate from her voyage for slight injuries, and each case must be determined by its own circumstances;

but, in my opinion, in this case it was the duty of the master to have put the libelant ashore at Para or Pernambuco, and to have had him sent to a hospital there. The bones of his wrist were broken. That is a serious injury; if the bones are not properly set, a permanent disability and a restricted circulation are apt to result, as has occurred in this case. The proper setting of such a fracture requires a larger degree of surgical skill than an ordinary shipmaster possesses. The master knew that the bones were broken, and, instead of putting the libelant ashore at either Para or Pernambuco, or endeavoring to obtain the aid of a surgeon from a passing vessel, proceeded on the voyage to his destination, occupying 13 days. The respondent claims that the libelant assented to this course. The libelant is a German, who speaks English very imperfectly; some witnesses say not at all. He claims that he asked, and expected, to be put ashore at Pernambuco. The officers deny this, and it may be that he said nothing, or that the officers did not understand him. But I do not think that in such a case the shipowner is exonerated even if the seaman acquiesced in not obtaining proper surgical treatment. It is the duty of the master in such a case to use his own judgment and to do what is necessary under the circumstances, and I think in this case the master was bound to know that he, with the best intentions, was not competent to so treat the broken wrist as to prevent the result which occurred. Dr. Cooper testifies that the libelant's hand is much better than it was when he first saw it, and that he thinks the libelant will gradually largely recover the use of it. I think that the libelant is entitled to recover for that portion of the pain and suffering which he has endured which resulted from the unskilful and insufficient treatment which he received, and for the loss which he has suffered from the inability to earn his usual wages which has resulted from such inadequate medical treatment, and I fix the amount of such damages at \$1,200. As already stated, the libelant is also entitled to recover what is justly due him for wages. If the parties cannot agree upon that amount, a reference will be ordered.

BACKUS et al. v. BROOKS et al.

(Circuit Court, D. Connecticut. July 28, 1911.)

No. 1,345.

EQUITY (§ 149*)—BILL—MULTIFARIOUSNESS.

A bill setting up a cause of action by a corporation complainant against a corporation defendant for breach of a contract, and an entirely separate and distinct claim by individual complainants against defendant corporation and other defendants for the delivery of stock in defendant corporation, *held* demurrable for multifariousness.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 368-370; Dec. Dig. § 149.*]

In Equity. Suit by Newton D. Backus, Henry N. Backus, and A. Backus, Jr., & Sons, a corporation, against George L. Brooks, Lewis

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

C. Brooks, and the Sealshipt Oyster System. On demurrers to bill. Demurrers sustained, and bill dismissed.

Albert McClatchey, for complainants.

Wing & Russell, for defendants.

PLATT, District Judge. It would be a tremendous task to bunch in this memorandum the facts which seem to be well pleaded in the bill, and therefore admitted by the demurrer. It is an unusually verbose and complicated presentation of facts, and will speak for itself. No abstract which satisfies my mind would help the higher powers, and therefore I refrain from the attempt. At the time the bill was filed an *ex parte* request was made for a preliminary injunction to prevent the alienation of stock in the Sealshipt Oyster System by either Brooks or the System until final hearing. When the affidavits were read, I was instantly satisfied that such an order was not warranted by the facts presented, which were substantially those found in the bill.

There were two sets of plaintiffs and two sets of defendants. One of the plaintiffs presented a state of facts which seemed to set forth a wrong which ought to be dealt with in a court of law. The other plaintiffs presented a state of facts which many years before might have appealed to the conscience of a court of equity, if the proper parties had come before it; but it struck me that they came too late, and in an improper manner, and with no very definite idea of what their wrongs were and what party they expected the court to enforce a remedy upon. The preliminary injunction was therefore refused, and later came the demurrers, amplyfying and defining with accuracy the vague notions which came over me at the beginning.

I do not know of any equity rule, written or unwritten, which prohibits the defendants from filing such demurrers as those here presented without first answering the allegations of fraud. Certainly no rule, with even a strained construction put upon it, could affect the rights of the Sealshipt Oyster System. Taking the broadest view possible of the facts and equity rule 32, I cannot accept the dicta found in *Johnston v. Mercantile Co.* (D. C.) 127 Fed. 845, and *Jahn v. Lumber Co.* (C. C.) 147 Fed. 631. Those cases were both properly decided on the facts, and the reference to an uncited equity rule was unnecessary. It is probable that in neither case was the matter taken up, except in the most incidental way. Equity rule 32 was not even mentioned.

There are two main lines of attack in this bill. One by A. Backus, Jr., & Sons Corporation against the Sealshipt Oyster System, counting on a breach of contract between the plaintiffs and defendant's predecessor, the American Company. The other is by Newton D. and Henry N. Backus, asserting their rights to have certain stock of the System turned over to them in place of stock which they ought to have had in the System's predecessor, the National Company, which followed the American Company. These rights are based entirely upon their ownership of stock in the American Company, and are

independent and wholly apart from the contract rights which the Backus Corporation asserts. The parties are different and demand different rights. N. D. and H. N. Backus had no interest primarily in the contract, and the Backus Company long ago parted with all right and title to the stock. They not only demand different rights, but one demands a right for which it should go into a law court to seek redress, and the other demands an equitable right about which the facts must have been known to them years ago, and which, if demanded promptly and sustained by proof, would have been long since settled. To do anything about it now would work harm to numberless innocent parties who have become stockholders of the Seal-shipt System in entire ignorance of any such story as the one here portrayed. In all this matter the obligations upon the defendant's part arose at different times. The evidence required to establish the separate claims is different, and the kinds of relief demanded differ.

When the charge of multifariousness comes up against a bill, I am aware that a court of equity will exercise a large discretion and retain the bill, if possible; but in such a case as the one before us the quagmire is so treacherous and the enveloping forest so dense that I am unable to see any way out of it, if I shall once begin to travel through it.

For the reasons faintly outlined, and for many untouched, the demurrers must be sustained and the bill dismissed, with costs.

O'ROURKE DRY DOCK CO. v. NEVILLE.

(District Court, D. New Jersey. August 3, 1911.)

SHIPPING (§ 76*)—SUIT FOR REPAIRS—EVIDENCE CONSIDERED.

A dry dock company allowed only a part of its claim for repairs made to respondent's vessel, it appearing from the evidence that the dock collapsed and caused injury to the vessel while she was being repaired, and it not being shown by libellant how much of the claim was for repairs made necessary by such injury, nor by respondent how much damage he sustained thereby.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 323-325; Dec. Dig. § 76.*]

In Admiralty. Suit by the O'Rourke Dry Dock Company against Michael K. Neville. Decree for libellant for part of claim.

Martin A. Ryan, for libellant.

James J. Macklin, for respondent.

RELLSTAB, District Judge. The libel is in personam, and alleges two causes of action. Both are for repairs, the first to the boat "Dr. B. R. Holcomb," and the other to the boat, "George F. Lang." The amounts claimed are \$115.23 and \$56.12, respectively.

The defenses are: As to the Holcomb, that she was seriously injured while in the custody of libellant, through its carelessness, and that the loss of time in the use of the boat while such injuries were be-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ing repaired exceeds in value the bill of repairs rendered. As to the Lang, that she was not owned by the respondent at the time such repairs were made, and that he did not order the same to be made. The testimony is very conflicting, and in many respects irreconcilable. Some of the witnesses contradict themselves in important particulars, and the record is not wanting in suggestion that some of the testimony has been influenced by a bias seriously affecting credibility. The duty of balancing conflicting testimony, never easy, is made particularly difficult in this case because of such suggestion, the elicitation of many answers by grossly leading questions, the introduction of incompetent testimony, and the irreconcilable character of much of the evidence. There is no question but that libellant made repairs to both boats, but in respect to the Holcomb much of the time spent and the labor and materials furnished were rendered necessary by the collapse of the dry dock after such boat was placed thereon. The real cause of such collapse is in dispute; but, whatever the cause, the dock careened, producing a twist in the boat, causing her to spring new and greater leaks. The filling of the boat as she sank with the dock to such an extent as to necessitate the removal of the captain and his family therefrom is not disputed; and the fact that the captain had theretofore been on the boat for the several days occupied in tugging it to libellant's wharf, and awaiting her being put on the dry dock, and the occupation of the cabin by him and members of his family while the boat was in the water outside of the dry dock awaiting to be placed thereon, proves that the prompt filling of the boat with water after the collapse of the dock was not due solely to defects in the boat before she was docked, but in large part to the twist received as the dock careened with the boat fastened thereto.

How much of the repairs charged would have been necessary had no collapse of the dock occurred is not clear. The libellant was in the best position to establish this, and, in view of my finding that injuries were sustained by the boat by such collapse, was required to assume such burden. But he offered no evidence on this point, taking the attitude that no injury was sustained by such boat as a result of such collapse. The respondent testified that \$20 would pay for all the repairs that this boat needed. Self-interest, perhaps, has unduly minimized the cost of the needed repairs, as stated by him, and exaggerated the damage sustained by the flooding of the cabin, and from the forced nonuse of the boat pending the restoration of the dock to proper working condition, and while the boat was undergoing the extra repairs necessitated by reason of such twist. It is evident that some damage resulted to respondent in consequence of such flooding and extra nonuse of his boat. How much is uncertain; the respondent's proof in that behalf not being convincing.

Both parties having failed to meet the burden cast upon them, as aforesaid, the court finds itself more perplexed than helped by the record placed before it. It has reached the conclusion, however, after balancing the equities as best it can, that \$40 be allowed the libellant for repairs to the Holcomb.

As to the Lang, the libellant has not established the ownership of

this boat in the respondent. The latter denied any ownership or interest therein, and that he ordered any repairs to be made thereto. Other witnesses called by him assert ownership in another, one of which claims such ownership and admits that he ordered such boat to be taken to the libelant's dock for repairs. As against this is the evidence of libelant alone, and this, so far as respondent's ownership or responsibility is concerned, is not of such a persuasive character as to justify a repudiation of the referred-to testimony introduced on behalf of the respondent, though some of it excites suspicion and distrust. No evidence was offered to show that respondent operated the Lang, or that he exercised any dominion over her, or shared in her earnings. If such ownership or interest existed, it was capable of proof, but none was offered.

As to the repairs to the Lang, no recovery can be had against respondent. A decree may be entered in favor of libelant for \$40 and costs for repairs to the Holcomb.

In re HIRTH.

(District Court, D. Minnesota, Third Division. September 8, 1911.)

1. PARTNERSHIP (§ 17*)—CREATION OF RELATION—INTENTION.

Whether a partnership existed as between the parties themselves depends on their intention, and that intention must be ascertained from the whole evidence and the circumstances in the case.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 3; Dec. Dig. § 17.*]

2. BANKRUPTCY (§ 309*)—LIQUIDATION OF CLAIMS—SETTLEMENT OF PARTNERSHIP.

Where a partnership existed between a bankrupt and another, which was terminated prior to the bankruptcy, the former partner cannot prove a claim against the estate, based on the debts of the partnership paid by him, without an accounting and settlement of the partnership affairs; but such accounting and settlement may be had in the bankruptcy court before a referee.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 309.*]

In the matter of Henry B. Hirth, bankrupt. On review of order of referee disallowing claim of Christian Grimsrud. Modified.

Boyesen & Flor, for trustee.

Orr, Stark & Collett, for bankrupt.

WILLARD, District Judge. [1] The question in the case is, not whether the parties were partners as to third persons, but whether they were such as between themselves. This depends upon the intention of the parties, and that intention must be ascertained from the whole evidence, and from the circumstances in the case. McDonald v. Campbell, 96 Minn. 87, 104 N. W. 760; McAlpine v. Millen, 104 Minn. 289, 116 N. W. 583. From the contract of November 3, 1906, and the other evidence in the case, it sufficiently appears that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Grimsrud and Hirth did intend to form a partnership. It may be said that Grimsrud never intended to give Hirth authority to incur debts that would bind him (Grimsrud). On the other hand, it may be said that Grimsrud never intended to borrow from Hirth the \$250 paid by Hirth at the time that the contract of November 3, 1906, was made, or the subsequent sums paid by Hirth, amounting to \$700, or the undivided half of the profits which were to be paid to Grimsrud until all of Hirth's payments amounted to \$5,000. Yet, if the contract was not one of partnership, it would be difficult to escape the conclusion that this money so paid by Hirth to Grimsrud, and the profits, if any, received by Grimsrud on Hirth's account, constituted a debt against Grimsrud in favor of Hirth.

The theory that Grimsrud intended to form a partnership is very much strengthened by the letter and accompanying document which Grimsrud sent to Hirth on September 26, 1907. The document, apparently prepared under the direction of Grimsrud, speaks of this business as a copartnership between the two, under the name of the Hirth Shoe Company. The facts in the case of *Drennen v. London Assurance Co.*, 113 U. S. 51, 5 Sup. Ct. 341, 28 L. Ed. 919, and 116 U. S. 461, 6 Sup. Ct. 442, 29 L. Ed. 688, were materially different from the facts in this case. See *Paul v. Cullum*, 132 U. S. 539, 10 Sup. Ct. 151, 33 L. Ed. 430. The relation between these parties having been one of partnership, the question is: What are now Grimsrud's rights?

It is to be noticed, in the first place, that the only person who has gone into bankruptcy is Hirth. His bankruptcy did not put into bankruptcy Grimsrud as an individual, nor did it put into bankruptcy the partnership between Grimsrud and Hirth. It does not appear that there are now any creditors of the Hirth Shoe Company. It was stated in the argument that Grimsrud had paid them all.

[2] That the partnership was dissolved at or about the time of the bankruptcy of Hirth is not disputed. If Grimsrud has paid the debts of the partnership, and if on an accounting between him and Hirth the latter would owe him, such a claim is a debt which will be discharged by the bankruptcy, and Grimsrud has therefore a right to prove it. To make such proof there must, of course, be an accounting between the partners and a settlement of their partnership affairs. The proper place for this accounting and settlement is in the bankruptcy court before the referee. If this is such a claim as is referred to in section 63b of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]), the power of the court to order it liquidated before the referee is ample.

The claim already filed by Grimsrud before the referee is not sufficient to allow proof of the balance due him on the final settlement; but there is no reason why a new claim cannot be presented by Grimsrud, which would permit of such proof.

The order of the referee was that the claim presented be disallowed, without prejudice, however, to the right of said claimant to hereafter make a claim against Hirth as an individual, in a proper case. That order is modified, so as to disallow the claim without prejudice to

the right of the claimant to present another claim to the referee for the balance due him upon an accounting of their partnership affairs between himself and the bankrupt Hirth, and, except as so modified, the order of the referee is affirmed.

STRATTON v. NATURAL CARBONIC GAS CO.

TRUST CO. OF AMERICA v. NATURAL CARBONIC GAS CO. et al.

(Circuit Court, S. D. New York. July 18, 1911.)

CORPORATIONS (§ 478*)—MORTGAGES—AFTER-ACQUIRED PERSONALTY.

Under the rule of the federal courts, a mortgage given by a corporation covering real and personal property owned and to be acquired extends to personal property subsequently acquired and necessary to the mortgagor's business, as against general creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1871; Dec. Dig. § 478; * Mortgages, Cent. Dig. §§ 208-289.]

In Equity. Suits by Charles G. Stratton against the Natural Carbonic Gas Company and by the Trust Company of America against the Natural Carbonic Gas Company, Charles G. Stratton, and Edward G. Benedict, receiver. On exceptions to report of special master. Overruled, and report confirmed.

Thomas & Oppenheimer, for complainant.

Morris & Plante, for defendant.

John Guyton Boston, for intervenor Trust Co. of America.

WARD, Circuit Judge. These are exceptions to the report of the special master holding that the lien of the defendant company's mortgage covering real and personal property acquired and to be acquired extended, as against general creditors, to certain gas tubes acquired after the mortgage was executed and delivered. These tubes were necessary to the mortgagor's business.

Sections 230 and 235 of the lien law of New York (Consol. Laws 1909, c. 33) make chattel mortgages void as against creditors unless they are filed and every year refiled. Section 231, however, relieves corporations from the duty of filing and refiled mortgages on their real and personal property as chattel mortgages. But the section does not profess to define, much less to expand, the lien of the mortgages. Therefore the question in this case is: Did the lien of the mortgage cover the tubes, as they were subsequently acquired, as against creditors?

The Court of Appeals of New York in *New York Security & Trust Co. v. Saratoga Gas & Electric Co.*, 159 N. Y. 137, 53 N. E. 758, 45 L. R. A. 132, and in *Zartman v. First National Bank*, 189 N. Y. 267, 82 N. E. 127, 12 L. R. A. (N. S.) 1083, held that such mortgages did not cover subsequently acquired current funds or product of which the mortgagor had the absolute use and disposition. The reason is that such ownership is entirely inconsistent with the intention to give

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a lien. However, in the general discussion of the subject in the Zartman Case, it seems to have been the view of the court that no after-acquired chattels are covered as against creditors, unless they are appropriated to the mortgagee, either by some act of the mortgagor or by the mortgagee's taking possession of them. See, also, MacDonnell v. Buffalo Co., 193 N. Y. 92, 104, 85 N. E. 801. Of course, between the parties the covenant conveys a good lien in equity. In the later case of People's Trust Co. v. Schenck, 195 N. Y. 398, 88 N. E. 647, 133 Am. St. Rep. 807, the lien of the mortgage was held to extend to after-acquired realty necessary to the company's business as against the lien of a judgment.

The federal courts have taken this broader view in Pennock v. Coe, 23 How. 117, 16 L. Ed. 436, followed in many subsequent cases as to both real and personal property. In it the lien of a mortgage was held to be superior to the execution of judgment creditors against rolling stock of a railroad company acquired after the mortgage was executed.

The exceptions are dismissed, and the report confirmed.

HOLLENBACK v. HAND et al.

(Circuit Court, N. D. New York. October 11, 1911.)

1. NEGLIGENCE (§ 136*)—STRENGTH OF MATERIALS—QUESTION FOR JURY.

Where a servant was killed by the collapse of a concrete pier, and plaintiff claimed that the pier fell because the materials of which it was made were improper, and that the concrete was not properly mixed, evidence *held* to require submission to the jury of the strength of the materials and whether defendant company knew or should have known it would make weak concrete.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 136.*]

2. NEGLIGENCE (§ 44*)—DEFECTIVE PIER.

Where decedent, a servant of a steel company, was killed by the collapse of a concrete pier, provided for the construction of a bridge, owing either to the neglectful use of improper materials or the improper mixing of materials, or to the premature use of the pier before it had time to set, there being no allegation or evidence that defendant was negligent in allowing the steel company to go on the work before it had time to set, defendant was only liable in case it was established that the pier was constructed of improper materials or that proper materials were not properly mixed.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 44.*]

3. NEGLIGENCE (§ 124*)—EVIDENCE—STATEMENT OF SUPERINTENDENT.

Where the servant of a steel company was killed by the collapse of a concrete bridge pier constructed by defendant company, due either to the fact that the pier was constructed of improper materials or negligently constructed of proper materials, or used by the steel company before it had time to set, the opinion of the superintendent of the entire work employed by the owner and known to both defendant and the steel company, that the pier would be all right to go on at the end of seven days after completion, and that such statement was relied on by the steel company and its employes, was inadmissible.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 124.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. NEGLIGENCE (§ 131*)—DEATH OF SERVANT—REPAIR OF DEFECTIVE CONSTRUCTION—EVIDENCE.

Where decedent was killed by the collapse of a concrete pier, and it was material to determine whether the catastrophe was due to the improper construction of the pier, in which event only would defendant be liable, or to the premature use of the pier by decedent's employer, evidence that six or seven months following the pier was repaired with concrete made of the same material allowed to stand three to six weeks before placing the superstructure thereon, and that it then bore the load, which evidence was not limited to show that certain of the materials properly combined and used had proved strong and efficient for the purpose intended, was improper.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 131.*]

5. TRIAL (§ 207*)—EVIDENCE—PURPOSE—LIMITATION.

Evidence competent for one purpose but incompetent for another may be admitted to answer the purpose for which it is competent; but its admission and use should be limited to that purpose, and the jury should be instructed that they are not at liberty to consider it for any other.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 498, 499, 501; Dec. Dig. § 207.*]

6. TRIAL (§ 79*)—RECEPTION OF EVIDENCE—OBJECTIONS—NECESSITY.

Where, during the examination of a witness, the court, by making a statement as to what it understood the defendant was seeking to prove and the purpose of it, stated it thought the evidence competent, and therefore overruled the objection, plaintiff's counsel was thereby given to understand that it was not necessary to object further, and, the ruling being erroneous, the objection should be considered sufficient.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 192; Dec. Dig. § 79.*]

At Law. Action by Harry S. Hollenback, as administrator, etc., of Jeremiah Hollenback, deceased, against Augustus N. Hand and another, as receivers of the Elmore & Hamilton Contracting Company. On plaintiff's motion to set aside a verdict for defendants, and for a new trial on the ground that the verdict is clearly against the weight of the evidence and not supported thereby, and for prejudicial errors in the admission and rejection of evidence. Granted.

Frost, Daring & Warner, for plaintiff.

H. V. Borst, for defendants.

RAY, District Judge. The Washington & Berkeley Bridge Company, a West Virginia corporation, as owner, undertook the construction of a bridge across the Potomac river near Williamsport, Md. The piers were to be of concrete from 20 to 40 or more feet in height and were designed to carry a steel superstructure of great weight and during construction heavy machinery for placing it and cars after construction. It was, of course, necessary that these piers should be strong and well constructed of suitable material well and thoroughly mixed and placed properly and left to harden or set at least a suitable time before placing a load thereon. The defendant company owed a duty to all who should go upon the piers while placing the superstructure to do its work properly and efficiently in all respects, and, if it knew the materials furnished for the construction of such piers were unsuitable and made a weak and dangerous struc-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ture, to notify the Pennsylvania Steel Company and its employés of the defects and danger. To this end, so far as construction was concerned, there were plans and specifications; but no time was fixed within which a load should not be placed thereon after completion, and nothing was said in the specifications as to the time the forms should be left on the various sections of a pier as the work of construction progressed. As matter of fact, after some of the piers were completed, the work of placing the steel superstructure was commenced and carried forward, so that it was placed or being placed on pier No. 10, counting from the Maryland side of the river, some seven days after this pier was completed. The weather at this time, December 16, 1908, was quite cold and damp, and there was evidence that such weather as this would delay the setting and hardening of the concrete material. The owner, Washington & Berkeley Bridge Company, let the contract for erecting the piers to the defendant company, the Elmore & Hamilton Contracting Company, and let the contract for erecting the steel superstructure thereon to the Pennsylvania Steel Company. As, after a little time, both companies were working on this bridge at the same time, each could see what the other was doing and how the work was being done and the materials used. There was an engineer in charge of the entire work for the owner, and each contracting company had a foreman or superintendent. Jeremiah Hollenback was in the employ of the Pennsylvania Steel Company and engaged with others in placing the superstructure. There was no contractual relation between the defendant company and the steel company, nor was there any such relation between the deceased and the defendant company. However, the defendant company owed the duty before mentioned to Hollenback.

On the morning of December 16, 1908, while Hollenback, with other employés of the Pennsylvania Steel Company, was engaged in placing the iron beams extending from pier 9 to pier 10, on pier 10, and after same had been partially placed, the top portion of pier 10 gave way, that is, the girder or beam placed thereon on the upstream side cut or sheared right down through the upper part of the concrete pier and the girder, crane, traveler, and other ironwork with the men thereon, including Hollenback, the deceased, were precipitated to the bed of the stream some 40 feet below, and Hollenback received injuries from which he died.

The contention of the plaintiff was and is that the concrete was of improper material, improperly mixed, and weak and rotten owing to the negligence of the defendant company in using same and in constructing such pier, and that its negligence was such as to charge it with notice of such weakness, and that it turned this pier over or allowed same to pass to the hands of the Pennsylvania Steel Company for the uses and purposes intended knowing of such weakness, improper construction, etc., or legally charged with notice thereof, without notice to that company, and hence was and is responsible for the consequences that followed. The contention of the defendant was and is that the concrete was all right, composed of suitable material, properly mixed and placed, but that the weather conditions were

such that the Pennsylvania Steel Company went upon such pier and placed the load thereon before the concrete had had time suitably to set and harden, and that the pier gave way because of this premature use; the defendant company being free from all fault and negligence on its part. There was evidence of some haste in the completion of this pier No. 10, and that the concrete for the part that gave way was mixed by hand instead of with machinery or a mixer, as the material used up to that time for the construction of the piers had been. Evidence was allowed under objection and exception that, after pier 10 gave way, the pier was in May, June, or July following, as to this top portion, reconstructed by the owner, Berkeley Company, of the same kind of sand, or sand from the same bank in the river, same crushed stone, that is, crushed stone of the same character from the same quarry and crushed in the same way, same kind of cement, all mixed into concrete in substantially the same way and allowed to stand some three to five weeks before use, and that the load, steel superstructure, etc., was then placed thereon, and that the pier carried the load without giving way. The steel superstructure was being placed by the Pennsylvania Steel Company when the accident happened, and that company placed it after the pier had been reconstructed in the early summer following. This evidence was offered and allowed for the purpose of showing that the sand, stone, and cement used were proper, suitable, and sufficient as to quality for the purpose, and that there was no negligence in using it, but it was not specifically limited to that purpose. There was evidence that the sand used was not such as the contract called for—that is, “clean, sharp, coarse sand”—as it was taken from the banks of the Potomac river at low water and was sand that had been washed down and left by the flow of the river at high water, and that it contained some leaves, sticks, etc. There was evidence that this tended to weaken the concrete. There was evidence also to the contrary. There was also evidence that the mixing of concrete by hand sometimes results in less uniformity and may produce a weaker concrete, a crumbling material, depending of course on the uniformity and thoroughness of the hand mixing. There was evidence pro and con as to the weakness of concrete made of sand containing a small percentage of loam. There was also evidence tending to show that on the 16th, the day the pier gave way, the top portion was green, looked wet, and was not suitably set or hardened, and that this could be seen from the ground.

It is undoubtedly true that this concrete was not first class, or such as would have been produced by using sand such as was called for by the strict terms of the contract; but there was evidence that it was tested, accepted, and used, all the contracting parties concurring in its use. Whether or not the concrete used in completing pier 10 before the accident was properly and sufficiently mixed was a disputed question. The evidence was not clear that the concrete used to repair and restore the top of pier 10 after the accident was mixed in the same manner as was that used in its completion prior to the accident. However, the fact that this stone, sand, gravel, and cement

actually used both prior to and after the accident made good and sufficient concrete when allowed to stand three or more weeks before used to carry a load was some evidence that it was not negligence to use it with the approval and knowledge of the contracting parties; that is, the owner, the Pennsylvania Steel Company, and the Elmore & Hamilton Company, and the engineer and superintendent in charge. The plaintiff gave evidence by actual test that the concrete made of these materials when properly mixed was not weak and insufficient for the load it was actually supporting at the time of the accident. If the Elmore & Hamilton Company was free from negligence in using it, and it was properly mixed, and there was no negligence in this respect, and it was properly placed, and the Pennsylvania Steel Company negligently, or through error of judgment, or ignorantly, went upon pier 10 with a load before it should have done—that is, before the pier had time to set and harden under the prevailing weather conditions—it is difficult to see how the Elmore & Hamilton Company can be charged with willful negligence or any wrong. All this was left to the jury. It would seem that proof that concrete made of this material in the proportions called for by the contract and properly mixed and left from three to five weeks before being subjected to a load did carry this load was competent evidence as to the sufficiency of the materials and on the question of negligence in using them. Would it not have been competent for the plaintiff to show that when it was used thereafter it gave way under the same load, assuming such to have been the fact? Would not this have been competent evidence on the question of the adequacy of the material as matter of fact?

[1] The plaintiff was allowed to show the pressure some of these same materials would stand and did stand mixed by experts subsequent to the accident. It was for the jury to say what the strength of these materials made into concrete was, and whether defendant company knew or should have known it would make weak concrete.

Pier 10 was completed December 9th and gave way December 16th, or seven days later, while the load was being placed. The pressure of the load carried was about 78 pounds per square inch. The temperature during this time ranged from 24 to 57 degrees above zero. Subsequent to the injury a test of concrete made of these same materials, under less favorable atmospheric conditions, showed a compression strength at the end of seven days of 758 pounds per square inch. This concrete was subjected to a pressure of 5,000 pounds, and while under pressure was struck a blow with a sledge hammer and again tested, when it showed a compression strength of only 609 pounds per square inch, which indicated that the blow weakened the concrete. Undoubtedly it would not have withstood this pressure if improperly mixed. The plaintiff contends that this evidence shows conclusively that the concrete which gave way was improperly and negligently mixed, and that this negligence was the cause of the giving way of the pier; that it gave way under a pressure of 78 pounds per square inch, when if properly mixed it would have sustained a pressure of at least 600 pounds per square inch, leaving out all questions of the improper character or quality of the materials. But we have

the evidence that after standing three to five weeks these concrete piers made of these materials sustained the full load they were designed to carry. Hence there was a conflict as to the load these piers, made of these materials properly mixed, would carry if given sufficient time in which to harden. That pier 10 gave way at the end of seven days under a pressure of 78 pounds per square inch indicated under all the evidence one of two things (assuming the material was suitable): That the mixing was negligently and improperly done; or that the concrete pier was prematurely—that is, while soft and green—subjected to the load or pressure of 78 pounds per square inch. If this material actually used, suitably and properly mixed and placed, would have carried considerably more pressure than it did at the end of seven days under prevailing weather conditions, and there had been no dispute on this point, it would follow that the material was improperly mixed and placed. But there was evidence tending to show that perfect material, perfectly and suitably mixed, under the prevailing conditions, would be delayed in setting and hardening so as to bear any considerable load, such as a pressure of 78 pounds to the square inch.

[2] Hence it came around always to the question: Was the giving way of pier 10 due to the negligent use of improper material or to the improper mixing of material good or bad, on the one hand, or to the premature use of the pier before it had had time to set and harden, on the other? If due to the first-mentioned cause or causes, or both, then defendant was liable; but, if due to the last-mentioned cause, the defendant was not liable, as there was no allegation or evidence the defendant company was negligent in allowing or permitting the Pennsylvania Steel Company or its men to go on the pier with their work before it had had time to set and harden. So far as appeared in the case, the Pennsylvania Steel Company was as well informed as the defendant company on this subject. If the defendant company by the use of improper or defective material, or by the improper mixing of such improper material, or the improper mixing of proper and suitable material, for that matter, put up a concrete pier which required a considerably larger time in which to set and harden under prevailing weather conditions than concrete properly mixed, so as to carry a load, and gave no warning, then defendant company was liable if the Pennsylvania Steel Company waited the usual time for the concrete to harden, and on inspection and examination it appeared to be in suitable condition to go upon, and that company was ignorant of the dangerous condition. In such case it would be the negligence of the defendant company in failing to properly mix the concrete, or in mixing improper material, which caused the injury. I think that under all the evidence it was a fair question for the jury whether the concrete of pier 10 was properly mixed. So if, without the knowledge and consent of the others interested, the defendant company substituted material which required a considerably longer time to set and harden than the material specified and which the Pennsylvania Company supposed and had the right to suppose was used, and the pier gave way because not sufficiently hardened, then the giv-

ing way was due to the defendant's wrong, and it was liable. All this was explained to the jury and submitted for its determination.

[3] The plaintiff sought and offered to show that, before going on pier 10, the superintendent of the work being done by the Pennsylvania Steel Company and hence, as it claimed, its employes, was told by the superintendent of the entire work, employed by the owner and known to both the other companies, that this pier was all right to go upon, or would be at the end of seven days from completion, and that this was relied upon by the Pennsylvania Company and its employes. The superintendent was not called as a witness. This, if true, would not tend to establish negligence or the absence of negligence on the part of the defendant company. But would it not establish or tend to establish the absence of contributory negligence on the part of the Pennsylvania Company or of Hollenback, one of its employes, in going thereon when they did? If the steel company or its foreman was assured by the superintendent of the entire work employed by the owner that at the end of seven days—that is, the day it did go on pier 10 and on which that pier gave way—it was or would be safe to go thereon, could it or its employes be charged with contributory negligence in going thereon at the expiration of such time assuming the dangerous condition was not obvious? The evidence offered was rejected and an exception taken. To admit this statement of the superintendent was to admit his opinion or statement as to the length of time necessary for this concrete pier made of these materials and properly mixed to harden. At this time he was superintending the work and was presumed to know all the essential facts. Did this statement, if made and credited by the jury, tend to establish that it was safe to go thereon? Clearly not. Was it information on which the steel company or Hollenback had a right to rely and act to some extent? It seemed to the court on the trial and seems now that this mere expression or statement of opinion by the superintendent was not legitimate evidence of any fact which would justify the Pennsylvania Steel Company or its employes in going on the pier before it had had time to suitably set and harden. The material was then in the presence of all parties, and the mixing and placing was going on in the presence of all who would observe. There was no evidence that the superintendent employed by the owner, and who made the statement sought to be proved, had any control over the Pennsylvania Steel Company or its men in directing when they should or should not go on these piers. Neither the steel company nor its men were under or subject to his orders in this regard. It follows, it seems to me, that his statement as to when it would be safe and proper to go on these piers was no more competent than would have been proof of the expression of an opinion on the subject to the foreman of the Pennsylvania Company by any other person.

[4] It is contended that it was error to allow proof that in May, June, or July, following the accident, this pier was repaired with concrete made of the same material, allowed to stand three to six weeks before placing the superstructure thereon, and that it then bore the load. This did tend to show: (1) That in December the

concrete had not been allowed to harden sufficiently when subjected to the load; and (2) that the material was sufficient for strong concrete if when properly mixed it was allowed to stand long enough. The plaintiff cites many cases holding that when a person or corporation is sued for damages for negligence in erecting or maintaining for use a certain structure, etc., whereby one sustains injury, the plaintiff cannot be permitted to show repairs or improvements or changes made by the defendant after the happening of the accident for the purpose of establishing negligence in the original construction. This is the law unquestionably. Such evidence was formerly admitted quite generally; but modern decisions are almost universally against its admission. It is offered, or may be used, as an admission by defendant that the original construction was defective or improper or that the condition had become defective. The reason for its rejection is tersely stated by Mr. Justice Gray in *Columbia R. R. v. Hawthorne*, 144 U. S. 202, 207, 12 Sup. Ct. 591, 593 (36 L. Ed. 405), adapting the language of the court in *Morse v. M. & St. Louis R. R.*, 30 Minn. 465, 16 N. W. 358, and *Hart v. L. & Y. R.*, 21 Law Times (N. S.) 261, 263, viz.:

"The true rule and the reasons for it were well expressed in *Morse v. Minneapolis & St. Louis Railway*, above cited, in which Mr. Justice Mitchell, delivering the unanimous opinion of the Supreme Court of Minnesota, after referring to earlier opinions of the same court the other way, said: 'But on mature reflection we have concluded that evidence of this kind ought not to be admitted under any circumstances, and that the rule heretofore adopted by this court is on principle wrong; not for the reason given by some courts, that the acts of the employes in making such repairs are not admissible against their principals, but upon the broader ground that such acts afford no legitimate basis for construing such an act as an admission of previous neglect of duty. A person may have exercised all the care which the law required, and yet, in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards. The more careful a person is, the more regard he has for the lives of others, the more likely he would be to do so, and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence. We think such a rule puts an unfair interpretation upon human conduct, and, virtually holds out an inducement for continued negligence.' 30 Minn. 465, 468 [16 N. W. 358, 359].

"The same rule appears to be well settled in England. In a case in which it was affirmed by the Court of Exchequer, Baron Bramwell said: 'People do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident. I think that a proposition to the contrary would be barbarous. It would be, as I have often had occasion to tell juries, to hold that, because the world gets wiser as it gets older, therefore it was foolish before.' *Hart v. Lancashire & Yorkshire Railway*, 21 Law Times (N. S.) 261, 263."

See, also, *Corcoran v. Village of Peekskill*, 108 N. Y. 151, 154, 155, 15 N. E. 309.

But here the defendant offered evidence of the subsequent repairs and their character and of the material used, not to prove negligence in the original construction, but to show that the owner used the same material in the same way for the same purpose, and that it made good and sufficient concrete when allowed to stand a sufficient length of time before being subjected to a load. The evidence did tend to show that the plaintiff's intestate may have been negligent in going

on the pier too soon, or that, if not negligent, the giving way of the pier was due to the premature use thereof by the plaintiff's intestate working for the Pennsylvania Company, and not to the use of improper materials or to any improper mixing of the materials used. I think it was competent to prove that certain of these materials properly combined were used after the accident and proved strong and efficient for the purpose intended as their efficiency for such purpose was in question and challenged. The length of time the material stood before being subjected to a load was also material, and the moment that fact appeared there came into the case the fact that the Pennsylvania Steel Company finally placed the superstructure after the lapse of four to six weeks from the restoration of the pier. Proof of this last fact was not specifically objected to by the plaintiff when proved by one witness; but I think the plaintiff's counsel understood it had been objected to and ruled on by the court, and at a prior time it was specifically objected to and admitted, as we shall see.

Could not a defendant, sued for negligence in making and selling weak and insufficient wagon wheels whereby the purchaser and user was injured, the insufficiency and weakness of the timber used being charged, show in defense that he had used the same timber for years in making such wheels both before and after the accident, and that they had been actually used and had proved strong and sufficient? And could not the plaintiff show in proving his case that other wheels of the same size made of the same timber by the defendant had broken, gone to pieces, and been shown by actual use both before and after the accident in question to be dangerous because of the weakness of the timber? Or would mere opinions be substituted for these actual facts?

Going on pier 10 prematurely was not necessarily contributory negligence; but it may have been the sole cause of the giving way of the pier. Here, until we come to the fact that the Pennsylvania Company placed the superstructure after the accident, the reason of the rule above referred to is absent. The defendant gave the evidence as to the reconstruction of this pier and the materials used and the length of time the concrete was allowed to stand before being subjected to a load for the purpose of showing the good character and sufficiency of the material. The reconstruction of the pier alone was done, not by the defendant company, but by the owner, the Berkeley Company, and could not operate as an admission of the defendant company that it was negligent in the original construction, or as an admission by the Pennsylvania Steel Company, or its employé, that it was negligent in going on the pier at the end of seven days after its completion. Mere reconstruction was not a fact tending to show that this material was proper and sufficient when properly mixed, but proof that if it was allowed to stand three to six weeks, and that it was then hard and solid, tended to show that it required more than seven days in which to harden or set sufficiently to carry a load. Proof of this fact of waiting three to six weeks after the accident also tended to show that the Pennsylvania Steel Company with its men commenced operations on pier 10 too soon prior to the accident, and, as the proof also

showed that the Pennsylvania Company waited three to six weeks after the reconstruction of the pier was complete before placing the superstructure, the jury might have said this was an admission on its part that it went on that pier in the first instance too soon and was negligent in so doing.

If A. is sued by B. to recover damages for negligence in supplying improper and defective sand and cement or lime for the mortar used in laying a high wall in which B. was at work placing timbers, whereby the wall was made weak, and hence crumbled and fell, causing the injury, could not A. show that the sand and cement were strong and suitable for the purpose, and that the wall fell because of plaintiff's negligence in going thereon with timbers too soon and while it was green, by proving that after the accident the same materials were used by defendant to reconstruct the wall, and that after standing a suitable time the wall was strong and bore the load without showing weakness? But would it be competent for the defendant to show that the plaintiff himself waited a longer time than at first before going on the reconstructed wall?

In the case at bar there was no change in material or mode of construction of the pier by any one when the pier was reconstructed. The only change in operations was that, after the pier was reconstructed by the owner with the same material in the same way as before, it was by the Pennsylvania Steel Company allowed to stand some four to six weeks before being subjected to a load. Assume that the Pennsylvania Steel Company is shown by this evidence to have waited from four to six weeks before going on the reconstructed pier, and that thereby the jury may have been led to conclude it admitted that it went on the pier too soon in the first instance, was the evidence any the less admissible? It may be argued the Pennsylvania Company was not negligent in the first instance; but, in view of what happened on the 16th of December, it had the right to use the precaution of waiting from four to six weeks, instead of seven days, before placing the load on the reconstructed pier, and that admitting the evidence in question was allowing a subsequent act of precaution taken by the Pennsylvania Steel Company in the light of experience and added knowledge to be used against the employe as an admission by said company that it went on pier 10 too soon or negligently in the first instance. The admissions of the Pennsylvania Steel Company made after the accident and injury, either by words or by acts, were not admissible against the administrator of Hollenback. If this may have been the effect of the admission of this evidence that the Pennsylvania Company waited three to six weeks as stated, and its use was not properly limited by the court, and its reception was objected to properly, then the ruling admitting the evidence was prejudicial error, and the plaintiff is entitled to a new trial. The question of the negligence of the Pennsylvania Steel Company was in the case and was brought in by the defendant company, which contended that the Pennsylvania Steel Company was negligent in going upon the pier with this heavy load at the end of seven days, and that its negligence or the premature

use of the pier was the proximate and producing cause of the injury to its employé Hollenback. The court charged:

"The defendant has given evidence tending to show that the concrete was composed of proper and suitable materials, sand, cement, and broken stone, which were suitably, properly, and sufficiently mixed and properly placed in the forms, and that such forms were left in position the necessary length of time; but that, on account of weather conditions, cold or freezing weather conditions, the concrete had not sufficiently hardened or set when subjected to the weight and pressure placed thereon, and that the weight was placed thereon prematurely and negligently by the Pennsylvania Steel Company, and that, for this reason, it was not safe to put the weight and pressure, to which it was subjected, upon it: and that, because of this premature subjecting of pier 10 to this great weight and pressure, the negligence of the steel company, it gave way and caused the accident and injury to the plaintiff's intestate and his consequent death.

"If, gentlemen, you find this to be the truth of the case, then the plaintiff cannot recover in this action, for, in such case, the injury to the plaintiff's intestate, and his consequent death, would not be the result of the negligence of the defendant company, but the result of negligence or want of care or of poor judgment on the part of the Pennsylvania Steel Company."

When the offer of proof by the witness Angle came as to what was done after the accident by way of reconstructing pier 10, the materials used, etc., including the time that was allowed to pass before going on the reconstructed pier with the superstructure, strenuous objection was made and repeated. The court in ruling on the objections, after stating the facts the defendant sought or was seeking to prove, said:

"Now the defendants are seeking to show, as I understand, they took off the top, and they not only found it hard, but he (witness) says they had to chisel it, and when they did they couldn't break the stone up, they had to cut through the stone. Now they seek to show, as I understand, what they are at, they have got some evidence to that effect, that they took the same sand from the same place, the same quality and character, the same foreign substance in that there was in that first used, the same stones from same quarry, broken with the same crusher, and the same cement, same quality, mixed it in the same proportions, and in the same manner, and put it up there and let it stand longer than seven days, then I suppose they intend to show that it was firm, hard, and all that sort of thing; show that it is proper material, and that if it was put up there and let alone that it will harden and be of sufficient strength. They seek to show from that that this injury occurred because of the negligence of the Pennsylvania Steel Company in not properly inspecting that pier and in going on it prematurely when it was green and endangered the men in their hurry. Now that is about the sum and substance of what they are driving at, as I understand it."

The court then made other remarks on the subject and concluded:

"So in that view I overrule the objections and give them (plaintiff) an exception."

There was a plain statement by the court of the evidence offered or sought to be introduced and of its purposes, and one of such purposes was to show that the accident and injury were the result of the negligence of the Pennsylvania Steel Company, and one of the facts to be proved ruled upon was that the reconstructed pier was allowed to stand more than seven days before placing the superstructure thereon. The court evidently did not intend to rule, and there was no ruling, that such delay in placing the superstructure subsequent to the accident could be used or admitted as evidence of an admission

by the steel company or its employé Hollenback that the pier was used too soon in the first instance, but it was admitted generally and without limitation as to the purpose for which it could be considered, and the jury was not instructed it could not be used or considered by them as an admission. I cannot say that the admission of this evidence, without any limitation at the time as to the purpose for which it could be considered by the jury, and in the absence of such a limitation in the charge, was harmless or not prejudicial to the plaintiff. The question of the negligence of the Pennsylvania Steel Company in prematurely placing the superstructure prior to the accident was one of the vital ones in the case. The mere fact that that company did wait from three to six weeks before placing the superstructure subsequently to the accident may have determined the verdict. If the defendant had based its defense solely on the grounds that the materials used were proper and suitable, that the mixing and placing of the concrete was properly done, but that the weather conditions were such that they delayed the setting and hardening of the concrete, a fact known to all if known to any one, and had left out of the case any contention or claim that the Pennsylvania Steel Company, or Hollenback, was negligent in going on pier 10 with this load, in my opinion all the evidence given would have been competent. But with the contention in the case that the Pennsylvania Company and Hollenback were negligent, and that their negligence, especially that of the Pennsylvania Company, caused or contributed to the injury of Hollenback, admissions of the steel company made after the accident and injury, either by words or acts, were prejudicial and incompetent evidence. The fact that the Pennsylvania Steel Company placed the steel structure on the pier after the accident and reconstruction was immaterial, harmful probably, and could as well have been omitted from the case. For legitimate purposes it was all sufficient to show that the load was not placed, after the reconstruction of the pier, until the lapse of some weeks. In *Corcoran v. Village of Peekskill*, 108 N. Y. 151, 155, 15 N. E. 309, the action was against the village for negligence in allowing an area next the walk in front of a dwelling house to remain open and unfenced, whereby the plaintiff fell in and was injured. The main question was whether this area was sufficiently guarded to protect travelers on the street. Evidence was permitted that after the accident the owner of the premises built a fence around the area. This was held to be fatal error. See, also, cases cited in the opinion in that case.

[5] Evidence competent for one purpose but incompetent for another may be admitted to answer the purpose for which competent; but its admission and use should be limited to that purpose, and the jury should be told they are not at liberty to use or consider it for any other. In *Clapper v. Town of Waterford*, 131 N. Y. 382, 389, 30 N. E. 240, 242, the action was against the town for negligence of the commissioner in not keeping the highway in repair. One defense was want of funds to make repairs. The plaintiff offered to show and was permitted to prove, for the purpose of showing the commissioner's control over the highway and that he had funds for

repairs, that some days after the accident he was seen repairing it. The court said:

"Upon whatever pretense such evidence is put into the case, it is generally used to mislead the jury. It is sometimes accepted by them as an admission of negligence, and its natural tendency is undoubtedly to influence them in that direction."

It was held prejudicial error to admit the evidence, as it was not essential for one of the purposes for which admitted, to show control over the highway, and had no tendency to show the possession by the commissioner of funds at the time of or prior to the accident complained of.

I think the Circuit Court of Appeals, in view of its decision in *Barber Asphalt Paving Company v. Odasz*, 60 Fed. 71, 73, 8 C. C. A. 471, would grant a new trial in this case because of the reception of this evidence as to who replaced the superstructure under the general objection made, even though the question to the witness Angle, which brought out the fact that the Pennsylvania Steel Company placed the steel superstructure on pier 10 after the accident and reconstruction, was not specifically objected to. During the examination of the defendant's witness Cullen, the same question arose, and the following took place:

"Q. How long after the pier was reconstructed before the Pennsylvania Company—oh, you say the Berkeley Company suspended work in December?
A. Yes, sir.

"Q. After the completion of this pier? A. No, sir.

"Q. How long after the completion of this pier was it, if you can tell the jury, before the company went upon it? A. Four or five weeks.

"Q. Just a minute, let me finish my question, to work?

"Mr. Matterson: What pier have you reference to?

"Mr. Borst: Pier 10.

"The Court: After it was repaired?

"(Objected to as illegal, improper, not binding upon this plaintiff, anything done subsequent to the injury. Objection overruled. Exception.)

"The Court: He may show how long they waited before they went on.

"A. Four or five weeks."

I think this presented the question in such shape that the ruling was clear error. The court said:

"He (defendant's counsel) may show how long they (Pennsylvania Company) waited before they went on."

True this preceded the examination of Angle before referred to, but it was not necessary to repeat the objection which I think sufficiently raised the question presented here.

In the case last referred to the witnesses were asked whether they could tell a way by which the accident could have been prevented. One witness in answer said:

"There is a platform made there now, but it was not there then, to prevent the car from falling."

And another witness in answer said:

"The tramway is made different from its construction when *Odasz* was killed."

When questions were directly asked as to whether or not changes or improvements had been made after the accident, objection was made

and sustained and the evidence excluded. The Circuit Court of Appeals said:

"The judge excluded the questions when directly and formally asked for the purpose of showing negligence before the accident; but the quoted answers slipped in, ostensibly in reply to the question whether the track was capable of a construction which would prevent accidents. The testimony was wanted by the plaintiff's counsel for the purpose of proving negligence. The answers showed the jury that changes had been made after the accident for the purpose of preventing similar calamities in the future. A plausible but untrue inference from this class of testimony is apt to be that the subsequent act, for the purpose of securing perfect safety in the light of past experience, is an admission of a previous omission to take proper precautions, and has an effect to call the minds of the jury away from the real issue, which is that of reasonable, but not extraordinary, care at the time of the accident, in view, among other considerations, of previous and universal experience."

[6] Here, during the examination of Mr. Angle, the court, by making its statement as to what it understood the defendant was seeking to prove and the purpose of it, as above quoted, and then stating it thought the evidence competent and thereupon overruling the objection, in effect gave the plaintiff's counsel to understand it was not necessary to further object.

However, during the examination of the witness Cullen, as we have seen, the question was raised, and the court said in overruling the objection:

"He may show how long they (the Pennsylvania Steel Company) waited before they went on."

This referred to the going on the pier after its reconstruction with the superstructure. In view of all that took place, I am of the opinion the objections made were sufficient, not waived, and that prejudicial error was committed which demands a new trial. See, also, *Dale v. D. L. & W. R. Co.*, 73 N. Y. 468; *Dougan v. Champlain T. Co.*, 56 N. Y. 1. On a retrial every essential fact may be proved without showing that the Pennsylvania Steel Company had anything to do with placing the steel superstructure after the reconstruction of the pier which followed the accident.

It is true that the evidence was not offered to show negligence on the part of the Pennsylvania Steel Company, or of Hollenback, and there was no suggestion in the objection that it might be so used and was for that reason inadmissible; but the fact remains, as we have seen, that it was immaterial who or what company waited three to six weeks before going on the reconstructed pier after the accident, and it was dangerous to permit proof that the Pennsylvania Company, who went on the pier at the end of seven days before the accident, waited from three to six weeks after the accident before going thereon. The jury could have and may have used this fact as an admission of negligence made by that company after the accident and against the administrator of Hollenback. The jury was not told they must not so use or consider it.

The motion to set aside the verdict and for a new trial is granted, and the order will be entered as of the date of the close of the trial; the term having been held open for the purpose of the motion.

SAN FRANCISCO GAS & ELECTRIC CO. v. CITY AND COUNTY OF SAN FRANCISCO et al.

(Circuit Court, N. D. California. August 7, 1911.)

No. 14,742.

1. COURTS (§ 282*)—JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION.

A suit by a gas company to enjoin enforcement of a municipal ordinance fixing the price of gas, passed in the exercise of powers conferred by the state Constitution, as being confiscatory and depriving complainant of its property without due process of law, in violation of the fourteenth constitutional amendment, presents a federal question under such provision which gives a federal court jurisdiction, notwithstanding the fact that the state Constitution contains a like provision, and on the facts alleged in the bill the ordinance would be invalid thereunder.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 820-824; Dec. Dig. § 282.*]

Jurisdiction in cases involving federal question, see notes to *Bailey v. Mosler*, 11 C. C. A. 308; *Montana Ore-Purchasing Co. v. Boston & M. C. C. & S. Mining Co.*, 35 C. C. A. 7; *Earnhart v. Switzler*, 105 C. C. A. 262.]

2. CONSTITUTIONAL LAW (§ 251*)—PROHIBITION OF FEDERAL CONSTITUTION—LAWS OF STATE—"ACT OF THE STATE."

Where a state has conferred power on some one of its agencies to perform a certain function involving the exercise of discretion, the performance of such function within that grant, although in a manner to render it obnoxious to the laws of the state, is none the less the act of the state within the contemplation of the constitutional prohibition against deprivation of life, liberty, or property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 251.*]

In Equity. Suit by the San Francisco Gas & Electric Company against the City and County of San Francisco and others. On motion by defendants to dismiss for want of jurisdiction. Motion denied.

See, also, 164 Fed. 884.

Percy V. Long, City Atty., and Thomas E. Haven, Asst. City Atty., for the motion.

Garret W. McEnerney, opposed.

VAN FLEET, District Judge. A motion was heretofore made by the respondents to dismiss this case (with certain others of like character) for want of jurisdiction, in that the facts stated in the bill do not really and substantially involve a controversy properly cognizable in this court under the judiciary act. The motion was denied at the hearing, the court being of opinion that it was not well founded, for the reasons then briefly stated orally.

Since the ruling the attention of the court has been called to the fact that the question presented has excited more than local interest; and, the views of the court not being available as an authoritative reference, it is deemed proper to accede to the suggestion that the reasons actuating it be expressed in writing.

There is but one substantive question involved, and the basis upon which it rests may be briefly stated:

[1] The bill seeks to enjoin the enforcement of an ordinance of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the board of supervisors of the city and county of San Francisco fixing the annual gas and lighting rates in the municipality, upon the ground, first, that the rates provided by the ordinance are inadequate to afford a due return to complainant, a public service corporation furnishing light to the city, and will operate to deprive it of its property without due process of law, in violation of the fourteenth amendment to the Constitution of the United States; and, secondly, upon the further ground that the ordinance is in form in violation of the express provisions of the charter of the city under which it was adopted, in that it embraces more than one subject, and is for that reason void and of no effect. The fourteenth amendment to the Constitution of the United States provides that no state shall "deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws"; and the settled construction of this provision is that it contemplates action by the state, through some one of its departments, functionaries, or agencies, having the effect prohibited, and not the act of a private individual or other agency acting without state authority. The Constitution of the state, by section 19, art. 11, vests in municipalities the power to establish, maintain, and regulate gas and lighting rates therein under the conditions alleged in the bill, and it was by virtue of this provision that the ordinance involved was passed; and it is conceded that a municipality, exercising the authority granted by that provision, is acting as an agency of the state, and that a valid ordinance adopted under such grant would constitute state action within the contemplation of the fourteenth amendment to the Constitution of the United States. But the Constitution of the state, in section 13, art. 1, also provides in almost the precise terms of the fourteenth amendment that "no person shall be deprived of life, liberty or property without due process of law"; and this latter provision is the underlying foundation which gives rise to the proposition involved in the motion.

Not questioning the jurisdiction in this court of a case arising under the Constitution or laws of the United States, the contention is that the bill does not disclose such a case, for the reason that the facts do not show "state action." This is predicated upon the argument that, conceding that the state has vested in a tribunal or functionary full and plenary power, as here, to do a certain thing, an act done under such authority is not the act of the state in the sense here involved, unless it be so done as to be legally unassailable; that is, so done that, if passed in review by the highest judicial tribunal of the state, it would necessarily be held valid in form and substance; that anything less than this is not state action. In other words, to apply the principle to the concrete case presented by the bill, that the above provision of the Constitution of the state vesting in municipalities the power to fix gas rates must be read in conjunction with the provision of the same instrument that no person shall be deprived of his property without due process of law; and if an ordinance adopted under the supposed authority of the first is found to be obnoxious to the second by fixing rates so unreasonably low as to be confiscatory

of the property of those affected, or is invalid for any other reason under the Constitution or laws of the state, then the adoption of such ordinance cannot be said to have been had under the authority of the state in a sense to bring it within the prohibition of the fourteenth amendment; that as the present bill by its averments, when read in the light of these provisions, discloses upon its face that the ordinance in question would not stand this test, it pleads the complainant out of court by showing that the controversy is not one arising under the Constitution of the United States, but involves alone the Constitution and laws of the state, jurisdiction of which rests solely in the courts of the state.

This contention, while not new, is nevertheless somewhat startling in view of the history of this character of litigation in the federal courts, wherefrom it has been very generally assumed that the question had been definitely set at rest. It is based entirely upon the supposed authority of the recent decision of the Circuit Court of Appeals for this circuit in the case of *Seattle Electric Co. v. Seattle R. & S. Ry. Co.* (C. C. A.) 185 Fed. 365, and the cases referred to therein. It is not contended that the facts of that case in any way required a decision going to the extent claimed by respondents, and, in fact, as will be seen, no such question was involved; but it is claimed that the language of the court lays down a principle broad enough to support the contention here made, and in this respect respondents are not without support. That there is some general language in that opinion which, when separated from its context and dissociated from its facts, lends color to the construction put upon it by respondents, cannot be denied, language which has induced a similar view, not only by able counsel seeking, through a petition for rehearing, its modification, but by leading law journals. 23 *Green Bag*, p. 153; 4 *Lawyer and Banker*, p. 132.

With the utmost disposition to observe any authoritative declaration of the Circuit Court of Appeals, the ruling denying the motion was made upon the assumption, as stated, that the question presented had been so firmly settled against respondents' contention by numerous decisions of the federal courts, including cases decided by the Supreme Court, prior to the ruling in the *Seattle* case, that the latter could not reasonably have ascribed to it the purpose and effect attributed to it by respondents; and a further examination of the question for the purposes of this opinion has tended only to confirm that view. Very certainly the idea should not be readily indulged that the Circuit Court of Appeals in that case intended to "take a new departure," as suggested by respondents, if that "departure" is found to be directly at variance with principles previously announced by the Supreme Court; and yet, if respondents' construction of that decision is correct, I think it can be confidently said that such is precisely the situation that confronts us. As a means, therefore, of throwing light upon whether the Court of Appeals intended any such result as that sought to be ascribed to it, it will be well before a more particular discussion of their opinion to ascertain just what the state of the law was on the question presented at the time that decision was rendered. For this

purpose, it is not deemed necessary to refer to the large number of cases of a similar character in which jurisdiction has been asserted and exercised by the federal courts without challenge; but it will be sufficient to call attention to some of those arising either under the same provision of the Constitution or the cognate one prohibiting the states from passing any act impairing the obligation of contracts, wherein the same objection has been interposed and directly adjudicated.

The case of *Raymond v. Chicago Union Traction Co.*, 207 U. S. 20, 28 Sup. Ct. 7, 52 L. Ed. 78, is strictly analogous to the present. There the Constitution of Illinois created a state board of equalization, requiring it in terms to carry out the provisions of the state Constitution, "so that every person shall pay a tax in proportion to the value of his, her or its property." Certain railroad companies brought proceedings in the United States Circuit Court to enjoin the collection of taxes claimed to have been improperly equalized by this board, and based upon an assessment alleged to violate the plaintiffs' rights under the fourteenth amendment. The record shows (52 L. Ed. p. 82 et seq.) that the point was there made in the briefs that no federal question was presented, since the action of the state board was contrary to the Constitution and laws of the state, and it would be presumed that the state courts would give full relief; and a dismissal was sought upon that ground. The court, through Mr. Justice Peckham, upheld the jurisdiction of the court and affirmed the judgment, holding that the action of the board of equalization, being within its grant of power, was, although illegal, the action of the state. It is there said:

"The most important function of the board, that of equalizing assessments, in order to carry out the provisions of the Constitution of the state in levying a tax by valuation, 'so that every person shall pay a tax in proportion to the value of his, her or its property,' was, in this instance, omitted and ignored, while the board was making an assessment which it had jurisdiction to make under the laws of the state. This action resulted in an illegal discrimination which, under these facts, was the action of the state through the board. *Barney v. City of New York*, 193 U. S. 430 [24 Sup. Ct. 502, 48 L. Ed. 737], holds that, where the act complained of was forbidden by the state Legislature, it could not be said to be the act of the state. Such is not the case here."

The force of the majority opinion in this case is accentuated by the dissenting opinion of Mr. Justice Holmes, concurred in by Mr. Justice Moody, taking the view that the case raised no federal question, since the action of the board complained of confessedly violated the state Constitution, and that, therefore, redress should have been sought first in the state courts.

In *Michigan Central R. Co. v. Powers*, 201 U. S. 245, 26 Sup. Ct. 459, 50 L. Ed. 744, the bill was one to restrain the enforcement of the provisions of a state law for the assessment and collection of taxes on railroad and other property. The court while holding that the state legislation did not conflict with the fourteenth amendment, upheld the jurisdiction of the federal courts in the following language:

"The unconstitutionality of a statute may depend upon its conflict with the Constitution of the state or with that of the United States. If conflict with the state Constitution is the *sole ground* of attack, the Supreme Court of the

state is the final authority (*Merchants' Bank v. Pennsylvania*, 167 U. S. 461 [17 Sup. Ct. 829, 42 L. Ed. 236], and cases cited in the opinion), while in the other case the ultimate decision rests with this court. The validity of this act has not been directly presented to or determined by the state court, but the first attack by the parties interested is made in the federal court and by this suit, and conflict *with both Constitutions* is alleged. Undoubtedly a federal court has the jurisdiction, and, when the question is properly presented, it may often become its duty to pass upon an alleged conflict between a statute and the state Constitution, even before the question has been considered by the state tribunals. All objections to the validity of the act, whether springing out of the state or of the federal Constitution, may be presented in a single suit, and call for consideration and determination." (Italics volunteered.)

In *Des Moines City Ry. Co. v. City of Des Moines* (C. C.) 151 Fed. 854, the same question was squarely presented, the action being one, as here, without diversity of citizenship, to enjoin the enforcement of a municipal ordinance claimed to deprive complainant of its property without due process of law, and to impair the obligation of an existing contract. The jurisdiction was attacked upon the same grounds here urged, and in response thereto it is said:

"Finally, it is urged by counsel for the city that the case can be decided under the Iowa Constitution, and, therefore, there is no federal question. That is the rule as to taking a writ of error to the Supreme Court; but it is not the test as to jurisdiction of this court. The contention of the city is because of article 1, § 21, of the Iowa Constitution. 'No law impairing the obligation of a contract shall ever be passed,' and those other provisions much like recitals to be found in the fourteenth amendment. Thirty-two of the states have a similar provision, and yet time and again from those states have cases arisen and been carried through the Supreme Court without a diversity of citizenship, on federal questions from states, wherein were involved the contract clause, and of taking property without due process of law. It must never be forgotten that the Constitution of the United States according to its own recitals in article 6 is as follows: 'This Constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land.' And, when it is not so, this government will be at an end, and we will again have a confederation. In most cases wherein the United States Circuit Courts take jurisdiction such courts and the state courts have concurrent jurisdiction. But, if the contention of the defendant's counsel is correct, then in 32 states of this Union United States courts are ousted of jurisdiction by the action of those states, while in the remaining states the jurisdiction remains."

While that case was reversed by the Supreme Court (214 U. S. 179, 29 Sup. Ct. 553, 53 L. Ed. 958) upon another ground, the question of jurisdiction asserted in the lower court was left untouched. In *Manigault v. S. M. Ward Co.* (C. C.) 123 Fed. 707, affirmed 199 U. S. 473, 26 Sup. Ct. 127, 50 L. Ed. 274, it was alleged that a state statute authorizing the defendants to construct a certain dam violated both the state and the federal Constitutions in several particulars, and the provisions of each of those instruments alleged to have been violated were set up in the bill. In passing upon the question of jurisdiction the court said:

"The first question which arises in this case—as, indeed, in all cases in federal courts—is as to the jurisdiction of the court. The action is between citizens of the same state. The only ground of jurisdiction is that the case involves questions arising under the construction or application of the Constitution of the United States. *Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257.

For the federal questions we must examine the allegations of the bill alone. The federal question must appear upon its face. *Tennessee v. Union & P. Bank*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511. The bill sets up violations of the Constitution of the United States, and also violations of the Constitution of South Carolina. Unless the federal question thus set up appears to be specious (*Illinois Central v. Chicago*, 176 U. S. 656, 20 Sup. Ct. 509, 44 L. Ed. 622), the court must take jurisdiction. The fact that a question made in good faith is presented to the court for its decision gives it jurisdiction of the case. *Illinois Central v. Adams*, 180 U. S. 28, 21 Sup. Ct. 251, 45 L. Ed. 410. And, there being a federal question in the case, the court can go on and decide every other question, whether federal or not. The ultimate question upon which the case may turn, whether of federal, local, or general law, is a matter which in no wise affects the jurisdiction of the case. *Mayor v. Cooper*, 6 Wall. 247, 18 L. Ed. 851; *Tennessee v. Davis*, 100 U. S. 257, 25 L. Ed. 648; *St. Paul, etc., Ry. Co. v. St. Paul & N. P. R. Co.*, 68 Fed. 10, 15 C. C. A. 167."

In *Ozark-Bell Telephone Co. v. City of Springfield* (C. C.) 140 Fed. 666, the bill was to enjoin the enforcement of an ordinance regulating telephone rates. The court, holding that the municipal ordinance constituted state action, said:

"But it is said that the complainant alleges that the ordinance challenged is in contravention of section 4, art. 2, of the Constitution of Missouri, in that it impairs its freedom of contract. It may be admitted that, if the only claim made is that the city has proceeded in a way forbidden by the Constitution of the state of Missouri, and for that reason the rights guaranteed by the fourteenth amendment of the Constitution of the United States have been infringed, there is no jurisdiction. The whole question would then turn on a construction of the Constitution of the state of Missouri, and should be left to the decision of its courts. But the bare averment that the ordinance contravenes the Constitution of Missouri states no issuable fact. It is a mere legal conclusion. Nor does the bill present a case of an unlawful interference with its right to contract. The conclusion of the pleader in this respect must be treated as surplusage. The suggestion made on the argument that the state had authorized the city to prescribe reasonable rates, and that, when unreasonable rates were fixed, the action of the city was unauthorized, and cannot be imputed to the state, is answered by the Supreme Court of the United States in *Barney v. City of New York*, 193 U. S. 430, 24 Sup. Ct. 502, 48 L. Ed. 737, in which case, in discussing *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014, it is said at page 440 of 193 U. S., at page 505 of 24 Sup. Ct., and 48 L. Ed. 737: 'And as the establishment of rates by the commission was the establishment of rates by the state itself, and the determination of what was reasonable was left to the discretion of the commission, their action could not be regarded as unauthorized, *even though they may have exercised the discretion unfairly.*' (Italics volunteered.)

It will be observed that this last case meets the very argument by which respondents seek to sustain their contention here; that is, that the rates authorized by the Constitution of the state are "reasonable rates," and, as those prescribed by the ordinance are not such, they were in excess of that power, and cannot therefore be regarded as the act of the state. It is shown by the quotation from *Barney v. City of New York*, there cited, that that argument is without merit; and it is further said in the *Barney Case*:

"Similarly in *Pacific Gas Imp. Co. v. Ellert* [C. C.] 64 Fed. 421, where a public board was given power to improve streets, and proceeded in excess of its powers but not in violation of them, its action was regarded by Mr. Justice McKenna, then circuit judge, as state action."

In *City of Louisville v. Cumberland T. & T. Co.*, 155 Fed. 725, 84 C. C. A. 151, Mr. Justice Lurton, then circuit Judge, speaking for the Circuit Court of Appeals for the Sixth Circuit, announces the same doctrine in this terse language:

"If the state has conferred authority upon the municipality to establish and enforce reasonable rates for telephone service, then the establishment of rates under this power would be the establishment of rates by the state itself."

Lastly, a precisely similar argument is made in *Citizens' St. Ry. Co. v. City St. Ry. Co.* (C. C.) 56 Fed. 746, and is thus met:

"It is contended that the constitutional guaranty which prohibits a state from passing any law impairing the obligation of contracts must be read into the state statute, and, thus read, the statute would not confer any authority on the city to make the contract and enact the ordinance in question, and therefore no federal question would be involved. If such concession were granted, it is argued that no law of the state, however clearly it might impair the obligation of contracts, would present a federal question, because the bane and antidote would go together. If the constitutional prohibition was read into the state law, the federal question would still remain. The federal question in all such cases is, Does the statute of the state, or the grant made a municipality thereunder, when fairly construed, and treating it as otherwise valid, present a case falling within the prohibition of the constitutional guaranty in question?"

This case was affirmed by the Circuit Court of Appeals in (C. C.) 64 Fed. 647, and by the Supreme Court in 166 U. S. 557, 17 Sup. Ct. 653, 41 L. Ed. 1114; and in both courts the question of jurisdiction was adverted to and sustained.

[2] These authorities, to my mind, fully sustain the views of this court as expressed at the argument: That, where it appears from the averments of the bill that the act complained of violates the Constitution of the United States, this court has jurisdiction of the controversy, notwithstanding it may also appear that the act contravenes the Constitution or laws of the state, and is for that reason invalid, and that, where a state has conferred power upon some one of its agencies to perform a certain function involving the exercise of discretionary power, the performance of such function within that grant, although in a manner to render it obnoxious to the laws of the state, is none the less the act of the state within the contemplation of the constitutional guaranty here invoked; that such an instance is in all material respects analogous to the one where a state has conferred certain jurisdiction upon its courts, where acting within the limits of that jurisdiction no one may question that the decision of a state court is to be regarded as much the act of the state, whose majesty it represents, when it decides wrong, as when it decides right, since it is still, in either event, acting under the cloak of state authority.

Are these views in any respect at variance with the ruling in the *Seattle* case? In more critically examining that case it will be well to keep in mind some pertinent utterances by two distinguished jurists, bearing upon the danger, in seeking the meaning of a court, of seizing upon an isolated expression in an opinion and making one's deductions therefrom without regard to the subject-matter intended to be

dealt with. Says Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat. 264, 399, 5 L. Ed. 257:

"It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. * * * The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

And Lord Manners in *Revell v. Hussey*, 2 Ball & B. 286, states the same rule in this way:

"It is always unsatisfactory to abstract altogether the reasoning of the court in any reported case from the facts to which this reasoning is meant to apply. This has a tendency to misrepresent one judge and mislead another."

The facts of the Seattle case were these: The complainant, the Seattle Electric Company, had obtained a franchise from the municipality to operate a street railway. The ordinance granting the franchise provided that it should not be deemed exclusive, and the right was reserved to the city to grant to any other person or persons, or to itself exercise the right and privilege to construct railway lines along the streets over which the franchise was granted. The city subsequently granted the defendant a franchise over the same streets and the ordinance granting this franchise provided that, before any railroad tracks should be laid, all injuries and damages to be occasioned thereby to any other parties should be ascertained and settled according to law. The bill alleged that, if the defendant were permitted to exercise this later franchise, it would greatly depreciate the value of the complainant's property; that the ordinance was in violation of the terms of the franchise owned and used by plaintiff, and had been obtained in fraud of its rights; that it was "granted illegally and without right by the city of Seattle"; that by its terms "the rights of the plaintiff would be taken from it without due process of law and in contravention of the Constitution and laws of the United States"; and that the ordinance was granted "without authority of law," and was "null, void, and without force and effect." There was no averment in the bill that the objectionable ordinance had been passed under state authority, but to the contrary, as stated above, it was expressly alleged that the second franchise had "been granted illegally, without right, by the city of Seattle, and that said alleged ordinance is without authority in law, and is null, void, and of no force and effect." The relief sought was an injunction to prevent the carrying out of the second ordinance. An injunction having been granted by the Circuit Court, an appeal was taken, principally upon the ground that the bill did not state a case within the jurisdiction of that court. In disposing of the question of jurisdiction, there being no diversity of citizenship, the Court of Appeals observes that, in order to give jurisdiction to the federal courts, the claim that a federal question is involved must be real and substantial, and not merely assertive or colorable. Pointing out that the claim there asserted was based upon

a supposed conflict between the municipal ordinance and the fourteenth amendment, the court says with reference to the provisions of that amendment:

"These provisions have reference to state action exclusively, and not to any action of a private individual or corporation. It is the state that is prohibited from abridging the privileges or immunities of citizens of the United States, and from depriving any person of life, liberty, or property without due process of law. The state may act through different agencies, through its legislative, executive, or judicial authority. *Virginia v. Rives*, 100 U. S. 313, 316, 25 L. Ed. 667; *Civil Rights Cases*, 109 U. S. 3, 11, 3 Sup. Ct. 18, 27 L. Ed. 835. A municipal corporation may be such an agency. Its power is generally that of a political subdivision of the state created by virtue of the power of the state acting through its legislative department. *Worcester v. Street Ry. Co.*, 196 U. S. 539, 548, 25 Sup. Ct. 327, 49 L. Ed. 591; *St. Paul Gaslight Co. v. St. Paul*, 181 U. S. 142, 148, 21 Sup. Ct. 575, 45 L. Ed. 788. A municipal ordinance passed pursuant to the authority of the state which abridges the privileges or immunities of a citizen or deprives a person of property without due process of law may be therefore an act of the state prohibited by the Constitution. But the ordinance to come within the prohibition of the amendment must, by implication at least, express the will of the state. It must be the act of the state. *City of Louisville v. Cumberland Telephone & Telegraph Co.*, 155 Fed. 725, 729, 84 C. C. A. 151. With these fundamental principles before us, let us make further inquiries concerning the ordinance involved in this case."

The ordinance under which the complainant acquired its franchise is then considered, and the court holds that by its very terms that franchise was in no way exclusive; and that, as the ordinance under which the respondent in the case acquired its franchise required it to make full compensation for any damages caused by the location of its railway before any track should be laid, the claim that the complainant had been or would be deprived of its property without due process of law was wholly unsubstantial and colorable, and in no way disclosed a violation of the Constitution of the United States; and hence that the Circuit Court was without jurisdiction. This conclusion, it will be observed, virtually disposed of the whole case; but the court, evidently to emphasize that conclusion, then proceeds as follows, and this is the feature of the opinion which has inspired the present motion:

"But there is a further and, as we believe, a conclusive, objection to the claim of right on the part of the complainant to invoke the jurisdiction of the Circuit Court on constitutional grounds. It seems to us that in no aspect of the grant to the defendant is there a real and substantial dispute or controversy dependent upon the application of provisions of the federal Constitution. If it should be conceded that in some view of the ordinance and defendant's action under color of its provisions there would be a taking of complainant's property without due process of law, still it would not follow that the Circuit Court had jurisdiction of the case, unless the ordinance in that aspect would be the law of the state. The supreme law of the state is the Constitution of the state; and that document provides, in article 1, § 13, as does the fourteenth amendment to the Constitution of the United States, that 'no person shall be deprived of life, liberty or property without due process of law.' Under this provision of the state Constitution, the ordinance would be as invalid as under the federal Constitution. It would be with respect to the former, as the complainant charges in its complaint with respect to the latter, 'without authority in law, null and void, and of no force and effect.' The presumption is that the courts of Washington will not deny to any of its citizens or corporations the equal protection of

its Constitution. If, however, it should turn out that we are mistaken in this respect, the complainant will have his remedy in an appeal from the highest court of the state to the Supreme Court of the United States."

Certain authorities are then referred to by the court which will be noticed later.

While the language employed is somewhat broad and sweeping, when the facts to which it was addressed are considered, it will, I think, be at once apparent that the principles there stated, while perfectly applicable to the case then under consideration, have no application to a case like the one at bar. The court was there dealing with a case in which the municipal ordinance was, as to any possible illegal aspect it might have, not only unauthorized by the state, but was affirmatively alleged to have been passed "without right" and "without authority in law"—allegations which must be taken to mean that it was without sanction under the laws of the state. It was clearly, therefore, a case in which the state was in no manner attempting to deprive the complainant of its constitutional rights as guaranteed by the fourteenth amendment, but simply one wherein in legal effect a municipality was alleged to be proceeding in violation of complainant's rights under the Constitution and laws of the state. It was accordingly held that the averment that the enforcement of the ordinance would deprive complainant of its property, contrary to the fourteenth amendment, was purely colorable; that the ordinance, if having the effect alleged, was in contravention of the state Constitution, which itself prohibited the taking of property without due process of law, and that it would be presumed that the state courts would protect complainant's rights thereunder; that, if the highest court of the state should enforce the ordinance, then only could it be said to "have received the sanction of the state, and in effect become the act of the state itself," in which event, should it operate unjustly, complainant would have its remedy by writ of error to the Supreme Court of the United States.

It is obvious from these considerations that the language of the court was intended to apply only to an act done or an ordinance passed without color of authority from the state, and as to which there could be no sanction attributed to the state as to any illegal effect until so declared by its courts. That this is so is made clear by the cases cited and relied upon in the opinion to support its conclusions. The first quotation is from 5 Ency. U. S. Sup. Ct. Rep. 545. That the language there quoted has reference only to cases in which there is both lack of authority from, and express prohibition by, the state of the act complained of, is made apparent by reading the portion of the paragraph immediately preceding that quoted by the court, which is as follows:

"When a subordinate officer or agency of the state in violation of state law undertakes to do that which is not only unauthorized, but which is forbidden by the state law, such action cannot be said to be action by the state, within the intent and meaning of the fourteenth amendment. In such cases the grievance is simply that the state law has been broken, and not that the state has inflicted a wrong through its legislative, executive, or judicial department."

The next case referred to by the court is that of *Hamilton Gas-light Co. v. Hamilton City*, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963, from which an extract from the opinion is quoted. There is nothing in the quotation given which tends to sustain the contention of respondents in this case, because, as we have seen, the Constitution having vested in the municipality the discretionary power to fix rates, it cannot be said that the ordinance here involved was "not passed under supposed legislative authority." But, when the entire portion of the opinion in that case bearing on the subject of jurisdiction is considered, there is left no doubt as to the character of case to which it refers. The court there say:

"The plaintiff's first contention is that there is no statute of Ohio authorizing any city in which there are already gas works in full and complete operation to erect gas works, or to levy a tax for that purpose. If this were conceded, we should feel obliged, the plaintiff and defendant both being corporations of Ohio, to reverse the judgment, and remand the cause with directions to dismiss the suit for want of jurisdiction in the Circuit Court. The jurisdiction of that court can be sustained only upon the theory that the suit is one arising under the Constitution of the United States. But the suit would not be of that character, if regarded as one in which the plaintiff merely sought protection against the violation of the alleged contract by an ordinance to which the state has not, *in any form*, given or attempted to give the force of law. A municipal ordinance, not passed under supposed legislative authority, cannot be regarded as a law of the state within the meaning of the constitutional prohibition against state laws impairing the obligations of contracts. * * * A suit to prevent the enforcement of such an ordinance would not, therefore, be one arising under the Constitution of the United States. We sustain the jurisdiction of the Circuit Court because it appears that the defendant grounded its right to enact the ordinance in question, and to maintain and erect gas works of its own, upon that section of the Municipal Code of Ohio adopted in 1869 (now section 2486 of the Revised Statutes) providing that the city council of any city or village should have power, whenever it was deemed expedient and for the public good, to erect gas works at the expense of the corporation, or to purchase gas works already erected therein, which section, the plaintiff contends, if construed as conferring the authority claimed, impaired the obligation of its contract previously made with the state and the city."

It will thus be seen that that case simply holds that an ordinance will not be regarded as state action if it be "an ordinance to which the state has not *in any form* given or attempted to give the force of law." That as we have seen is not this case.

The only other authority referred to by the court is the case of *Barney v. City of New York*, 193 U. S. 430, 24 Sup. Ct. 502, 48 L. Ed. 737, which was a suit brought to enjoin the construction of a subway or tunnel at a certain point in its route on the ground that the easterly tunnel section was not within the routes and plans consented to by the abutting owners. The act of the Legislature under which the rapid transit board was acting empowered it to prescribe the routes and general plan of any proposed rapid transit railroad, and that the municipal authority and abutting property owners must consent to this construction on the routes and plans adopted, and any change in the details of the plans must likewise be consented to by the abutting owners. The case made by the complainant's bill in legal substance was that the tunnel was not being constructed along the route to which the property owners

had consented, and the court held that for that reason, if the objections of the complainant were correct, there was simply a violation of law by the state officials, and not any act of the state depriving the complainant of its property so as to bring it within the prohibition of the fourteenth amendment. In reaching that conclusion, the court reviewed a number of cases, and, among others, that of *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014, in which the jurisdiction of the Circuit Court was upheld to enjoin unreasonable rates fixed by the State Railroad Commission, and in that connection used the language hereinbefore quoted in the case of *Ozark-Bell Telephone Co. v. City of Springfield* (C. C.) 140 Fed. 666, to the effect that the act of the board, although illegal, was nevertheless the act of the state, since it was proceeding under the grant of authority given it by the state. And the court expressly distinguished such a case from that which the court was there considering, in which, as it states, "defendants were proceeding not only in violation of provisions of the state law, but in opposition to plain prohibitions."

These authorities leave no room for doubt as to the proposition the court intended to decide in the *Seattle* case; and make it plain that there is nothing in that case antagonistic to the ruling denying the present motion.

The point was also made at the argument, but in a minor key, that the jurisdiction of this court is ousted because of the allegation that the ordinance in form violates the provisions of the charter under which it was passed in the respect above stated. This point is fully covered, I think, by the authorities hereinabove reviewed; but, independently of that consideration, the allegation is of a mere conclusion of law which adds nothing of substance to the effect of the bill (*Ozark-Bell Tel. Co. v. Springfield*, supra); and, moreover, the Supreme Court of the state has held that the provision of the charter in question is merely directory. *Law v. San Francisco*, 144 Cal. 384, 77 Pac. 1014.

I have devoted more space perhaps to the main question presented than is absolutely demanded by the facts; but it has been with an anxious desire to leave no room for the thought that the court would, either intentionally or inadvertently, ignore a pertinent ruling of its superior tribunal.

UNITED STATES v. ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS.

(District Court, W. D. Texas, Waco Division. August 16, 1911.)

No. 77.

1. COMMERCE (§ 27*)—MASTER AND SERVANT (§ 13*)—CONSTITUTIONAL LAW (§§ 89, 238*)—INTERSTATE COMMERCE—POWER OF CONGRESS TO REGULATE—CONSTITUTIONALITY OF HOURS OF SERVICE LAW.

The federal hours of service act (Act March 4, 1907, c. 2939, § 2, 34 Stat. 1416 [U. S. Comp. St. Supp. 1909, p. 1170]), which makes it unlawful for any interstate carrier by railroad to permit any employé, as the terms "railroad" and "employé" are defined in section 1. to remain

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1901 to date, & Rep'r Indexes

on duty for a longer period than those prescribed, is within the constitutional power of Congress to regulate interstate commerce, and is not unconstitutional as interfering with the liberty of contract, nor because of the classification of telegraphers by prescribing a different limitation for the hours of operators in offices or stations continuously operated day and night and those operated only during the daytime.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27;* Master and Servant, Dec. Dig. § 13;* Constitutional Law, Dec. Dig. §§ 89, 238.*]

2. MASTER AND SERVANT (§ 13*)—CLASS LEGISLATION—HOURS OF SERVICE ACT—CONSTRUCTION.

The hours of service act (Act March 4, 1907, c. 2939, 34 Stat. 1415 [U. S. Comp. St. Supp. 1909, p. 1170]) is not a penal statute, strictly speaking, requiring the application of the rule of strict construction, its dominant purpose being remedial; and, construed with the liberality required to effect such purpose, there is no inconsistency or ambiguity in section 2, in that the proviso fixes different and shorter hours for telegraph operators than those prescribed for other employes by the first part of the section, and, as to such operators, the proviso clearly applies to the exclusion of the general provisions.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 13.*]

3. MASTER AND SERVANT (§ 13*)—HOURS OF SERVICE ACT—CONSTRUCTION—TELEGRAPH OPERATORS—"CONTINUOUSLY OPERATED."

Under the hours of service act (Act March 4, 1907, c. 2939, § 2, 34 Stat. 1416 [U. S. Comp. St. Supp. 1909, p. 1170]), which in the proviso provides that no telegraph operator who transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to remain on duty for a longer period than 9 hours in any 24-hour period in all towers, offices, or stations continuously operated night and day, nor for a longer period than 13 hours in towers, offices, or stations operated only during the daytime, an office which is closed each day of 24 hours four times for a period of one hour each only is to be classified as one continuously operated night and day.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. § 13.*]

4. MASTER AND SERVANT (§ 13*)—HOURS OF SERVICE ACT—CONSTRUCTION.

Under the hours of service act (Act March 4, 1907, c. 2939, § 2, 34 Stat. 1416 [U. S. Comp. St. Supp. 1909, p. 1170]), which prohibits interstate carriers by railroad from permitting any telegraph operator employed in connection with the movement of trains in an office or place operated continuously night and day from remaining on duty for a longer period than 9 hours in any 24-hour period, a company does not avoid violation of the act by dividing the hours of service of an operator into two periods, where the aggregate hours of service each day of 24 hours exceed 9.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. § 13.*]

At Law. Action by the United States against the St. Louis Southwestern Railway Company of Texas. Trial by the court. Judgment for plaintiff.

This suit was brought by the government to recover of the defendant penalties aggregating \$5,000 for alleged violations of the act of Congress entitled "An act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes thereon," approved March 4, 1907 (34 Stat. pt. 1, p. 1415), and commonly known as the "Hours of Service Act."

The defendant demurred to and answered the petition, but substantially the same defenses, and those legal, are embodied in the two pleadings. The

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

defenses relied on are enumerated in the following summary taken from the defendant's brief:

"(1) The act is unconstitutional because Congress has no power to pass an act regulating the hours of labor of employes on interstate railways, for the reason that the subject of hours of labor is so remote from the regulation of commerce that it is beyond the limit of the power granted to Congress.

"(2) Said act is unconstitutional for the reason that the power to regulate commerce granted to Congress is limited by the fifth amendment to the Constitution, which prohibits Congress in the regulation of commerce from depriving any person of liberty or property without due process of law, and the right of contract for personal service is both a personal liberty and a property right, which cannot be restrained except by reasonable restraints which are required by the common good or public welfare, and the act shows on its face that such is not true of the provisions of this act.

"(3) The act is unconstitutional and void because it shows on its face, when considered with reference to the subject-matter, that the purpose and intent of the act is to arbitrarily and capriciously interfere with the rights of the employer and employe to contract with reference to personal service.

"(4) The construction of the act as contended for by the government, and by the Interstate Commerce Commission, emphasizes and makes conclusive all of the objections above stated.

"(5) We submit that the only possible way of saving the act from being unconstitutional, and bringing it within the rule that it is an enactment required by the 'common good and public welfare,' is to hold that telegraphers are included within the body of section 2 of the act, and are subject to the provisions thereof, with the sole limitation contained in the proviso that the periods of 9 and 13 hours referred to in the proviso as periods of remaining on duty are intended to mean 'consecutive hours,' and did not mean that such telegraphers might not be permitted to labor for 'sixteen hours in the aggregate.'

"(6) Even under the fifth paragraph of this summary, which is the one just preceding, we submit that the constitutionality of the act, even with the construction therein referred to, is extremely doubtful, if the unconstitutionality is not apparent, by reason of the fact that the discrimination between telegraphers in stations that are 'continuously operated night and day' and stations that are 'continuously operated only during the daytime' is an arbitrary classification, and therefore renders the proviso void.

"(7) In any event, the government is not entitled to recover herein, for the reason that it is apparent from the allegations of the complaint and answer, and the agreed statement of facts, that there was no violation of the act on the part of the defendant for the reason that the defendant did not require or permit the telegraphers mentioned in the complaint to 'remain on duty for a longer period than nine hours in any twenty-four hour period in a tower, office or station continuously operated night and day,' it being admitted that the telegraphers mentioned were off duty, and the station closed, from 12 o'clock noon until 1 o'clock p. m. and from 12 o'clock midnight until 1 o'clock a. m.

"(8) Under the strict construction required of penal statutes, and of provisos in penal statutes, the court cannot add any words either to the statute or the proviso so as to change the meaning thereof, cannot adopt any construction which adds to or changes the meaning of the words used."

A jury was waived by the parties, and the cause submitted to the court upon the following stipulation as to the facts:

"(1) That the defendant is now and was at all times mentioned in plaintiff's petition a railway corporation and common carrier engaged in both interstate and intrastate commerce by railroad in the state of Texas; said corporation being organized under the laws of the state of Texas, with its principal office and place of business in Tyler, Smith county, Tex., and that it operates a main line from Texarkana, in Bowie county, Tex., to Gatesville, Coryell county, Tex., with various branch lines in said state.

"(2) That on the 29th day of January, 1910, one J. F. Scarff was employed by the defendant at its telegraph office in East Waco, McLennan county,

Tex., and within the jurisdiction of this court, as telegraph operator, to report, transmit, receive, or deliver orders pertaining to or affecting train movements by the use of telegraph, as will be hereafter set out, and was required and permitted to be on duty from 7 o'clock a. m. on said date until 12 o'clock noon, and during such period was permitted and required to report, transmit, receive, and deliver such orders as were necessary pertaining to or affecting train movements, and at 12 o'clock noon he was relieved from duty until 1 o'clock p. m., and during said hour was not required or permitted to perform any work or duty for the defendant, and at 1 o'clock p. m. said Scarff went back on duty and remained on duty in the same character of service until 6 o'clock p. m. on said date, and was engaged and employed in the same service of this defendant as will be hereafter set out.

"(3) That at 6 o'clock p. m. on said date he was relieved from duty and no other work or service was permitted or required from him, except that he was required to work for said two periods of 5 hours each, aggregating 10 hours in said 24-hour period.

"(4) That on said date of January 29, 1910, one W. R. Alford was employed by the defendant at its telegraph office in East Waco, McLennan county, Tex., and within the jurisdiction of this court, as telegraph operator, to report, transmit, receive, or deliver orders pertaining to or affecting train movements by the use of telegraph, as will be hereafter set out, and was required and permitted to be on duty from 7 o'clock p. m. on said date until 12 o'clock midnight, and during said period was permitted and required to report, transmit, receive, and deliver such orders as were necessary pertaining to or affecting train movements, and at 12 o'clock midnight he was relieved from duty until 1 o'clock a. m., and during said hour was not required or permitted to perform any work or duty for the defendant, and at 1 o'clock a. m. said Alford went back on duty and remained on duty until 6 o'clock a. m. on the following day, and was engaged and employed in the same service of this defendant as will be hereafter set out.

"(5) That at 6 o'clock a. m. on January 30, 1910, he was relieved from duty, and no further work or service was permitted or required from him until 7 o'clock p. m. on said date, and he did no other work or service except that he was required to work two said periods of 5 hours each, aggregating 10 hours in said 24-hour period.

"(6) That the same facts exist as to the work and service required and permitted to be done by said Scarff and Alford for the 30th and 31st days of January, 1910, and the 1st, 2d, and 3d days of February, 1910, as set up and alleged in plaintiff's amended petition.

"(7) That from 6 o'clock a. m. until 7 o'clock a. m., and from 12 o'clock noon to 1 o'clock p. m., and from 6 o'clock p. m. until 7 o'clock p. m., and from 12 o'clock midnight until 1 o'clock a. m. on each and all of said dates set up in plaintiff's amended petition, said operators were off duty as hereinbefore stated, and said telegraph office was closed, and no business of any kind or character was required or permitted to be done by said operators during said 4 hours in each 24-hour period, except in case of emergency.

"(8) That the lines of railway of defendant are located, and it is engaged in operating a line of railway, wholly within the state of Texas, and is not engaged in the operation, by itself, of any trains, except trains between points within the state of Texas, but, in conjunction with its connections, it is engaged in interstate commerce and traffic, and that, as to the employés mentioned and described in the various causes of action in plaintiff's petition, each and all of them are employed by this defendant for service on its line of railway within the state of Texas, and in handling orders affecting the movements of trains engaged in both interstate and intrastate commerce as hereinafter mentioned.

"(9) That said employés on each and all of said dates handled dispatches, reports, and orders affecting the movements of trains that were handling both intrastate and interstate traffic, both freight and passenger, and that all such traffic, either freight or passenger, was handled by this defendant over its own line and delivered at one of its termini to its connection for further transportation.

"(10) That the greater part of the duties incumbent upon said telegraph operators and performed by them in such service on said dates was with reference to matters and things in connection with the business of this defendant which were separate and apart from, and had no connection with, dispatches or orders pertaining to the movement of trains.

"(11) That in addition to the duties of receiving reports, and transmitting, receiving, and delivering orders pertaining to or affecting the movements of trains carrying both interstate and intrastate traffic, it was the duty of said telegraph operator to report, transmit, receive, or deliver orders pertaining to or affecting the movement of trains which moved entirely intrastate, and handled only intrastate business, such as excursion trains, work trains, cattle trains, and other trains handling exclusively intrastate business or traffic.

"(12) That there are sundry other telegraph operators in the employ of defendant and other railway companies within the United States who are not engaged in any way in the handling or dispatching of train orders, and sundry other operators who are engaged in handling or dispatching train orders who are employed at stations open only in the daytime, and sundry other employes at stations which are only open a part of each day and a part of each night.

"(13) That the office of chief dispatcher of defendant is located at Mt. Pleasant, Titus county, Tex., and that said office is open continuously during the 24 hours for the purpose of receiving reports and transmitting, receiving, or delivering orders pertaining to or affecting the movements of trains over the lines of defendant, and said telegraph operators in East Waco transmit to and receive train orders from said chief dispatcher at Mt. Pleasant.

"(14) That the management who controls the operation of defendant's line and the employment of said telegraph operators described in plaintiff's petition submitted said hours of service act to its legal department, and, acting on the advice of said department, fixed the hours of service of said operators, as hereinbefore stated, and contracted with said operators for the performance of said 10 hours of service in each 24-hour period, as hereinbefore stated."

Charles A. Boynton, U. S. Atty., and Philip J. Doherty, Special Asst. U. S. Atty.

E. B. Perkins, Daniel Upthegrove, and Scott, Sanford & Ross, for defendant.

MAXEY, District Judge (after stating the facts as above). When counsel for the respective parties submitted their able and interesting briefs in this cause, there were pending in the Supreme Court the two cases of the United States v. A. T. & S. F. Railway Company, 220 U. S. 37, 31 Sup. Ct. 362, 55 L. Ed. 361, decided March 13, 1911, and B. & O. Railroad Company v. Interstate Commerce Commission, 221 U. S. 612, 31 Sup. Ct. 621, 55 L. Ed. 878, decided May 29, 1911. The former involved the construction of the hours of service act, and the latter, among other questions, its constitutionality. In the present case counsel for the defendant contend, as the court understands their objections, that the act is repugnant to the Constitution in the following particulars: (1) In attempting to regulate the hours of labor of employes on interstate railways; (2) that it restrains the right of contract in violation of the fifth amendment of the Constitution, in that it arbitrarily and capriciously interferes with the right of the employer and employe to contract with reference to personal service; and (3) that the discrimination between telegraphers in stations that are "con-

tinuously operated night and day" and "stations that are continuously operated only during the daytime" is an arbitrary classification, rendering the proviso of the act void.

Reference will be hereinafter made to other objections of counsel which affect the construction of the act as applied to the facts of this particular case.

1. Consideration will be first given to the constitutional questions.

[1] At the outset it is well to state that the defendant, a Texas corporation, is engaged in both interstate and intrastate, or domestic, commerce, as shown by the stipulation of counsel, and that its telegraph operators, Scarff and Alford, upon the dates mentioned in the petition, handled dispatches, reports, and orders affecting the movements of trains that were handling both intrastate and interstate freight and passenger traffic. The defendant is clearly subject to the provisions of the statute, and the question to determine is whether the act itself is in harmony with the Constitution. In view of the ruling of the Supreme Court in the *Baltimore & Ohio Case*, extended discussion of the constitutional questions would seem to be unnecessary. Counsel in their elaborate briefs have presented every phase of these questions in an exceedingly interesting manner, and have submitted a large number of authorities which they claim support their contention that the statute was beyond the constitutional power of the Congress to enact. But the Supreme Court has otherwise decided. In the *Baltimore & Ohio Case* a bill was filed by the railroad company to annul an order made by the Interstate Commerce Commission. Discussing the question, Mr. Justice Hughes, as the organ of the court, said:

"Although the question was not specifically raised by the bill, it is now contended that the statute is unconstitutional in its entirety, and therefore no action of the commission can be based upon it. It is said that it goes beyond the power which Congress may exercise in the regulation of interstate commerce; that, while addressed to common carriers engaged in interstate transportation by railroad to any extent whatever, its prohibitions and penalties are not limited to interstate commerce, but apply to intrastate railroads and to employes engaged in local business. The prohibitions of the act are found in section 2. This provides that it shall be 'unlawful for any common carrier, its officers or agents, subject to this act to require or permit any employé subject to this act to be or remain on duty' for a longer period than that prescribed. The carriers and employes subject to the act are defined in section 1 as follows: 'That the provisions of this act shall apply to any common carrier, or carriers, their officers, agents, and employes, engaged in the transportation of passengers or property by railroad in the District of Columbia or any territory of the United States, or from one state or territory of the United States or the District of Columbia to any other state or territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. The term "railroad" as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement or lease; and the term "employé" as used in this act shall be held to mean persons actually engaged in or connected with the movement of any train.'

"No difficulty arises in the construction of this language. The first sentence states the application to carriers and employes who are 'engaged in

the transportation of passengers or property by railroad' in the District of Columbia or the territories, or in interstate or foreign commerce. The definition in the second sentence, of what the terms 'railroad' and 'employés' shall include, qualify these words as previously used, but do not remove the limitation as to the nature of the transportation in which the employés must be engaged in order to come within the provisions of the statute. If the definition in the last part of the sentence of the words used in the first part be read in connection with the latter, the meaning of the whole becomes obvious. The section in effect thus provides: 'This act shall apply to any common carrier or carriers, their officers, agents, and employés (meaning by "employés" persons actually engaged in or connected with the movement of any train), engaged in the transportation of passengers or property by railroad (meaning by "railroad" to include all bridges and ferries used or operated in connection with any railroad) in the District of Columbia or any territory * * * or from one state * * * to any other state,' etc. In short, the employés to which the act refers, embracing the persons described in the last sentence of the section, are those engaged in the transportation of passengers or property by railroad in the district, territorial, interstate, or foreign commerce defined; and the railroad, including bridges and ferries, is the railroad by means of which the defined commerce is conducted.

"The statute, therefore, in its scope, is materially different from Act June 11, 1906, c. 3073, 33 Stat. 232 (U. S. Comp. St. Supp. 1909, p. 1148), which was before this court in the Employer's Liability Cases, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297. There, while the carriers described were those engaged in the commerce subject to the regulating power of Congress, it appeared that, if the carrier was so engaged, the act governed its relation to every employé, although the employment of the latter might have nothing whatever to do with interstate commerce. In the present statute the limiting words govern the employés as well as the carriers.

"But the argument undoubtedly involves the consideration that the interstate and intrastate operations of interstate carriers are so interwoven that it is utterly impracticable for them to divide their employés in such manner that the duties of those who are engaged in connection with interstate commerce shall be confined to that commerce exclusively. And thus many employés who have to do with the movement of trains in interstate transportation are by virtue of practical necessity also employed in intrastate transportation. This consideration, however, lends no support to the contention that the statute is invalid; for there cannot be denied to Congress the effective exercise of its constitutional authority. By virtue of its power to regulate interstate and foreign commerce, Congress may enact laws for the safeguarding of the persons and property that are transported in that commerce and of those who are employed in transporting them. *Johnson v. Southern Pacific Co.*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363; *Adair v. United States*, 208 U. S. 177, 178, 28 Sup. Ct. 277, 52 L. Ed. 436; *St. Louis & Iron Mountain Railway Co. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061; *Chicago, Burlington & Quincy Railway Company v. United States*, 220 U. S. 559, 31 Sup. Ct. 612, 55 L. Ed. 582, decided May 15, 1911. The fundamental question here is whether a restriction upon the hours of labor of employés who are connected with the movement of trains in interstate transportation is comprehended within this sphere of authorized legislation. This question admits of but one answer. The length of hours of service has direct relation to the efficiency of the human agencies upon which protection to life and property necessarily depend. This has been repeatedly emphasized in official reports of the Interstate Commerce Commission, and is a matter so plain as to require no elaboration. In its power suitably to provide for the safety of employés and travelers Congress was not limited to the enactment of laws relating to mechanical appliances, but it was also competent to consider, and to endeavor to reduce, the dangers incident to the strain of excessive hours of duty on the part of engineers, conductors, train dispatchers, telegraphers, and other persons embraced within the class defined by the act. And in imposing restrictions having reasonable relation to this end there is no interference with liberty of contract as guaranteed by the Constitution. *Chicago, Burlington & Quincy Railroad Co. v. McGuire*,

219 U. S. 549, 31 Sup. Ct. 259, 55 L. Ed. 328. If, then, it be assumed, as it must be, that in the furtherance of its purpose Congress can limit the hours of labor of employes engaged in interstate transportation, it follows that this power cannot be defeated either by prolonging the period of service through other requirements of the carriers or by the commingling of duties relating to interstate and intrastate operations."

But it is insisted by counsel for the defendant that the classification of the telegraph operators is arbitrary, rendering the act void, since it discriminates between operators engaged in stations that are "continuously operated night and day" and those employed in stations that are "continuously operated only during the daytime." Just why the classification is unconstitutional it is difficult for the court to conceive. And it is still more strange that the Supreme Court in construing the act in its entirety should have overlooked what counsel appear to regard as so vital an objection to its constitutionality. The proviso, referring to operators, train dispatchers, etc., was considered by the court, and there is no intimation in the opinion that the classification is either unjust or arbitrary. Where Congress has power to legislate in reference to the hours of labor of employes, no hard and fast rule of classification may for all cases be prescribed. Thus it was said by the court in *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 296, 18 Sup. Ct. 599, 42 L. Ed. 1037:

"There is therefore no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things."

The objection of counsel that the classification in the act provided is unreasonable and arbitrary, and therefore void, is untenable.

[2] 2. It is also urged by counsel for the defendant that there exists in the provisions of the statute respecting periods of time such uncertainty and ambiguity as, under recognized rules for the construction of penal statutes, render it void or partially inoperative. In support of this contention it is said by counsel:

"The last clause of the first paragraph of the act reads: 'And the term employes as used in this act shall be held to mean persons actually engaged in or connected with the movement of any train.' The second paragraph of the act makes it unlawful for a carrier to require or permit 'any employé subject to this act to remain on duty for a longer period than sixteen hours consecutively.' The contention is that an operator, train dispatcher, or other employé who assists in receiving, transmitting, or delivering orders pertaining to train movements is a person 'actually engaged in or connected with the movement of a train,' and as such is an employé within the scope of the second paragraph of the act."

And it is further said by counsel, using substantially their own language, that the effect of the proviso contained in the second paragraph, restricting the employment of telegraph operators to 9 and 13 hours, "is to import an inconsistency and ambiguity into the meaning of the statute, and to make it difficult, if not impossible, to state with certainty which provision of the statute is applicable to the case of operators and train dispatchers." To the position assumed by counsel it may be replied: (1) The hours of service act is not, strictly speaking, a penal statute, requiring the application of the

rules of strict construction; and (2) a reasonable view of the act removes the difficulty in ascertaining the clause applicable to operators and dispatchers in contradistinction to the clause which embraces other employes. Of these in their proper order.

It has been assumed that the act is not strictly a penal statute, and this assumption is justified by the ruling of the Supreme Court in a case involving the construction of the safety appliance act. Thus it was said by Mr. Chief Justice Fuller, speaking for the court, in *Johnson v. Southern Pacific Co.*, 196 U. S. 17, 18, 25 Sup. Ct. 161, 162, 49 L. Ed. 363:

"The primary object of the act was to promote the public welfare by securing the safety of employes and travelers, and it was in that respect remedial, while for violations a penalty of \$100, recoverable in a civil action, was provided for, and in that aspect it was penal. But the design to give relief was more dominant than to inflict punishment, and the act might well be held to fall within the rule applicable to statutes to prevent fraud upon the revenue, and for the collection of customs, that rule not requiring absolute strictness of construction. *Taylor v. United States*, 3 How. 197 [11 L. Ed. 559]; *United States v. Stowell*, 133 U. S. 1, 12 [10 Sup. Ct. 244, 33 L. Ed. 555], and cases cited. And see *Farmers' & Merchants' National Bank v. Dearing*, 91 U. S. 29, 35 [23 L. Ed. 196]; *Gray v. Bennett*, 3 Metc. (Mass.) 522. Moreover, it is settled that, 'though penal laws are to be construed strictly, yet the intention of the Legislature must govern in the construction of penal as well as other statutes; and they are not to be construed so strictly as to defeat the obvious intention of the Legislature.'"

Speaking of the same statute, the following language was used by the Circuit Court of Appeals for the Fifth Circuit in the case of *St. Louis Southwestern Railway Co. v. United States*, 183 Fed. 771, 106 C. C. A. 137:

"On reason and weight of authority, it is considered that actions to recover the statutory penalties for violation of the safety appliance law (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]) are so far civil in their nature that the strict construction applicable in criminal proceedings is not required, and the United States may recover upon the preponderance of evidence, and the trial judge may in proper cases direct a verdict."

See, also, *United States v. St. Louis Southwestern Railway Co. of Texas*, 184 Fed. 32, 106 C. C. A. 230; *Hepner v. United States*, 213 U. S. 103, 29 Sup. Ct. 474, 53 L. Ed. 720, 27 L. R. A. (N. S.) 739; *C. B. & O. Ry. v. United States*, 220 U. S. 559, 31 Sup. Ct. 612, 55 L. Ed. 582.

The language of the Supreme Court and of the Circuit Court of Appeals is peculiarly applicable to the hours of service act. If then the act be construed so as to effect the obvious intention of the Congress, may not the clause applicable to telegraph operators and train dispatchers be ascertained, not only with reasonable, but with exact, certainty? This objection of counsel relates to section 2 of the act, which is in the following words:

"Sec. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this act to require or permit any employe subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employe of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employe who has been on duty sixteen

hours in the aggregate in any twenty-four hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty: Provided, that no operator, train dispatcher, or other employé who by the use of the telegraph or telephone dispatches reports, transmits, receives or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employes named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four hour period on not exceeding three days in any week: Provided further, the Interstate Commerce Commission may after full hearing in a particular case and for good cause shown extend the period within which a common carrier shall comply with the provisions of this proviso as to such case." 34 Stat. 1416.

It will be observed that the first part of the section refers to employes generally, subject to the act, and renders it unlawful for a carrier to require or permit any employé to be or remain on duty for a longer period than 16 consecutive hours, etc. The proviso, however, excepts operators and train dispatchers from the general language thus employed, and provides for them a special rule. For reasons deemed wise by the Congress, it was thought that telegraph operators and train dispatchers should have shorter hours for work and longer intervals of rest; and hence the provision directly applied to them, that their work hours should be limited to 9 and 13, respectively, accordingly as they might be employed in stations continuously operated night and day, or in stations operated only during the daytime. Is there any uncertainty or ambiguity in the language of the act? It is thought by the court that the language is too plain to be misunderstood. The obscurity suggested by counsel is rather imaginary than real. The proviso of section 2 relates solely to the operator, train dispatcher, or other employé "who * * * reports, transmits, receives, or delivers orders pertaining to or affecting train movements"; while the first part of the section embraces all other employes subject to the act.

[3] 3. It is further insisted by counsel for the defendant that the statute is not applicable to the facts of the present case, because, it is urged, the station or office in which Scarff and Alford were engaged as operators was not one continuously operated night and day. The agreed facts pertinent to this contention are as follows:

"That from 6 o'clock a. m. until 7 o'clock a. m., and from 12 o'clock noon until 1 o'clock p. m., and from 6 o'clock p. m. until 7 o'clock p. m., and from 12 o'clock midnight until 1 o'clock a. m. on each and all of said dates set up in plaintiff's amended petition said operators were off duty as hereinbefore stated, and said telegraph office was closed, and no business of any kind or character was required or permitted to be done by said operators during said 4 hours in each 24-hour period, except in case of emergency."

It is also shown that Scarff worked five hours in the morning, to wit, from 7 o'clock a. m. until 12 o'clock noon, and five hours in the afternoon, to wit, from 1 o'clock p. m. until 6 o'clock during each day designated in the petition, and that Alford was engaged for each of said days from 7 o'clock p. m. until 12 o'clock midnight, and from 1

o'clock a. m. until 6 o'clock a. m.; thus working 10 hours in every 24 hours.

Was the East Waco station, within the meaning of the law, continuously operated night and day? In the case of *United States v. A. T. & S. F. Railway Company*, supra, where the office was closed three hours by day and three hours by night, the court strongly intimated that it was one continuously operated night and day. Upon this point Mr. Justice Holmes spoke as follows:

"We are of opinion that the government's argument cannot be sustained, even if it be conceded that Corwith was a place continuously operated night and day, as there are strong reasons for admitting. The antithesis is between places continuously operated night and day and places operated only during the daytime. We think that the government is right in saying that the proviso is meant to deal with all offices, and, if so, we should go farther than otherwise we might in holding offices not operated only during the daytime as falling under the other head. A trifling interruption would not be considered, and it is possible that even three hours by night and three hours by day would not exclude the office from all operation of the law, and to that extent defeat what we believe was its intent."

In the present case the office was closed each day of 24 hours four times for the period of one hour only. The court is clearly of the opinion that the office was within the contemplation of law continuously operated night and day. If the defendant may interrupt the continuity of the working hours by closing the office for an hour and thus evade the statute, why may it not do so by closing the doors for a period of 30 or even 15 minutes? But it can do so in neither case. It is not within the power of a carrier by resorting to shifts and evasions of any kind or character to nullify a statute obviously intended, as was the present act, to promote the safety of employes and of the traveling public.

[4] 4. Finally, it is insisted that the defendant has not violated the provisions of the act, for the reason that the operators were not engaged in work for a longer continuous period than 9 hours in a 24-hour period. And it is said by counsel in their brief:

"The way these operators were handled, they were on duty for two distinct periods in a 24-hour period. Those two periods added together made 10 hours, but neither one of them was longer than 9 hours. We therefore confidently submit to the court that neither of the allegations of facts shows that the statute was violated in letter or in spirit."

The words of the law are that no operator or train dispatcher, etc., "shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places, and stations continuously operated night and day," etc.

It has been shown (1) that the East Waco office was one continuously operated night and day; and (2) that the two operators remained on duty 10 hours for each day mentioned in the petition. Since, then, the office was a continuously operated night and day office, and Scarff and Alford were permitted to remain on duty for a longer time than 9 hours in a 24-hour period, it follows, if the language of the act be given its ordinary signification, that the defendant infringed the law in thus permitting its operators to work for a longer time than that prescribed by the statute.

The defendant having violated the law, the remaining question for consideration is, What penalty shall be imposed for its infraction? In this connection it is disclosed by the stipulation of counsel that in fixing the hours of service of the two operators the managers of the defendant relied upon the advice of the defendant's legal department. The law is of recent origin, and at the time of filing the petition in this case its constitutionality and construction were involved in doubt. In view of these considerations and the further fact that this is the first case to be prosecuted against the defendant, the court is not inclined to impose the extreme penalty provided by the act; but will content itself with the imposition of a penalty of \$100 under each count of the petition, making in the aggregate the sum of \$1,000.

And it is so ordered.

THE JOHN TWOHY, JR.

(District Court, E. D. Virginia. February 4, 1911.)

1. JUDICIAL SALES (§ 54*)—TITLE AND RIGHTS OF PURCHASER—REVERSAL OF DECREE.

The title acquired by a purchaser at a judicial sale made under the decree of a court having jurisdiction is not affected by a reversal of such decree for errors or irregularities.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. §§ 108, 109; Dec. Dig. § 54.*]

2. ADMIRALTY (§ 100*)—SALE OF PROPERTY—TITLE OF PURCHASER—EFFECT OF REVERSAL OF DECREE.

A court of admiralty in a proceeding in rem ordered a vessel sold at private sale, and confirmed the sale when made. The purchasers resold the vessel to persons outside of the district who removed it therefrom. Subsequently an appeal was taken, without supersedeas, and the order of sale was reversed on the ground that the court had no power to authorize a private sale. *Held* that, notwithstanding such reversal, the vessel could not be recovered from the second purchasers, who were not parties to the litigation, but bought in good faith in reliance on the title given by the court.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 670-673; Dec. Dig. § 100.*]

3. ADMIRALTY (§ 99*)—SALE OF PROPERTY—SETTING ASIDE SALE.

Conceding that a suit to recover the vessel might be successful, the court should not order it where it would then be necessary to resell the vessel, and in all probability the amount realized after paying costs would not be as much as was paid by the first purchaser, and the result would be a loss to the fund.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 661-669; Dec. Dig. § 99.*]

In Admiralty. In the matter of the petition of the Lambert's Point Tow Boat Company, as owner of the steam tug "John Twohy, Jr.," for limitation of liability. On motion to set aside a deed to the vessel made by the marshal and to direct a suit for its recovery. Granted in part.

Hughes & Little, for petitioners.

L. L. Lewis, U. S. Atty.

Jeffries, Wolcott, Wolcott & Lankford, for Moss & Moss.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

WADDILL, District Judge. On the 9th day of November, 1910, a rule was awarded in this case, as follows:

"It is ordered on motion of the Lambert's Point Tow Boat Company that W. W. Moss and James B. Moss, partners trading under the name of Moss & Moss, do show cause, if any they can, to this court, at Norfolk, on the 23d day of November, 1910, why the said deed [referring to the deed of sale of the vessel known as the 'John Twohy, Jr.,' executed by the marshal pursuant to decree of court in these proceedings] should not be set aside, and why they should not be required to surrender the said tugboat, John Twohy, Jr., into the custody of the said court, or for such further proceedings as according to justice may appertain."

On the 23d day of November, 1910, pursuant to said rule, which had been duly served upon Moss & Moss, they appeared and filed their answer, setting up, among other things: That on the 18th day of April, 1910, pursuant to the decree of this court entered on the 16th day of April, 1910, they received from the marshal the bill of sale of the tugboat Twohy, which was duly recorded in the office of the collector of customs, in the city of Norfolk, Va., the home port of said vessel, having paid the purchase price therefor of \$11,000. That subsequently the Lambert's Point Towboat Company filed its petition in the Circuit Court of Appeals, and procured an appeal from the order under which said sale was made. That said company announced that no supersedeas would be applied for, and in point of fact none was ever granted. That upon the receipt of the deed to the boat aforesaid they set to work at considerable expense in traveling to northern points to sell the Twohy, and succeeded in securing \$14,000 for her from McAllister Bros., of the city of New York. That although the appeal was allowed after the sale to McAllister Bros., and without supersedeas, Moss & Moss did not feel justified in giving a general warranty to the boat, and the purchaser would not take the boat without a general warranty deed. Whereupon it was agreed that the \$14,000 should be paid into the National Bank of Commerce, Norfolk, Va., to be held by said bank, and to be paid to said Moss & Moss upon their title to the boat being confirmed, either by the United States Circuit Court of Appeals or some other competent legal tribunal; and in the event that title was not confirmed to them in said boat, and the purchasers were required to surrender and give up the same, then the fund should be repaid to them. Thereupon the Lambert's Point Towboat Company introduced certain evidence in support of its motion, namely, portions of the record in this case, as well as the bill of sale aforesaid from the marshal to Moss & Moss, and the said Moss & Moss likewise placed in evidence the bill of sale aforesaid from themselves to McAllister Bros., with the exhibits therewith, and examined certain witnesses in support of their claim.

The case is now before the court upon the questions arising upon said rule, the testimony thus submitted, and upon the motion of the Lambert's Point Towboat Company asking the entry of the following order (title omitted):

"This cause came on this day to be heard upon the rule to show cause, the return thereto, the pleadings, proofs, and exhibits, and was argued by counsel, and thereupon it is adjudged, ordered, and decreed that the bill of sale

made by the marshal of this court to Moss & Moss and dated the 18th day of April, 1910, conveying the steam tug John Twohy, Jr., to the said Moss & Moss, be, and the same is hereby, set aside; and it further appearing that on the 8th day of June, A. D. 1910, the said Moss & Moss conveyed the said steam tug John Twohy, Jr., to McAllister Bros., for and in consideration of the sum of fourteen thousand dollars (\$14,000.00), it is adjudged, ordered, and decreed that Walter B. Gwyn, trustee, be, and he is hereby, directed to proceed against the said McAllister Bros., or the said tugboat John Twohy, Jr., by appropriate proceedings to recover the said tugboat John Twohy, Jr., with all profits earned by the said McAllister Bros., from the time of the conveyance of the said steam tug to them. And the question of the liability of the said Moss & Moss for rents and profits of the said tugboat is reserved until the result of the litigation by the trustee to recover the said tugboat, together with the question of their liability to refund the amount realized from the sale of said tugboat, in case proceedings for the recovery of said tug are unsuccessful."

First. It goes without saying that pursuant to the decree of the Circuit Court of Appeals the first deed executed by the marshal should be set aside, and a decree to that end will be entered. By that decision, it was determined that a private sale of a vessel seized in an admiralty proceeding could not be legally made, although two efforts to dispose of the same at public auction had proved ineffective. While it is believed that this is the first decision to that effect that can be found, still it is now the law in this circuit, and it is no less the duty than it is the pleasure of this court to respect and carry out the same.

Second. The question then to be determined is, What action should be had upon the decree asked for in the light of the mandate of the appellate court, which, after directing the setting aside of the deed as aforesaid, required this court "to proceed with the cause as may be proper, as its condition will then suggest and demand, and as the respective interests of the parties may require, in accordance with the opinion of this court herein." The Lambert's Point Towboat Company urges that Walter B. Gwyn, trustee, to whom the tug was conveyed in these limited liability proceedings, be directed to proceed against the said McAllister Bros., or the tugboat John Twohy, Jr., by appropriate proceedings to recover said boat with the profits earned by said McAllister Bros. from the time of the transfer of the steamboat to them, and it is as to the propriety of this request that the court has to determine; it being admitted that said McAllister Bros. reside without, and the tugboat is not within the jurisdiction of this court.

We must first ascertain the legal status of McAllister Bros., as the purchasers of this boat; the Lambert's Point Towboat Company having prosecuted its appeal, which resulted in the reversal of the decree of sale under which their vendors bought, without executing a supersedeas bond, and said McAllister Bros having purchased before receiving notice of the appeal. If under the circumstances, they acquired good title to the boat, that would end further controversy in this case, so far as the vessel's ownership is concerned.

[1] In the view of the court, there can be no doubt as to what their status is, and that they are the bona fide holders for value of

the boat itself, having acquired the same through purchasers at a judicial sale, under decree of a court of competent jurisdiction, with proper parties and subject-matter before it, and, having paid for and received title to the property, they cannot be disturbed or molested in the ownership thereof. Unless this is true, judicial sales would come to an end, as nothing is better settled than that the reversal of a decree of a court of competent jurisdiction will not operate to affect the title to property sold under such decree, if the court making sale had before it the necessary parties and the proper subject-matter in litigation.

In *Gray v. Brignardello*, 1 Wall. 627, 634, 17 L. Ed. 692, it is said:

"It is a well-settled principle of law that the decree or judgment of a court which has jurisdiction of the person and subject-matter is binding until reversed, and cannot be collaterally attacked. The court may have mistaken the law or misjudged the facts, but its adjudication, when made, concludes all the world until set aside by the proper appellate tribunal. And, although the judgment or decree may be reversed, yet all rights acquired at a judicial sale while the decree or judgment were in full force, and which they authorized, will be protected. It is sufficient for the buyer to know that the court had jurisdiction and exercised it, and that the order, on the faith of which he purchased, was made and authorized the sale. With the errors of the court he has no concern. These principles have so often received the sanction of this court that it would not have been deemed necessary again to reaffirm them, had not the extent of the doctrine been questioned at the bar."

The doctrine here announced is well recognized throughout the country as the rule applicable to judicial sales; and in no state stronger than in this state, and certainly in the states of Maryland, West Virginia, and North Carolina. *Zirkle v. McCue et al.*, 26 Grat. (Va.) 517, 527; *Ward et al. v. Hollins et al.*, 14 Md. 158; *Hughes v. Hamilton et al.*, 19 W. Va. 366, 397, and cases cited; *Hull v. Hull*, 26 W. Va. 30, and cases cited; *Sutton v. Schonwald*, 86 N. C. 198, 203, 41 Am. Rep. 455; *England v. Garner*, 90 N. C. 197, 201.

The decision of the Supreme Court in *Gray v. Brignardello*, 1 Wall. 627, 17 L. Ed. 692, supra, is followed by that court in as late a decision as *Davis v. Gaines*, 104 U. S. 386, 391, 26 L. Ed. 757, in which the former was cited and fully approved. This doctrine also has the support of approved text-writers; *Rorer on Judicial Sales*, p. 138, saying:

"The title acquired at a decretal sale of land made by the court in the exercise of competent jurisdiction is not rendered invalid by the reversal of the decree for mere irregularity or errors. This, too, although the purchaser was a party to the suit in which the decree was made. Nor, if notice be given to the purchaser at the time of the sale, and before he purchased, that an effort would be made to reverse the decree."

[2] The Lambert's Point Towboat Company, apparently seeing the force of the cases cited, seek to avoid the same, and ask the court to authorize the institution of a collateral proceeding to set aside a sale to an innocent purchaser whose vendor acquired title under the decree of this court by attempting to show that said vendors were parties to the proceeding, and not entitled to the protection due an ordinary purchaser buying property sold under judicial proceedings; and in support of their contention cite several authorities, relying

especially upon the case of *Marks v. Cowles*, 61 Ala. 299. It may be seriously doubted, assuming an exception of the character made to exist at all, and which has for its support a very considerable weight of authority, whether the same applies to sales had in proceedings in rem, notably in admiralty cases, where prompt and effective disposition of the res is absolutely essential, to the maintenance of the jurisdiction itself. And, moreover, it would seem clear that, if such an exception exists as to sales to parties, it does not mean mere quasi parties, who become such merely because they purchase at the sale. It refers to regular parties to the litigation, who have an interest in and claim to the thing—i. e., land—sought to be sold, or in litigation. Perhaps, with some reason, as between them, it might be contended that a supersedeas need not be given, as one could be said to acquire no rights against the other by bidding at an erroneously ordered sale, and that they and persons taking under them would necessarily have notice of the infirmity in their title. But this has no application to a case where an outsider, as for instance, *Moss & Moss*, in this case, bids on property, and acquires it, and subsequently makes sale of it to another purchaser. To apply that doctrine in the latter case would be an absolute suspension of all judicial sales. If either the libellant or respondent could suspend a judicial sale of a ship by raising the question of inadequacy of price, and appeal without supersedeas, as was done here, what would become of the property? It would be in the possession of the court. No purchaser would take it, and no sale could be made of it, because of a mere desire of one party to receive a greater price. An owner, in debt, if this be the law, would have his creditor absolutely at his mercy, and prompt and effective methods of realization by judicial proceedings in admiralty would be at an end, indeed, the effort to dispose of such property would quickly become a farce. That the doctrine contended for by the towboat company has application only to cases where the purchaser at the sale is one of the parties to the litigation, and the owner of, or having an interest in, the land or other tangible property involved, is apparent even under the Alabama decisions. *McDonald v. Mobile Life Insurance Co.*, 65 Ala. 358, 362, a case later than that cited in support of the doctrine. The case of *Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 959, much relied upon by the towboat company, shows the same thing. See, especially, paragraph 9 of syllabus, and pages 355, 364, 373, and 374, of 18 Wall. (21 L. Ed. 959). The plaintiff in that case through his attorney purchased the property at the sale, and the Supreme Court first holding that the court making the decree of sale was without jurisdiction, and hence that the sale was invalid, further decided that such attorney having knowledge of the lack of jurisdiction, stood in the position of his client, and could not maintain title to the property because of such jurisdictional defects in the proceedings. The court, moreover, stated that under the laws of California a different rule prevailed between a purchase by strangers to the record and parties thereto, and that the Supreme Court of the United States in a case from California would follow the decisions of that state. This view taken by the court of the effect of a reversal of the decree authorizing a judicial sale upon a sale

made thereunder in the interim is supported almost by an unbroken line of authorities. Among cases of interest may be mentioned *Wilson v. Hoffman* (Chancery Court of New Jersey) 50 Atl. 592; *Newbold v. Schlens et al.* (Court of Appeals, Maryland) 66 Md. 585, 9 Atl. 849, 851; *Benson v. Yellott et al.*, 76 Md. 159, 24 Atl. 451; *Henninger v. Heald* (N. J. Ch.) 52 N. J. Eq. 431, 29 Atl. 190, especially subdivisions 8 and 9, opinion page 193; *Stewart v. Hoskins* (Court of Appeals, Kentucky) 3 S. W. 128. In this last case a party purchased in the absence of a supersedeas bond, and even as to him the sale was held valid. The cases of *Lenderking v. Rosenthal*, 63 Md. 28, and *Garritee v. Popplein*, 73 Md. 322, 20 Atl. 1070, will also be found to discuss sales made in the absence of appeal bonds. See, also, *Century Digest*, 131, § 108, where cases generally will be found cited.

[3] Third. If the court is correct in this view as to the rights of these purchasers, it is conclusive of the relief asked now against them; but, assuming otherwise, should the court grant the same by ordering the institution of suit against McAllister Brothers to recover the tug John Twohy, Jr., with all the profits earned by said McAllister Bros from the time of the conveyance of said steamboat to them, in the light of the direction to this court from the appellate court "to proceed with the cause as may be proper, as its condition would then suggest and demand, and as the respective interests of the parties may require, in accordance with the opinion of the court herein," under the facts and circumstances of this case?

The original proposition before the court by the maker of the present motion made some 10 months ago was to sell the tugboat Twohy, because expensive to keep, and greatly deteriorating in value. A sale was had to the mover of the motion for \$10,000. Subsequently, on motion of the government, which was largely to be affected by a sale at that price, it was set aside over the protest of the Lambert's Point Towboat Company; the latter insisting that the boat was not worth over \$10,000. A second sale was had. The marshal announced that he would not take less than \$10,000 for the boat, which amount, as stated in the petition for appeal in the record, the Lambert's Point Towboat Company was unwilling to bid under the then changed conditions, but it did make an offer of \$5,000 to stand 48 hours. Later a private offer of \$11,000 was made to the marshal by Messrs. Moss & Moss, and, after exhausting every effort to procure more from the Lambert's Point Towboat Company, the Moss offer was accepted, the bill of sale to the boat given by the marshal, and the amount paid into court, where it has since remained. Subsequently the boat was sold by them for \$14,000, and that amount is likewise held in the National Bank of Commerce by agreement of the parties to await the outcome of the litigation. The government earnestly opposes the motion to institute the suit in question, and urges that the \$11,000 be accepted, and the transaction closed. Now, ought the court under these conditions, over the protest of the government, the real party to be affected, and at the instance of the Lambert's Point Towboat Company, which has brought about all the confusion and trouble by at-

tempting in a litigation affecting the sale of perishable property to appeal, without giving a supersedeas bond, to now start out on a long, expensive, and, in the opinion of the court, fruitless, errand of recovering this property in a foreign court, with damages for the detention? It seems clear that it should not for many reasons, among them: (A) That the court believes no recovery under the law can be had. (B) That no court with the two sums of money afore mentioned held, namely, \$25,000, would, as against the purchasers, or Moss & Moss, award any damages for the use and occupation of, or detention of, the boat, when the purchasers had paid down \$14,000, the same being \$4,000 more than the Lambert's Point Towboat Company said the boat was worth, and tried to acquire it for nearly a year ago. (C) Assuming that the boat at the end of the necessary litigation was recovered, the costs incident to such litigation would necessarily be very heavy, and in the result no real benefit would likely accrue to the fund. (D) That taking into account the hazards and delays incident to a lawsuit, and the probable and indeed almost inevitable deterioration in value of the boat pending such controversy, it would seem unbusinesslike in the extreme to embark upon the same, having regard to the court's experience in disposing of old vessel property generally, and this boat in particular, which the testimony of the Lambert's Point Towboat Company showed to have been constructed not of the most modern and substantial machinery, much of the same being secondhand, and some of it very old. (E) Sight should not be lost of the fact that the government, the chief party in interest, was satisfied with the sale to Moss & Moss, and at any new sale of the boat, should it be recovered, would find itself unable to contest with the Lambert's Point Towboat Company for the purchase thereof, and in all probability it might in that way be relegated from its present sale of \$11,000, back to the last offer of the towboat company of \$5,000. (F) That the court is without means to prosecute such a litigation, as it could not use the funds arising from the sale sought to be overthrown for such purpose, assuming the \$11,000 should be held at all, if the litigation to recover the vessel back is to be embarked upon as requested.

For these and other reasons the court feels that it should decline to grant the request made of it, to direct the trustee to institute the litigation to recover this boat back; and it is further convinced that it is not among the probabilities, admitting the success of such litigation, that it would ever be enabled to realize in the future as much as \$11,000 for the property, and a decree may be entered so declining.

This case was heard at great length on Wednesday, the 23d day of November, 1910, and, after a full and most interesting and elaborate argument, submitted to the court, as hereinbefore recited. Subsequently, late in the evening of Friday, November 25th, counsel for the Lambert's Point Towboat Company presented to the court a brief, or written argument, a new decree, along with a letter addressed to the judge by the Lambert's Point Towboat Company, a copy of which is embodied in and made a part of the new decree as

offered, and also a letter from counsel of the company, accompanying the same. While none of these last-named papers should have been presented, particularly the letter written by the towboat company to the judge, and embodied in and made a part of a proposed pleading in the cause, still, for the purpose of determining this case on its merits, the court will give consideration to the two suggestions made: First. That should the court see fit to enter a decree authorizing the trustee to demand possession of the tug, and to sue for its recovery, with damages for its detention, that the Lambert's Point Towboat Company would pay the necessary cost and expenses of the litigation, to be finally refunded out of the fund at the disposal of the court in the limited liability proceeding. Second. That if as a result of the proceedings the boat was restored to the court, and subsequently offered for sale at public auction under the decree of this court, that the Lambert's Point Towboat Company would agree to start the sale with a bid of \$10,000, and would file a formal stipulation or bond to that end. The "agreement to make this bid, however, is of course, conditioned on the idea that the boat at the time she is offered for sale is in as substantial and good a condition as she was on the 7th of April, 1910, the date of the last public auction sale." These two belated suggestions thus made to the court cannot, and should not, be accepted by it for the purpose of altering the conclusions hereinbefore announced. As to the first one, namely, that one of the parties litigant, the Lambert's Point Towboat Company, would advance to the court money upon the condition that it should be thereafter refunded to it out of the fund, instead of the court taking it out itself, would be an unnecessary circumlocution, as the court could as well take it out of the fund in the start, and thereby avoid being placed under obligation to a party litigant. The weakness of the second proposal, and the folly of the court's accepting and acting upon it, is manifest. The offer to bid \$10,000 at another sale is made conditional upon the property at the end of a lawsuit, which would reasonably take a year at least, being worth then as much as it was worth some nine months ago. Now, who would determine this, and besides, in the nature of things, we know in advance that there would necessarily be depreciation, especially of property that the court, nearly a year ago, at the instance of the same company, ordered to be sold because the same was then greatly deteriorating in value. Start the sale, however, at \$10,000, the fund would be minus \$1,000, plus the cost of the new litigation, which would in all probability be another \$1,000.

THE IOLA.

(District Court, S. D. Georgia, E. D. September 22, 1911.)

1. SHIPPING (§ 56*)—CHARTER PARTY—CONSTRUCTION.

Where a charter party hiring a small tug and barges for inland harbor improvement work provided that the property was hired to be used by an engineering company for engineering and construction work in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the harbors of M. and B., and such other places on the Atlantic or Gulf Coast as the charter party might desire, contained no stipulation for deep sea towage, and did not authorize an assignment to another for any purpose, the charterer had no authority to let the tug to another to tow a loaded car float from Norfolk to Savannah.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 56.*]

2. MARITIME LIENS (§ 65*)—HARBOR IMPROVEMENT WORK—COAL FURNISHED TO TUG AND IMPROVEMENT BARGES.

Coal furnished by libelant for a tug and barges chartered by an engineering company to perform certain harbor improvement work *held* to have been furnished on the credit of the engineering company, and not of the tug, so that the latter was not subject to a libel therefor.

[Ed. Note.—For other cases, see Maritime Liens, Dec. Dig. § 65.*]

3. MARITIME LIENS (§ 25*)—SUPPLIES.

Supplies furnished to a tug on the captain's orders while in a harbor and at her legitimate work under a charter party, the terms of which were not known either to the captain or the merchants, were furnished on the credit of the tug for which it was liable, as provided by Act June 23, 1910, c. 373, 36 Stat. 604.

[Ed. Note.—For other cases, see Maritime Liens, Dec. Dig. § 25.*]

In Admiralty. Libel against the steam tug Iola. Dismissed in part. Lawton & Cunningham, for libelant. John Rourke, Jr., and Garrard & Gazan, for claimant.

SPEER, District Judge. The substantial controversy which must be determined may be seen from the statement following:

The Blackstaff Engineering Company, a corporation with its principal office in Philadelphia, made a contract with the government for the construction of jetties in the St. Johns river near Mayport and Jacksonville, Fla., and near Brunswick, Ga. In this work the Blackstaff Company required a tug and a flotilla of barges and water carrying vessels. It secured by contract, or charter party, made with the owners of the tug Iola, four barges and two water carrying vessels. The owners were of Mobile, Ala., and were represented by Lee Kimball, their agent. The libelant, the Standard Fuel Supply Company, a Georgia corporation with its principal place of business at Savannah, furnished a quantity of coal upon contract with the Blackstaff Company for the use of the tug Iola, and made certain advances for food, provisions, repairs, and other supplies. The coal bill amounted to \$521.41, advances for food, repairs, and other supplies to \$123.71; and at the request of the Blackstaff Company the libelants paid in cash certain drafts of Kay & Doggett, attorneys of Jacksonville, Fla. These were made for the purpose of paying the amount claimed on a libel against the Iola, and certain expenses and attorney's fees connected with that libel. This sum amounted to \$285.87. The total amount claimed by libelant is \$1,113.54.

The greater portion of the evidence is documentary, and, as there was little ambiguity about this, the cause might have been determined upon construction of this evidence, but for the very copious and valuable briefs of the respective proctors, and the immovable opposition

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of these gentlemen upon every remaining question involved. It was therefore deemed proper to take the case under advisement.

[1] A prime consideration is the construction of the charter party. This is in evidence, and was dated July 26, 1909. It is material to perceive that the charterer, namely, the Blackstaff Company, agrees that it will not suffer any liens to attach to the property thus leased; that it will not permit any indebtedness whatever that might constitute a lien on the property to run or accrue against it, except those indebtednesses which are incurred incident to the ordinary expense of the operation of said floating property; that such operating expenses shall be settled promptly at the end of each month, and a statement thereof furnished to the lessor; that said floating property is hired by the Blackstaff Engineering Company to be used by it in the engineering and construction work in the harbors of Mayport and Brunswick, and such other places on the Atlantic or Gulf Coast as said company might desire; that the property is to be returned to the lessor on August 2, 1910, at Mobile, Ala., in the same good order and condition as when turned over to the charterer, reasonable wear and tear excepted. The charterer, the Blackstaff Company, gave bond in the sum of \$25, with the Fidelity & Deposit Company of Maryland as surety, for the faithful performance of this contract. The bond is also in evidence. It is most material to bear in mind that the tug, which was new and of moderate power, was chartered for construction, engineering, and harbor work in inland waters. It contains no stipulation for deep sea towage, and none for assignment to another for any purpose. This conclusively appears from the second clause of section 6 of the charter party:

"It is expressly understood and agreed, however, that it is within the contemplation of the parties hereto that said floating property is hired by said second party to be used by it in the engineering and construction work in the harbors at Mayport and Brunswick, and such other places on the Atlantic or Gulf Coast as the second party may desire."

It is to be observed that, so far as they might do, the owners sought by the charter party to protect themselves from misadventure, failure of contract, or other failure on the part of the Blackstaff Company. It seems clear that there was no privity between the owners of the Iola and the libelants, the Standard Fuel Supply Company. It seems equally clear that the libelants made all of its contracts in the main not with the Iola, but with the Blackstaff Engineering Company. The first material communication on the subject shows this to be true, and also clearly indicates a distinct knowledge on the part of the libelants of the character of the work in which the tug was engaged. This letter is dated June 5, 1909, and is addressed to the Blackstaff Engineering Company, 1332 Walnut street, Philadelphia, Pa. It is evident that the supply company did not have the Iola in mind, for this was more than six weeks before the Blackstaff Company had chartered the Iola. The letter is as follows:

"Gentlemen: We understand you have recently secured a contract for concrete work, and, as we are in a position to furnish you the necessary material at a very attractive figure, we will appreciate your calling on us for prices,

advising approximately how much gravel and sand you may need, and point of delivery.

"Thanking you in advance for an inquiry,

"Very truly yours,

Standard Fuel Supply Co."

On June 9, 1909, the Blackstaff Company replies from Philadelphia as follows:

"Gentlemen: Replying to your communication of June 5th, we have to state that the contract to which you refer does not include any concrete work, and we do not, therefore, expect to be in the market for sand and gravel."

On June 14th libelant wrote again from Savannah to the Blackstaff Engineering Company at Philadelphia:

"Gentlemen: We have your favor of the 9th instant, and in reply beg to state that we are operating a coal yard at Mayport, Fla., just alongside of where you will be doing your jetty work, and we will be glad indeed if you will let us furnish you with what steam coal you may need for this work. We have a regular agent at Mayport, and if we can be of any service to you while you are doing this work, we will be glad to have you communicate with us."

To this letter Blackstaff replies on June 19th, informing the supply company that their representative expects to be in Jacksonville within a few days, and will call to see them. All of this was anterior to the charter party, and to the appearance of the Iola in the Florida and Georgia waters.

The next letter in evidence is from the Jacksonville office of the Blackstaff Company, and is addressed to libelant at Savannah. It is dated October 23d, and reads:

"On September 13th our tug Iola took from your dock at Jacksonville 28100 # of steam coal trimmed in bunkers, and your Mr. Jewett advised that the price would be \$3.75 per net ton. Up to the present writing we have never received a bill for this coal, although we have spoken to Mr. Jewett several times concerning same. Please mail bill to the Jacksonville office as soon as possible, and also advise what rate per ton you will charge for coal if taken at Mayport by our tug and derrick barges. Your prompt reply will be appreciated."

To this letter libelant replied as follows on October 25th:

"Gentlemen: We have your favor of the 23rd instant, and in reply to same beg to hand you herewith invoice for coal delivered to you September 13th at Jacksonville. Whenever you want invoices, or don't get invoices, or want any information about the business, simply drop us a line to this office. Our agents have instructions to pay no attention whatsoever to anything concerning the home office. We will be pleased to furnish you whatever coal you may desire at Mayport at \$4.15 per net ton f. o. b. your derrick, barge, or tug. This proposition is made with the understanding that you are to take your entire supply that you will require at Mayport from us, either at Mayport or Jacksonville.

"Thanking you for this business, we remain,

"Very truly yours,

Standard Fuel Supply Co."

Now, it seems very clear from this evidence that in the effort to get this "business" the libelants extended no credit whatever upon any maritime lien against the Iola. The contract was made and the coal delivered on the credit of the Blackstaff Company. The agreement was to furnish coal, not only to the Iola, but to the derricks and barges.

From this time until July, 1910, libelant furnished coal regularly to the Blackstaff Company. A number of letters are in evidence, written by Blackstaff and the Standard Fuel Supply Company, relative to the payment of the monthly accounts for coal, and to disputes as to the price. A great number of bills in favor of libelant were rendered, and all made against the Blackstaff Engineering Company. It is true that on some of these statements the words "Tug Iola" are written. This, however, was evidently to indicate where the coal was delivered. The canceled checks and vouchers in evidence show the payment of these bills by the Blackstaff Engineering Company, and up to this time nothing whatever is paid by the Iola. It is also clearly inferable from the testimony of the master that he at no time purchased coal on account of the tug. He would receive orders from the engineering company, to repair to the coal docks of the supply company, and take on the needed coal. But this was on account of the Blackstaff Company, and not on account of the tug.

It gradually appears that the Blackstaff Company was not fortunate with its ventures, and failed to pay libelants for the coal furnished during the months of May and June, 1910. This amounted to \$379.80, and appears from the bill of particulars attached to the libel. The supply company now began to cast about in an effort to recoup this loss. It was fully apprised by this time as to the work for which the Iola was chartered, namely, in engineering work and construction of jetties at the points named in Florida and Georgia. It is true that the Iola might go elsewhere, but the most casual inquiry would have disclosed that its owner had chartered it for engineering and construction work only. The Iola was a comparatively small tug. The supply company, however, deemed it advisable to utilize such powers as the Iola possessed in a serious work not connected with the government service to which the charter related. It appears that this was taken up first by an indefinite letter, and then by personal interviews or by conversations over the telephone. The letter is as follows:

"Savannah, Ga. July 19, 1910.

"Blackstaff Engineering Co., Mr. W. Stevens Harding, Jacksonville, Fla.

"Gentlemen: Since speaking to you this morning, something has transpired which I believe will enable me to have the 'Iola' do the towing of our barge 'Canton', and we will let you know something definite to-morrow.

"Very truly yours,

Standard Fuel Supply Co."

What it is that "transpired" is not disclosed, but its effect upon Mr. W. Stevens Harding, the representative of the Blackstaff Company, is indicated by his reply of the 21st:

"Gentlemen: Your favor of the 19th inst., just received on first mail this morning. The writer is holding the 'Iola' subject to your order, and am very glad to be of service to you, and at the same time make settlement with you, our Home Company apparently has no regard for agreements and I am anxious to show my loyalty to you as well as to my company.

"Awaiting your earliest instructions,

"Very truly yours,

W. Stevens Harding."

There may be some dubiety with the uninformed in interpreting the word "loyalty" as used in this connection. It is made plain, however, by the next letter that it imports "righteousness." This letter also suf-

ficiently expresses the result of the negotiations between the defaulting Blackstaff Company and the Standard Fuel Supply Company as to the fate of the Iola. It is written at Savannah, July 22, 1910, and is addressed to the "Blackstaff Engineering Co., Mr. W. Stevens Harding, Mgr., Jacksonville, Fla.":

"Gentlemen: We have your favor of the 21st inst., contents noted with care, and we more than appreciate the exact position that you at present occupy, and we think your views are precisely in order, and we never fail to recognize a high standard of righteousness."

After these lofty sentiments, the supply company continues:

"We now beg to confirm phone conversation with you this morning wherein we agreed to give you the towing of our car float 'Canton' at price arranged a few days ago, (\$825.00), and we agreed to furnish a new hawser for this job, and this new hawser will be delivered to the tug Iola at Norfolk. It is understood that we are to pay you \$825, on delivery of this car float at Savannah, and at the same time you are to pay us the amount of the Blackstaff Engineering Co.'s indebtedness to us. It is understood that you will have the tug Iola coal this afternoon, and we have instructed our agent to coal you up. In case your tug requires any coal at Norfolk we will be pleased to furnish you same, and you can instruct your captain to call on the Maryland Coal & Coke Co., Warricks Hotel Annex at Newport News, and you will be furnished whatever coal your tug requires at the regular market price.

"We are sending this letter to you by special delivery mail, and ask that you acknowledge receipt of same and confirm contents by return mail, mailing your letter to us to-night so that it will leave on the train leaving your city this evening, and we ask that you be kind enough to put a special delivery stamp on same, so that it will reach us early to-morrow morning.

"It is understood that you will not be required to furnish any bond, as we have succeeded in covering the insurance on this barge, to be towed by tug Iola.

"Very truly yours,

Standard Fuel Supply Co.

"It is understood if you fail to deliver our barge at Savannah we are not to be called upon for any compensation."

The surprising expedition, noted by the special delivery letter et cetera, is not without its significance; but it does not appear that the owners of the Iola were apprised of this important and onerous change in the voyage or ventures of the little tug. It is now plain that the values and powers of the Iola were to be used, not in the construction and engineering work for which it was chartered, but were to be utilized to pay a debt of the Blackstaff Engineering Company to the Standard Fuel Supply Company. This was clearly dehors the contract between the Iola and the Blackstaff people. Their contract charged the Blackstaff Company with knowledge of this unwarrantable use. Not less clearly did the supply company know that the proposed towage of the huge car float from Norfolk to Savannah was unwarrantable and an unauthorized use of the tug. Neither, however, hesitated on this account. Replying to Salas, president, on the same days as the last letter, the Blackstaff Company writes:

"Dear Sir: In answer to your esteemed favor of even date, I beg to say that the tug Iola will leave here about ten o'clock to-night, and will go right to Savannah, where Capt. Pinner will report to you for instructions.

"It is understood that the tug Iola is to tow a car float 'Canton' from Norfolk, Va., to Savannah, Ga., for \$825.00, you to furnish a new hawser, sufficiently large to handle the barge and tow her safely.

"Your claim against Blackstaff Engineering Company is to be settled out of this tow money.

"The amount advanced by Mr. W. E. Kay to-day the writer will acknowledge just as soon as he ascertains the exact amount.

"Thanking you most kindly for the courtesies and confidence you have placed in me.

"Very truly yours, Blackstaff Eng. Co., Jacksonville Office,
"Per W. Stevens Harding, Local Manager."

It otherwise appears from the evidence that in order to enable the Iola to proceed northward upon this voyage, to which we will presently advert, it became necessary to pay off a certain libel by which the tug had been seized in Jacksonville. Mr. Salas, president of the libellant company, in his direct testimony, on page 35, states that the tug Iola was tied up in Jacksonville, and could not go on the trip to Norfolk that she had been chartered to him to take, and that she was tied up on the Barker & Cardy libel, "so the agent of the Blackstaff people, Mr. Harding, asked that the libel be dissolved so that the vessel could be free," and consequently he paid the amount. Mr. Harding, the agent of the Blackstaff Company, states that he had no money to pay off the Barker & Cardy libel. Here Messrs. Kay & Doggett generously appear. Of this sum \$50 was paid to Mr. Kay for his professional services in this behalf exerted. It further appears from the testimony of Mr. Salas that after remunerating Messrs. Kay & Doggett \$73.50 from the proceeds of their sight draft was for money to pay laborers at Mayport. This does not appear to be an expense incurred by the tug for which the owners are responsible. It further appears that of the remainder \$20 was for provisions. This moderate amount was to victual the tug on her voyage from Jacksonville via Savannah to Norfolk. It does not appear that Capt. Pinner, the master of the Iola, was considered or consulted in the supplies stored or brought aboard for the voyage. The money was not paid to him. President Salas testifies as follows:

"Q. Now, Mr. Salas, you say that \$20 was for provisions on the trip to Norfolk? A. Yes, sir.

"Q. And who was the money advanced to? A. W. Stevens Harding.

"Q. Who was W. Stevens Harding? A. He was manager of the Blackstaff Engineering Company and the tug Iola."

That he may make it indubitable that he was in no sense responsible for Pinner, Mr. Salas further testifies:

"Q. What did you have to do with Capt. Pinner of the tug Iola? A. I had nothing to do with him. He was sent to Savannah with his tug to proceed to Norfolk for the barge Canton, and I told him to report there to Mr. Duggan, who would deliver the barge to him."

It follows that, if Mr. Salas had nothing to do with Capt. Pinner, Capt. Pinner and the tug Iola, which he commanded, had nothing to do with Mr. Salas. This is confirmatory of what has been previously stated that the entire transaction was between the Blackstaff Company and the Standard Fuel Supply Company.

[2] It also follows that the owners of the Iola are in no sense responsible for any costs of this voyage. The charterer of the tug and

its suppositious creditor had as little right to dispatch Capt. Pinner to Norfolk after the car float Canton as to send him to the South Seas for the buried doubloons and pieces of eight on the Treasure Island of Stevenson, or after the golden fleece coveted by the Argonauts of old. It follows that whatever indebtedness may exist inter sese between the Blackstaff Company and the supply company, or others aiding them in this expedition of the Iola, so clearly beyond the charter party, a court of admiralty will neither subject the vessel therefor, nor, indeed, hear or give any relief to the parties who were thus taking unwarrantable advantage of the Iola's owners, and subject their vessel in a manner not to be justified to settle a debt for which the owner was in no sense liable, and the vessel itself to the gravest danger.

From the testimony of Capt. Avery, for the libellant, it appears that the Iola was about 80 feet in length, 21 feet beam, and 8 or 9 feet depth of hold. Her engines would have developed about 250 horse power. He thinks she was about 70 tons. He saw the car float Canton. The car float was 335 feet long, over all, about 40-foot beam, 12 to 14 feet depth of hold, and she was about 1,200 tons register. It was quite proper, therefore, with a tow so large, and with a tug of such small capacity, that the agent of the insurance company, coming aboard at Norfolk, positively refused to permit this scheme between the Blackstaff Company and the libellants to be carried out. Capt. Avery himself testifies that the tug could have been brought from Norfolk around Cape Hatteras under the most favorable conditions only, when perfectly smooth and calm, with no headwinds. He adds:

"I would not have thought of sending that kind of a vessel on that trip. If I was the owner of the barge, I wouldn't let the tug take her, and, if I was the owner of the tug, I wouldn't send her."

He also testified that at the time of the proposed towage it was the very worst part of the year, the hurricane season. To the same effect is the testimony of another experienced witness, Capt. Edward B. Fitzgerald.

Interventions of J. Croissant and T. H. Sompayrac.

[3] As to the interventions for the provisions and supplies furnished the Iola while in the harbor and at her legitimate work by J. Croissant and T. H. Sompayrac, the evidence seems to justify a decree of liability against the tug. These supplies were furnished on the captain's orders and he knew nothing about the terms of the charter party, nor does it seem that these merchants were put upon inquiry. The liability of the tug as to all such articles furnished after the act of Congress approved June 23, 1910 (Act June 23, 1910, c. 373, 36 Stat. 604), seems beyond question.

Intervention of W. W. Pinner, Captain.

As to the lien claimed by Capt. Pinner for the wages set forth in his intervention, it is insisted in the briefs of opposing proctors, with great earnestness, that the ancient authorities denying such lien and the more modern rulings are in conflict. The authorities cited in the

briefs have not been furnished to the court, and are not now accessible. The right of the captain to his wage or salary will be heard, and, if possible, determined, at the approaching session of the court in Savannah.

With this reservation, a decree may be framed in accordance with these rulings.

THE LITTLE SILVER.

(District Court, D. New Jersey. August 24, 1911.)

1. COLLISION (§ 66*)—VESSELS CROSSING—FAULT.

A steamer *held*, under the evidence, solely in fault for collision with a tow, alongside a tug, whose course she undertook to cross.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 66.*]

2. DAMAGES (§ 33*)—INJURY TO PERSON.

A woman injured in a collision while a passenger on the vessel in fault is not deprived of the right to full recovery of damages because her physical condition made her injuries more painful, or renders her less capable of a prompt recovery.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 42; Dec. Dig. § 33.*]

3. DAMAGES (§ 33*)—INJURY TO PERSON—PHYSICAL SUFFERING—EVIDENCE.

In an action for a personal injury, while no damages are to be allowed for pains except those due to the injuries received, pains clearly shown to be such as would naturally come from the injuries received and the shock resultant therefrom are not to be excluded from consideration, or unduly minimized, merely because they are also symptomatic of physical conditions which the injured person is then undergoing.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 42; Dec. Dig. § 33.*]

4. DAMAGES (§ 132*)—MEASURE—PERSONAL INJURIES.

A married woman who received serious and painful injuries in a collision, due to the fault of the steamer on which she was a passenger, which were to some extent probably permanent, and from which she continued to suffer two years after they were received, *held* entitled to recover \$4,000 damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385; Dec. Dig. § 132.*]

5. DAMAGES (§ 95*)—PERSONAL INJURIES TO WIFE—ACTION BY HUSBAND.

A husband, whose wife was injured in a collision due to the fault of the vessel on which she was a passenger, is entitled to be reimbursed for his expenditures in taking care of his wife and seeking to effect a cure; also compensation for being deprived of the aid, comfort, and society of his wife, and such future deprivation and expenses as may be reasonably expected.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 222-229; Dec. Dig. § 95.*]

In Admiralty. Petition of the New York & Long Branch Steamboat Company, charterers of the steamboat *Little Silver*, for limitation of liability. On claims for damages resulting from collision by *Borrea Johnson* and *Hans Johnson*. Damages awarded.

McDermott & Enright, for libellant.

Eberhard & Stites, for claimants.

RELLSTAB, District Judge. In response to the monition issued in this suit Borrea Johnson and Hans Johnson have answered the libel and claim damages for injuries sustained as a result of the collision of the steamboat Little Silver with a car float in charge of the steamtug Slatington. Mrs. Johnson claims \$25,000, and Hans Johnson claims \$10,000.

[1] On the 19th of October, 1909, Borrea Johnson was a passenger on the Little Silver on her trip from New York to Long Branch, N. J. About 3:12 p. m. the Little Silver left her Battery dock, on an ebb tide, with her course south southwest; and about 3:30 ran into the starboard float in charge of the steamtug Slatington. The day was clear, and there was no obstruction to the view from the Little Silver. The Slatington was between two car floats hooked near their sterns. The latter, extending astern of her, had just come out of the East River, and was making across the Little Silver's course, substantially at right angles thereto, making for Communipaw, on the New Jersey shore. While in the East River opposite Wall street, she had passed the tug Pliny Fiske with a hawser tow, and was gradually increasing the distance between them. The Little Silver, with the purpose of getting astern of the Slatington, signaled the Fiske of her intention to cross her bow, to which the Fiske responded in acquiescence. The Fiske thereupon slowed down and ported her helm, thus carrying her further to the starboard and away from the Slatington. The pilots of both the Fiske and the Slatington say that after the Fiske had ported her helm there was ample clearance for the Little Silver to pass between the tows. She did not make the clearance, however, but ran into the Slatington's starboard float 15 or 20 feet from its stern. The impact threw a number of passengers from their camp chairs. Borrea Johnson was thrown prostrate, striking the back of her head and her shoulder and the side of her body. She was picked up unconscious, and admittedly sustained some injuries.

Being a passenger, and injured in the manner stated, the burden is upon the libelant to show a want of negligence on the part of the Little Silver. In the petition libelant charges that the Slatington "carelessly and negligently slackened her speed" and collided with the Little Silver. This charge is not sustained by the proofs. It was, in fact, abandoned. The Little Silver's master expressly exculpated the Slatington from any negligence. The defense that the "upset" tide—that is, where the ebb tide of the East River and that of the Hudson river meet—was responsible, is not tenable. That such tide might influence the movement of the boats at the place of collision may be conceded, but that is one of the factors in navigation that is to be taken into consideration by the navigator. The fact of an "upset" tide at that place and of its probable effects on navigation because of the slack or swirling waters were well known to the Little Silver's pilot, and it was his duty to consider it as well as other things that might affect the navigation of boats in his course, and to so direct his steering and regulate his speed as to avoid collision. The Little Silver did not slacken her speed or starboard her helm, but kept straight on. The pilot did not answer the first alarm given by the Slatington, and made

no change in her speed till after the second alarm was given, when it was too late. He either grossly miscalculated, or, as is more likely, took a chance. The impact was violent. The Fiske's pilot said the Little Silver rebounded. Dr. Kavanagh, who was a passenger on the Little Silver, said she shook from stem to stern. She was beached on the New Jersey flats, her passengers and freight transferred, and subsequently put on the dry dock and repaired. The Slatington's float had two planks stove in, causing her to leak. The evidence permits of no other conclusion than that the collision was due to the careless navigation of the Little Silver.

[2] Both claimants are entitled to damages. On their behalf it is insisted that the injuries sustained by the wife were serious and permanent. Mrs. Johnson testified that she was sitting in a chair with a back, on the Little Silver, when she felt the chair going backwards; that she fell, striking the back of her head; when she awoke there was no life in her left arm; that she had terrible pains in her head, left side, and shoulder; that they had not left her, and she had them yet; that, when she got home, they helped her to undress, and she got in bed; that she was confined to her bed until the 2d of February, when she went to the hospital; that she had pains continually; that Dr. Karp put straps on her body which relieved the pain; that she was in the hospital until the 1st part of March; that before she received the injuries she was well, and had no pains in the back or side; that she had had very little trouble with her head and headaches; that she still had pains, but not as often as formerly; that before the injury she did her housework, washing, etc., assisted only by her children; that she can do very little housework now, and has to have her washing done by others; that she was weak and would faint at times, and that before the accident she never fainted; that she had been married 22 years, had nine children, six of whom are living; at the time of the injury she had a baby about two years old; that Dr. Reed had been attending her for 16 years at the birth of her children, but for no other reason, with the exception of once; that she occasionally had headaches; that Dr. Reed last attended her the Sunday before she was taken to the hospital; that he said he could do no more for her; and that she should go to the hospital.

Mr. Johnson testified that he was a carpenter by trade, and dependent upon his exertions for a living; that all through their married life and until the time of the accident his wife did all the household work, assisted only by their children, that, after the accident, she was unable to do it, and, as he had not the means to employ a nurse, he had to give up his work and give his personal attention to the care of his wife; that he stayed with her in her room nine or ten weeks; that for about six weeks he never had his clothes off day or night—part of November, December, and January; that he had to stay in the room with his wife; that she was almost out of her mind, in spells; that his regular pay was \$3 a day; that he sometimes did jobs on his own account; that he had opportunity of employment during his wife's illness, but could not accept it because he was needed at home; that he was in attendance upon his wife from the day of the collision

to the 2d day of February; that he could not keep it up any longer, and she was then sent to the hospital; that he was wore out and run down and unable to work until the last part of March; that he paid the hospital doctor, and the expenses of his wife at the hospital, the former about \$20 and the latter \$46; that he was put to the expense of \$3 or \$4 in transporting his wife to the hospital; that he paid Dr. Karp \$16; that he had paid something to Dr. Reed, but he did not say how much; and that Dr. Reed's drug bill must be around \$25; that the winter time was the busiest time for carpenters around Seabright.

Josephine Bowser, the next door but one neighbor of the Johnsons, testified to her frequently seeing Mrs. Johnson during her illness beginning with October, 1909; that she could see her every day from her own house; that she frequently ran in to see her, finding her in bed; that before the accident Mrs. Johnson did her own housework; that she never heard of her being ill before, except at the birth of her children, and that after the accident she had not seen her do any work at all; that it was at her instance that Dr. Karp was sent for; that she was called in by the children, the husband being away; and that she, being afraid Mrs. Johnson was dying, sent a young man on a bicycle for the doctor. Dr. William J. Kavanagh had his attention called to her condition immediately after the collision. He aided in restoring her to consciousness, assisted her when transferred to another boat, and gave her his attention until she arrived at Long Branch. From there she went to her home at Seabright, N. J., accompanied by her daughter, who was with her on such trip. Dr. Kavanagh said he found her very nervous, and, from a superficial examination, the only one practicable in the circumstances, found that she had a contusion on the right side of the head, and a convulsion of the muscles of the right shoulder. To him she complained of pains in the back of her head, shoulder, spine, and buttocks. He gave it as his opinion that her condition required medical treatment. No doctor, however, was called in by the Johnsons until a week after. The family physician not being found at such time, Dr. Karp of Seabright was called in. He testified that he first called on October 26th at the Johnsons' home, and found that she had sustained injuries to the chest, spine, and head; that she was very nervous and complained of headache, backache, nausea, vertigo, pains in breathing, and sleeplessness; that for the first few days she was unable to get out of bed; that her symptoms indicated that she was suffering from severe shock and nervous breakdown; that "she must have come in contact with something to have suffered the pains she had." Regarding her condition, he said:

"I didn't think it was serious. It wasn't fatal, and I didn't expect it would be fatal; but she was too sick to be about, and had to remain in bed, and should have been under treatment continuously."

He said he could not tell positively that she had any bones fractured; that "she had tenderness over the rib; but I wouldn't state positively that it was a fractured rib; it might have been a sprained rib;" that he treated her for pleurisy, and he strapped her about the body to relieve her pains. He continued calling until about the 8th

day of November, making eight visits altogether. He first called five days in succession, and then at greater intervals.

Dr. Reed, a practicing physician at Seabright, who had been the Johnson family physician for many years, said he was called in to attend Mrs. Johnson on November 11, 1909, and continued to give her treatment pretty regularly for a year; that she improved so that he did not think it was necessary to further attend her, as they were poor people, and he never went oftener than necessary. He said:

"I made a thorough examination of the woman and found she had sustained a concussion of the spine and brain. The symptoms were not as severe, they told me, as they had been. She was in a stage of incipient insanity at that time. She had delusions, and it kept two people taking care of her and constantly watching her. She couldn't walk. She rolled out of bed once, and she was suffering severe pain. She sustained a fracture of three ribs."

He also said that the ribs "had been strapped, and were practically healed, * * * but the trouble was intercostal neurasthenia: that is, inflammation of the nerves supplying the muscles of the ribs. It is the muscles between the ribs." He also said that "she still suffers from the effects of that neuritis." As to her health before she sustained such injuries, he said:

"She was in pretty good health except she had children frequently; otherwise she was able to do her housework and washing and scrubbing and ironing, and such things."

He also said that she was of a slightly nervous temperament prior to the accident, but that the accident aggravated such condition. He said that he called upon her "two or three times a day for a long while"; that he had never sent in his bill, but that he estimated it between \$150 and \$200, stating that the amount was reduced from what he would charge other people because they were poor. During the year of his attendance she was taken to the Long Branch Hospital, where she remained for about four weeks, during which time Dr. Reed did not attend her. He said her condition was improved after she left the hospital, and that the last time he attended her she had a uterine trouble, due or incident to menopause or change of life, through which she was then passing; that that "is part of her trouble now."

The libelant contends that the injuries of Mrs. Johnson were neither serious nor permanent, and that she was undergoing a change of life—menopause—at the time of the accident, and that her pains and sufferings were due to and in consequence of such condition, and not to any injuries received in such accident. Such contention is said to be sustained by the testimony of Drs. Field and Bennett, who also made an examination of Mrs. Johnson at the instance of those representing adverse interests. Dr. Field's examination was made the Saturday previous to the taking of his testimony, which would make it the 8th day of April, 1911. He made his examination at the Johnson residence in the presence of Drs. Reed and Bennett; and in answer to the question, "Tell us what you found?" he said, "There was no objective symptoms. I examined her ribs. They had been broken and

entirely healed. The woman complained of being nervous and having some pain in the back and shoulders, and that's about all. There was some irregularity in menstruation she had had for about a year." He said this "might bring about a nervous condition. It generally does." He gave his opinion that the other conditions he found were not serious, and not of a permanent character.

Dr. Bennett examined her twice. He made such examinations upon the request of an insurance company. The first time was on November 30, 1909; that no other physician was present at that time; that he came from Long Branch, his residence, with the expectation of having Dr. Reed accompany him to the Johnson residence, but, Dr. Reed being absent from Seabright, he went to the Johnson residence alone. Concerning that visit, he said:

"I did not make a thorough physical examination. She was sitting up in bed. I was admitted to her room. She had bandages on her chest. They didn't wish me to remove them in order to make an examination without their physician was present. All I could do was to take her statement."

That her pulse and temperature were normal. That she said her age was between 44 and 45. That she "complained to me of being very nervous. She complained of dizziness in the head, and of sleeplessness, insomnia and pains, and that she imagined queer things." He next saw her with Drs. Reed and Field—the occasion referred to by Dr. Field. At this time she removed her outer clothing. He said:

"We allowed her to keep on her shirt. She said she was feeling fairly well except that she was nervous, and that her greatest trouble was due to menstruation. She had them every three weeks, and they were very profuse."

Her heart and pulse were normal. He said he felt her ribs and felt no trace of a fracture; that, if it had been a very severe fracture, they would have been able to locate it. If there had been a little fracture, there would be no evidence. He gave it as his opinion that Mrs. Johnson was "undoubtedly passing through what is known as the climacteric or menopause—that is, the transition state from a woman's normal (reproductive) functions to the cessation of the same"; that from what Mrs. Johnson said such menopause had begun a year previous, or October, 1909. Asked the question "During the menopause period what symptoms do you find in women?" he answered:

"You find all sorts of symptoms, particularly you are apt to find nervous symptoms, hallucinations, dizziness, pain, fear of impending death, fear of going insane; in fact, women at that period do go insane, sometimes temporary, and sometimes it is permanent."

He also said:

"If there had been any trouble from the effects of the collision, the trouble would have developed at once, and it would have been a necessity to have a physician at once."

In response to the question asked by counsel for the claimant, "And the condition of nervousness and headaches described to you by Mrs. Johnson, could that be caused by any other reason than this you have stated?" he said:

"They could have been caused by the menopause. I cannot conceive of any other reason which would cause the condition and symptoms and the train of symptoms she described. Certainly no accident could have caused them."

The damages to be awarded are to be compensatory, not punitive. They are to be limited to those due to the injuries sustained in such collision. In the case of the wife, an allowance is to be made for her pain and suffering resulting from such injuries. If such injuries are of a permanent character, the allowance must include pain and suffering yet to be endured. The making of allowance for such affliction is always difficult and perplexing, for the reason that there can be no more a satisfactory measurement of such pain, etc., than there can be money equivalent therefor. In the present case such difficulties are more acute because Mrs. Johnson before the time of such collision had entered the menopause period, through which she was still passing when she gave her testimony, and many of her pains and sufferings are symptomatic of menopause. There is no doubt, however, that she sustained severe injuries to her head, chest, and ribs, and perhaps to her spine, and that she was confined to her bed and rendered incapable of service for a long time by reason thereof, and that most of her pains, etc., are due to such injuries. Of her pains some undoubtedly have their origin in the menopause, but these were considerably augmented by such injuries. A satisfactory differentiation in the effects of these two causes of said pains, etc., is impossible, as is also the determination whether the aggravation of the pains chargeable to menopause, will endure during the whole period of such transition, and, if so, whether they will end with it.

[2] The wife, however, is not deprived of her recovery because such differentiation is impossible. A woman, passing through the physical transition peculiar to her sex, is entitled to as safe passage as any other person, and is not barred of a full recovery for injuries sustained through another's negligence because that condition makes such injuries more painful, or renders her less capable of a prompt recovery. Upon the question of differentiation in said pains, the burden is on the wrongdoer to show what, if any, of such pains are due to causes not chargeable to his neglect.

[3] While no damages are to be allowed for pains, except those due to the injuries received, pains clearly shown to be such as would naturally come from injuries received in collision and the shock resultant therefrom are not to be excluded from consideration, or unduly minimized, merely because they are also symptomatic of physical conditions that the injured party is then undergoing. The evidence establishes that the dominant cause of Mrs. Johnson's sufferings is the injuries and shock received in the collision, and that it is very probable that such pains, with more or less frequency and intensity, are yet to endure.

[4] What rule shall be adopted in estimating the damage? The very nature of the pain and suffering negatives the idea that a decision can be reached by the application of any standard of values. Pain has no market value, and suffering no scale of prices. Our best conclusions on such an inquiry are necessarily founded largely on con-

lecture. Sentiment is to be cast aside and the mind charged with seeking a rational basis for its judgment; but candor compels the admission that our best results on such inquiry are largely arbitrary. This, however, is necessarily so. The judge in such estimation acts as jury, and he must be controlled largely by what may be termed the common-sense view, such a finding as can be justified by his conscience, and which would meet with a ready acquiescence by the ordinarily discreet man familiar with all the circumstances of the particular case.

In my examination of cases cited by counsel, and such others dealing with the awarding of damages for pain and suffering as time and the pressure of other judicial work permitted, I have not found a case even substantially parallel with the one at bar. This was not unexpected, and only emphasizes the rule that the particular circumstances of the case must control. Upon due consideration of the evidence and the arguments of counsel I have reached the conclusion that an allowance of \$4,000 should be made to Mrs. Johnson as compensation for her injuries.

[5] As to the husband. He is entitled to be reimbursed for his expenditures in taking care of his wife and seeking to effect a cure; also compensation for being deprived of the aid, comfort, and society of his wife, and such future deprivation and expenses as may be reasonably expected. The actual expenses are as follows: To Dr. Karp \$16; conveying wife to the hospital \$3; hospital charges, including medical attendant, \$66; making a total of \$85. To this should be added \$175 to Dr. Reed, the family physician, for his medical attendance, and \$25 for the drug bill. He also should receive the money value of his services as a carpenter which would likely have been rendered during the period when he was compelled to cease from such labor to take actual personal charge of his wife, which, at the rate of \$3 a day during the nine weeks he so attended her, amounting to \$162, is substantially what the services of such a nurse as his wife was entitled to would have cost.

As to the compensation to be allowed for the loss of the aid, comfort, and society of his wife, a marital right which the libellant's carelessness encroached upon, the observations heretofore made in dealing with the wife's pains and sufferings are in the main applicable; and for this loss, after due consideration, including therein probable future deprivation and expenses, an allowance of \$700 will be made, making a total allowance to Hans Johnson, the husband, of the sum of \$1,147.

A decree in accordance herewith in favor of claimants may be entered.

In re WATERTOWN CONCRETE STONE CO.

(District Court, N. D. New York. September 7, 1911.)

CONTRACTS (§ 319*)—CONSTRUCTION AND OPERATION—CONTRACT TO FURNISH MATERIAL FOR BUILDING—PART PERFORMANCE.

Bankrupt contracted to furnish to claimant concrete blocks for the completion of a house and veranda for the price of \$900, of which \$500 was to be paid when material for the house proper was delivered, and \$400 on delivery of that for the veranda. The contract further provided that the two deliveries should be made by times fixed, and that bankrupt should pay \$10 per day for any delay thereafter. Some time after the time so fixed, it delivered the greater part of the material for the building proper, which was accepted and used; the remainder, of the value of \$115, not being delivered at all. It also, after the time fixed, delivered material for the veranda, which was not in compliance with the contract and was properly rejected. *Held*, that the delivery of material of the value of \$585 only did not constitute a substantial performance of the contract as an entirety, but, as the contract was by its terms made divisible, it might be considered a substantial performance of that part relating to the building proper and entitled bankrupt to recover \$500, less claimant's damages for delay and for failure to make full delivery; that, accepting the provision for \$10 per day as furnishing the proper rule of damages for the delay, claimant was entitled to a deduction from the \$500 of such amount, and \$115 for the material not delivered, and that, as to the veranda, there was no performance and nothing became due the bankrupt, but claimant was entitled to recover the stipulated per diem damages, at least until the delivery of the rejected material.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1493-1507; Dec. Dig. § 319.*]

In the matter of the Watertown Concrete Stone Company, bankrupt. On review of order of referee disallowing in part the claim of Peter A. Ward for damages for breach of contract, and finding that he owed the bankrupt \$110 on the contract. Reversed.

Pitcher & O'Brien, for claimant Ward.

John Conboy, for trustee and Wingate Concrete Machine Company.

RAY, District Judge. The Watertown Concrete Stone Company was adjudicated a bankrupt on the 12th day of March, 1906. Prior and up to that time it had been engaged in the business of making and furnishing or selling concrete blocks for building purposes. In the spring of 1905 the claimant, Peter A. Ward, made plans and specifications for the erection of a wooden house on his premises in the city of Watertown, prepared by one D. D. Kieff. Thereafter George E. Card, representing the Watertown Concrete Stone Company, hereafter called the "bankrupt," had conversations with Mr. Ward respecting the substitution of concrete stone blocks, and made a written proposition to furnish same, which was accepted in writing. A formal contract was drawn, signed, and submitted by Ward, which the bankrupt declined to execute. This varied in some respects from the letters referred to. By June 29, 1905, most of the concrete blocks had been placed on the premises of Ward, and some of these were

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

used. In September, 1905, Ward notified the bankrupt that the blocks, etc., were not satisfactory or according to contract, and that he would not accept or pay for same, and demanded that the blocks be removed. On September 18, 1905, the bankrupt made a proposition to furnish cement stone to take the place of stone off color. At that time the foundation walls of the house had been erected so far as the water table, and some few blocks had been laid above that line.

On the 20th day of September, 1905, the bankrupt and Ward entered into a formal written agreement whereby:

(1) The bankrupt was to furnish and deliver on the ground all the concrete blocks necessary to complete the house to the roof, including cornice, caps, and sills for windows and doors as per plan, and complete the 8-inch blocks, railings, spindles, posts, and cornice for piazzas and steps as per plans, and also concrete chimney blocks for rear chimney from cellar to top of chimney and for other chimneys from roof up, as shown in plans.

Also (2):

"It is further understood and agreed that the contractor is to furnish all the concrete material necessary to complete house on or before the 5th day of October, 1905, except cornice, spindles, railing, and posts for piazzas which is to be done by November 5, 1905. On failure to furnish same by the said 5th day of October, 1905, and 5th day of November, 1905, the contractor hereby agrees to pay to the owner ten dollars (\$10.00) a day as agreed upon by the parties hereto as liquidated damages, and not as penalty, for each day after said October 5, 1905, and November 5, 1905, that contract shall remain unfulfilled. The caps for front and side of house are to be as near color of sills as it is possible to make the same. It is hereby further understood and agreed that all concrete material furnished for front and cornice shall be of an even color, such color to be a shade between two colors chosen and agreed upon by the parties hereto, samples of the minimum and maximum in color to be in the hands of each of the parties. It is further agreed by party of the first part to furnish material for verandas as near the color of blocks as possible."

And as to payments the contract provided:

"Payments to be made as follows: Five hundred dollars when material is delivered for house and balance of four hundred dollars to be paid on delivery of material for verandas. It is hereby mutually agreed between the parties hereto that the sum to be paid by the owner to the contractor for said material and work shall be eleven hundred dollars (\$1100), subject to a deduction of two hundred dollars heretofore paid for material already furnished and used by owner, leaving a balance of nine hundred dollars (\$900) due contractor upon fulfillment of within contract. In witness whereof, the parties to these presents have hereunto set their hands and seals, the day and year first above written."

From the last clause it is evident that \$200 of the \$1,100 was payment for the material furnished, accepted, and used prior to the making of this last agreement, and it is also evident that this new agreement took the place of all former agreements and operated as a settlement of all prior and existing differences.

It appears from the evidence and findings of the referee that the concrete blocks for the house aside from the material for piazzas was not furnished by October 5, 1905, and that some of it was never furnished, but that the most of it was placed on the ground by October 31, 1905. This was 22 days after it should have been delivered. The

concrete material so far as furnished by the bankrupt for the front piazza, consisting of porch rails, columns, and spindles, was not placed on the ground until December 7, 1905, or 27 days after it should have been delivered, and, when delivered, the referee finds was not according to the contract, and was absolutely rejected and refused, and not used. Its value, if according to contract, was over \$400. The referee expressly finds that the bankrupt did not furnish the concrete blocks for front steps, back steps, front door sill, side door sill, and back door sill, and that they were worth \$65, and also that it failed to furnish the blocks for the chimney above the roof which were worth \$50. The referee also finds:

"That the concrete materials for the piazza, when furnished, were not in accordance with the plans, viz., instead of single and upper lower rails these rails came in three (3) foot lengths. The pieces were smooth, cut off square, without dowel or socket. The spindles did not correspond with plan. They were square on each end, and tapered from top to bottom, had no O. G. or fancy turning on them. The posts were not fluted, were concave, instead of convex. No plate or cornice was delivered and no dental work. The piazza was useless to claimant, and was refused and thrown aside, and a wood piazza substituted."

This is, of course, a finding that the bankrupt utterly and wholly failed to perform the contract so far as the piazzas or verandas were concerned. The material furnished therefor was not in accordance to contract, and it was wholly rejected. The evidence shows that the "wood piazza substituted" was furnished by Ward, and paid for by him. It follows that under the terms of the contract the "four hundred dollars to be paid on delivery of material for verandas" never became due or payable to the bankrupt. The fact that certain material not according to contract was delivered, but rejected and never accepted or used, did not comply with the contract, or make the \$400 due or payable. The material was not accepted, but rejected. As to the blocks for the main part of the house, they were accepted, but not in full performance of the contract. Of the \$900, \$300 were actually paid, leaving \$600 unpaid, but of this \$600, \$400 never became due. The bankrupt never became entitled to it, and Ward never became liable to pay it. The balance of \$200 did become due as the blocks were accepted and used, but this was subject to the claim of Ward for damages.

The referee found, and the trustee and objecting creditor has not excepted or appealed:

"That the claimant sustained damages by reason of the stone company's failure to perform the contract, but is limited to the sum specified in the contract as liquidated damages, to wit, \$10 per day, and I therefore find that claimant is entitled to offset against the balance of \$600 due from him upon the contract the sum of \$490, being for forty-nine (49) days of default as heretofore found, leaving a balance of \$110 due from the claimant (Ward) to the bankrupt's estate."

The difficulty with this is that the referee erroneously assumed that a balance of \$600 was due the bankrupt on the contract, when in fact only \$200 was due. Making the proper offset and the claimant, Ward, was entitled to have his claim allowed at \$290 over and above all claims of the bankrupt against him. This, too, on the assumption that

the bankrupt was entitled to the \$115 for front steps, back steps, front, back, and side door sills and blocks for chimney above roof not furnished at all. Just how the bankrupt ever became entitled to recover for these the referee does not point out. Clearly the value of these went to make up the balance of \$200, and should be deducted, leaving only \$85 that ever became due to the bankrupt. As the claimant's damages are \$490, and the amount due the bankrupt only \$85 after deducting from the \$600, the value of material not furnished at all, the claimant, Ward, is entitled to have his claim allowed at \$405, the balance of his damages as found by the referee, unless we assume that the \$10 per day fixed and agreed upon as liquidated damages was a substitute for any delivery of material at all, and that whether material according to contract was delivered or not, or any material at all was delivered, Ward became liable to pay the \$600, and could offset as damages the \$10 per day up to the time the bankrupt delivered material in pretended compliance with the contract, but which was not in compliance therewith and not accepted but refused, and no longer.

This is the result of the holding of the referee, as (1) the contract expressly provides that the \$400 was not to be paid until the material for the piazza or veranda was delivered; and (2) the referee finds that such material as called for by the contract was never delivered, and that that delivered was not accepted, and the owner finally in the spring of 1906 substituted a wooden veranda at his own expense; and (3) he charges Ward with the \$400 that was to be paid when such materials for the veranda were furnished and then only; and then finally (4) he credits Ward with the \$10 per day damages up to the time the rejected material for the veranda was put on the ground and rejected. If Ward was entitled to the \$10 per day for failure to deliver the material for the veranda according to the contract at all and for any length of time, he was entitled to it after as well as before the delivery of such rejected material (found not to be according to the contract), and at least down to the time Ward was able to get other material or substitute his wooden veranda. In any event, assuming the \$10 per day is the correct rate of damages, and that Ward knew when the improper material for veranda or piazzas was put on the ground that he must furnish his own and then substituted wood, the claimant owes nothing to the bankrupt estate, and is entitled to have his claim allowed at \$290 in any event.

Now, taking the transaction as it was, and considering only actual damages shown, and we find that, when the contract of September 20, 1905, was made, they agreed that the compensation of the bankrupt for all material theretofore furnished and thereafter to be furnished Ward, including labor, was \$1,100, from which was to be deducted the \$200 theretofore paid. This left a balance of \$900 to be paid in case the contract was fulfilled by the now bankrupt company. The bankrupt delivered certain stone, and Ward paid on account \$300, leaving \$600. Concrete stone for the main part of the house, viz., front steps worth \$30, back steps worth \$20, front door sill worth \$7.50, side door sill worth \$3.75, back door sill worth \$3.75, and blocks

for the chimney above the roof worth \$50, in all \$115, were never furnished, and should be deducted from the \$600, leaving \$485. Stone, etc., for the veranda or piazzas according to contract were never furnished, and, assuming they were worth only \$400, there could be only \$85 due the bankrupt, making no allowance for damage for delay in delivery or in the erection of the house and in cutting blocks not of the size required and which have to be cut and fitted by Ward. The referee finds:

"And some of the concrete blocks furnished were not of the required size, and claimant was put to an expense for fitting them of \$47.60."

This, of course, should be deducted from the \$85, leaving \$37.40. The referee also expressly finds:

"By reason of the delay in furnishing blocks, the house could not be inclosed until late in the fall or early winter, and the walls could not be pointed until the following spring, and as a consequence dampness and frost got into the building and damaged the plastering and the cellar bottom, so that claimant was obliged to replace a large portion of the same at an expense for replastering of \$75, and repairing the cellar bottom \$45 [in all \$120]."

These were natural and probable consequences of a delay in delivery, and clearly within the contemplation of the parties. The concrete blocks, etc., were for a special purpose. Hence special damage was recoverable. See 2 Joyce on Damages, § 1631, p. 1684, and cases cited.

All these actual damages are unquestioned. Clearly Ward was entitled thereto, if we exclude the \$10 per day as the rule of damages. Taking the above balance of \$37.40 from this \$120, and Ward was entitled to have his claim allowed at \$82.60 over and above all sums due or owing to the bankrupt. In no event and on no theory of the contract and evidence is Ward owing the bankrupt estate. This makes no allowance to Ward for damages for delay in completing the house for occupation and consequent loss of use and occupation or for damages by reason of being compelled to use a wood veranda, in place of a concrete stone one, a matter difficult to determine, but of which there is substantial evidence. There was no substantial performance of the entire contract. The stone blocks, etc., for the house and piazzas were worth according to the contract \$900, and, of this, material worth \$515 was not furnished at all; that is, steps, sills, and blocks for chimney worth \$115 were not even put on the ground, and blocks, etc., for the piazza, worth \$400 or more, were put on the ground, but were not according to the contract, and rejected, and not used as the referee finds. This was the same as no performance at all as to this part of the contract. And it must be kept in mind that the value of the material for the piazza was fixed at \$400, and this sum was not to be paid at all until such materials according to contract were furnished. It is impossible to find that a contract to furnish concrete blocks, etc., worth \$900 for the erection of a house is substantially performed by furnishing such concrete blocks to the extent of \$385. This contract was divisible, and, in fact, was divided by the parties themselves, as it was in legal effect expressly provided that \$400 for piazza or veranda material specified was not to be paid for

until delivered. Thus, while the consideration was entire and the structure was to be a complete house, the material for the upright or main portion was to be delivered at one time and that for the piazzas or veranda at another, and \$400 was not to be paid until the material for the piazzas or veranda was delivered. Therefore performance as to time of delivery and payment was divided. It follows that performance and acceptance as to the one part was possible and non-performance and no payment of the \$400 was possible as to the other. It is evident that the parties contemplated that there might be a performance as to the one part and no performance as to the other, and in case of entire failure to perform as to the piazza or veranda, which actually happened, there was to be no payment of the \$400.

Hence it may be said there was a substantial compliance with the contract to deliver blocks for the house proper, but it is plain there was no compliance whatever with the contract to furnish material for the piazzas or veranda. This case is covered by *Springfield Milling Co. v. Barnard & Leas Mfg. Co.*, 81 Fed. 261, 266, 26 C. C. A. 389, 395, and cases cited. Sanborn, C. J., in giving the opinion of the court, said:

"An action upon a contract of sale for the purchase price may be maintained by one who has substantially but not completely performed it, if the purchaser has retained the benefits of that performance. The amount of the recovery, however, will be measured by the contract price, less the damages sustained by the defendant from the failure of the plaintiff to complete its performance in the agreed time and manner—[citing cases]. Compensation for the pecuniary loss—that is, the direct, natural, and immediate consequence of a breach of a contract of sale, or of a guaranty contained in such a contract—is the just and legal measure of a purchaser's damages. The damages recoverable of a manufacturer for the breach of a contract to furnish machinery or for a breach of a warranty of its character or serviceableness, when he has agreed to furnish and place suitable machinery in operation for a known purpose, are not confined to the difference between the value of the machinery as warranted, and as it proved to be, but include such consequential damages as are the direct, immediate, and probable result of the breach"—[citing cases].

So in *Reich v. Colwell Lead Co.*, 66 Hun, 634, 21 N. Y. Supp. 495,¹ it was held that the reasonable rentable value of a building during the period of delay in furnishing material to be used in its construction may be recovered. It is idle to say that if A. contracts to furnish brick to B. of a certain character, quality, shade, and shape for the construction of a house for \$1,000, and delivers say one-third according to contract and they are used, the parties contemplating delivery as the work progresses, and he fails to deliver the remainder, that he may recover the contract price even for those delivered and used. Much less may he recover the entire contract price. And B., the purchaser, is not obligated to tear down his walls and restore those actually used or pay the full contract price for all the brick. In this case, if the contract is not divisible, the bankrupt is not entitled to be allowed anything over and above what was actually paid, as there was no substantial performance. Here the now bank-

¹ Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 66 Hun, 634.

rupt company well knew the purpose for which this material was to be used. See, also, *Passinger v. Thorburn*, 34 N. Y. 634, 90 Am. Dec. 753; *Van Wyck v. Allen*, 69 N. Y. 61, 25 Am. Rep. 136; *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13; *Id.*, 78 N. Y. 393, 34 Am. Rep. 544; *Messmore v. N. Y. Shot & Lead Co.*, 40 N. Y. 422; *Booth v. S. D. R. M. Co.*, 60 N. Y. 487.

The referee adopted the \$10 per day agreed upon as the proper rule of damages under the circumstances of this case. In this I think he was correct, and the trustee and objecting creditor filed no exception to this, and, on the hearing before me, stated that they were bound by it, or so considered themselves. The amount fixed by the agreement was under the circumstances and conditions reasonable and the damages in case of default very difficult to accurately ascertain and determine. See 2 *Joyce on Damages*, § 1334, p. 1469. I do not think the \$10 per day should be construed as a penalty. It was not the intention of the parties to insert a penalty.

Accepting this as the true rule of damages and giving to the bankrupt estate the benefit of every doubt, the claim of Mr. Ward must be allowed at \$290 over and above all claims of the bankrupt estate against him. The theory on which the \$10 per day would stop running at the date the material for the veranda was put on the ground is that Ward then knew or should have known it was not according to the contract, and was at liberty to get his material elsewhere. But, then, we give him no redress for the time necessary to obtain other material. The findings of the referee as to damages and the amount that became due the bankrupt company on the contract are disapproved, and the order is reversed.

The matter is sent back to Referee Mazzy, with directions to allow the claim of Mr. Ward at \$290 over and above all claims of the bankrupt against him.

TILLER v. ST. LOUIS & S. F. R. CO.

(Circuit Court, W. D. Oklahoma. May 10, 1911.)

No. 36.

1. LIMITATION OF ACTIONS (§ 88*)—STATUTES—FOREIGN CORPORATIONS—"PERSON."

Comp. Laws Okl. 1909, § 5553, provides that if, when a cause of action accrues against a person, he be out of the state, or has absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he comes into the state or while he is so absconded or concealed, etc. *Held*, that such section does not apply so as to prevent the statute of limitation from running against a foreign corporation authorized to do business within the state and having an officer or agent within the state on whom process may be served and an action commenced within the prescribed period of limitation.

[Ed. Note.—For other cases, see *Limitation of Actions*, Dec. Dig. § 88.*

For other definitions, see *Words and Phrases*, vol. 6, pp. 5322-5335; vol. 8, p. 7752.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. DAMAGES (§ 49*)—FIRES—RIGHT OF ACTION.

Wilson's Rev. & Ann. St. 1903, § 3068, provides that any railroad company operating a line within Oklahoma Territory shall be liable for all damages sustained by fire originating from operating the road. *Held*, that the term "all damages" as so used should be construed as limited to indemnity recoverable by a person who has sustained an injury either in his person, property, or relative rights through the act or default of another, not including such acts as are *damnum absque injuria*, and hence a complaint by a husband against a railroad company for alleged mental anguish, suffering, terror, and other states of mind of his wife, caused by fire alleged to have been negligently set out by defendant railroad approaching their dwelling disassociated from any acts of personal injury or violence, did not state a cause of action.

[Ed. Note.—For other cases, see *Damages*, Dec. Dig. § 49.*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1812-1820; vol. 8, pp. 7625, 7626.]

3. LIMITATION OF ACTIONS (§ 127*)—AMENDMENT OF PLEADING—NEW CAUSE OF ACTION—LIMITATIONS.

Comp. Laws Okl. 1909, § 5679, provides that before or after judgment the court in the furtherance of justice may amend any pleading by adding or striking out the name of a party or correcting a mistake in the name of a party, or a mistake in any respect, or by inserting other allegations material to the case, or to conform the proceeding to the facts proved, when such amendment does not change substantially the claim or defense, and when any proceeding falls to conform in any respect to the provisions of the Code, the court may permit the same to be made conformable thereto by amendment. *Held* that, where an original petition filed by a husband for injuries to his wife by fire alleged to have been set out by defendant railroad company approaching their dwelling charged mere mental suffering disassociated from physical injury due to the fire, and therefore failed to state a cause of action, it could not be amended after limitations had run by inserting an allegation of a physical injury due to the fire.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 543-547; Dec. Dig. § 127.*]

At Law. Action by J. M. Tiller against the St. Louis & San Francisco Railroad Company. On demurrer to plaintiff's amended petition. Sustained.

M. Fulton, for plaintiff.

R. A. Kleinschmidt, for defendant.

POLLOCK, District Judge. This action was instituted by plaintiff on the 9th day of April, 1906, in what was the then Third judicial district of the territory of Oklahoma, to recover damages alleged to have been sustained by him by reason of the defendant setting out a fire which spread to and burned on the premises of plaintiff. The original petition contains four causes of action, as follows: (1) A claim for damages for the death of plaintiff's infant child; (2) a claim for damages accruing to plaintiff's wife transferred to plaintiff; (3) damages for loss sustained by plaintiff in the destruction of his property; (4) damages accruing to plaintiff for injuries received by his wife which deprived him of her aid, assistance, and help.

All of the demands of plaintiff above stated, save the last, have been adjudicated.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The material facts charged in the original petition, in so far as the now remaining cause of action is concerned, are alleged in the following manner:

"Fourth. That, after the said fire was so started as aforesaid, the wind carried it forward in a southeast course, rapidly caused it to spread out and burn and consume high weeds, trash, and rubbish spread over the lands lying south-east of the point where such fire was started and burn up to, and surrounded plaintiff's house with such fire, and that the plaintiff's said children then at home being apprehensive for the safety of their mother, plaintiff's wife, and for the safety of their little brother, attempted with all the means and strength that they possessed to check and stop such fire from approaching plaintiff's house, all of which was done with the knowledge of plaintiff's wife, and by their such acts in so endeavoring to stop such fire greatly endangered the life of each of them, putting them all in jeopardy, by means of all of which the sudden and rapid approach of such fire and the strength and volume of the same, and the dangers incident thereto, to plaintiff's wife as well the danger incident to her said children, caused the plaintiff's wife to become greatly excited and terrified, and her nervous system greatly wrought up, and her mind greatly distracted through fear, terror, and excitement for her offspring from the surroundings aforesaid, and caused her to be in great fear. That this condition of the plaintiff's said wife was injurious and detrimental to said plaintiff's wife, and caused and did arrest the due and proper recovery of plaintiff's wife in her then sickness, and greatly retarded her recovery, and then and there caused her permanent and lasting injuries in weakening the female organs of her body."

On the admission of the territory of Oklahoma as a state by appropriate proceedings the cause was removed into this court. Thereafter the record discloses there was a trial before the court and a jury on this remaining cause of action in the month of March, 1909, resulting in a verdict in favor of plaintiff and against defendant, which was by the court set aside. The same cause of action was again tried before the court and a jury in the month of March, 1910. On this trial the court directed a verdict in favor of the defendant, which verdict was thereafter set aside. On May 17, 1910, the plaintiff filed an amended petition, the material charging portion of which, with the new matter therein alleged, underlined, is stated, as follows:

"And that had it not been for the act of defendant in so setting out said fire over all that country about plaintiff's house which was burned over and where said children and mother were, and such fire approaching said house, on account of the velocity of the wind, with great force and violence accompanied with dense smoke and flames, filling the room where plaintiff's wife was then confined with smoke and heat, putting the said wife in danger of suffocation, and wherein and whereby she did then almost suffocate and began suffering great pain for want of fresh air, such condition being brought about by reason and on account of the dense smoke whereby she was compelled to raise up from the bed and did so raise up in her bed putting her face towards the window and door where she could breathe, and in such condition putting her in personal danger and injuring her, the plaintiff's wife would not have been made severely sick and would not have been hindered in her recovery from her childbirth sickness in the usual manner and usual time.

"(5) That, after the said fire was so started as aforesaid, the wind carried it forward in a southeast course, caused it to be spread out rapidly and burn and consume high weeds, trash, and rubbish spread over the lands lying south-east of the point where such fire was started, and it did burn up to and surround plaintiff's house with such fire, and that the plaintiff's said children then at home being apprehensive for the safety of their mother, plaintiff's wife, and for the safety of their little brother, attempted with all the means and strength that they possessed to check and stop such fire from approaching

plaintiff's house, all of which was done with the knowledge of plaintiff's wife, and by their such acts in so endeavoring to stop the fire, greatly endangered the life of each of them, putting them all in jeopardy. That by means of all of which the sudden and rapid approach of such fire and the strength and volume of the same, and the dangers incident thereto, to plaintiff's wife, as well the danger incident to her said children, caused the plaintiff's wife to become greatly excited and terrified, and her nervous system greatly wrought up and her mind greatly distracted through fear, terror, and excitement for herself and her offspring from the surroundings aforesaid, and caused her to be in great fear. *That by reason of the dense smoke entering the room where plaintiff's wife was confined, together with the heat accompanying the same, plaintiff's wife was compelled to protect her life and prevent being suffocated from smoke and heat, to raise up in her bed and get her face to the window and door for air, thus producing great physical pain and suffering.* That the putting plaintiff's wife in this condition so brought on by defendant in setting such fire was injurious and detrimental to her, and caused and did arrest the due and proper recovery of plaintiff's wife in her then sickness, *caused her great pain* and greatly retarded her recovery, and then and there caused her permanent and lasting injuries in weakening the female organs of her body."

To this amended petition defendant has demurred. The theory of defendant in demurring is this: (1) That the original petition showed on its face no right to recover in plaintiff for the matters and things therein alleged against it; (2) that the new matter alleged in the amended petition substantially changes the claim or demand of plaintiff, does not relate back to the date of filing the original petition, and, as the amendment was made more than four years after the fire, the cause of action set forth therein is barred by the statute of limitations.

On the contrary, the plaintiff contends in opposition to the demurrer: (1) As defendant is a foreign corporation, it may not under the statutes of the state of Oklahoma plead the statute of limitations; (2) that the original petition stated a cause of action against the defendant; (3) that the new matter introduced by the amendment does not substantially change the cause of action, and hence it should be held to relate back to the date the action was commenced and is not barred by the statute, even though the defendant may be held entitled to plead it.

[1] The demurrer has been argued and submitted for decision on elaborate briefs of counsel for the respective parties. While it is conceded by defendant it is a corporation foreign to this state and was a corporation foreign to the territory of Oklahoma, when the action was commenced, yet it is contended under the statutes of the territory and this state providing for personal service on foreign corporations transacting business in the state, such as was the defendant when the action was commenced, the provisions of section 5553 Snyder's Compiled Statutes of Oklahoma, are not applicable to it and do not prevent it from pleading the bar of the statute. The latter act provides, as follows:

"If, when a cause of action accrues against a person, he be out of the state, or has absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he comes into the state, or while he is so absconded or concealed; and if, after the cause of action accrues, he depart from the state, or abscond, or conceal himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought."

The above statute was by the territory of Oklahoma adopted from the statutes of Kansas and on the admission of the territory of Oklahoma as a state was continued as the law of this state. The Supreme Court of the state of Kansas after its adoption by the territory of Oklahoma in the case of *Williams v. Railway Co.*, 68 Kan. 17, 74 Pac. 600, 64 L. R. A. 794, 104 Am. St. Rep. 377, held by force of this statute a foreign corporation could not avail itself of the plea of the statute. However, from a reading and consideration of that case I am constrained to the opinion it is not only opposed to the great weight of authority in this country, but also to the very reason of the matter itself. Many of the cases therein cited and relied upon involved the question of the citizenship of the parties to the controversy and not the question of the presence of the defendant in or its absence from the state. While it is undoubtedly true the defendant in this case is not a citizen of this state, and was not a citizen of the territory of Oklahoma at the time the action was brought, for, if so, it could not have removed the case into this court as it has done, yet a corporation organized under the laws of a foreign state may by permission transact business in this state and for the purpose of transacting such business be personally present in the state through the establishment of offices, agencies, and the like places of doing business, occupied by its officers, agents, and employes on whom, at any time, by force of other provisions of the statute law, valid, personal service, binding the corporation itself to respond in damages to any personal judgment pronounced by the court, may be had. Hence during such time the foreign corporation will be held personally present in the state for the purpose of service of process and the above-quoted statute not applicable. Such is the conclusion of an almost unbroken line of decisions. *Huss v. Central R., etc., Co.*, 66 Ala. 472; *Lawrence v. Ballou*, 50 Cal. 258; *Hubbard v. U. S. Mortg. Co.*, 14 Ill. App. 40; *Pennsylvania Co. v. Sloan*, 1 Ill. App. 364; *Wall v. Chicago, etc., R. Co.*, 69 Iowa, 498, 29 N. W. 427; *Winney v. Sandwich Mfg. Co.*, 86 Iowa, 608, 53 N. W. 421, 18 L. R. A. 524; *St. Paul v. Chicago, etc., R. Co.*, 45 Minn. 387, 48 N. W. 17; *Louisville, etc., R. Co. v. Pool*, 72 Miss. 487, 16 South. 753; *Sidway v. Missouri Land, etc., Co.*, 187 Mo. 649, 86 S. W. 150; *King v. National Min., etc., Co.*, 4 Mont. 1, 1 Pac. 727; *Colonial, etc., Mortg. Co. v. Northwest Thresher Co.* (1905) 14 N. D. 147, 103 N. W. 915, 70 L. R. A. 814, 116 Am. St. Rep. 642; *Burns v. White Swan Min. Co.*, 35 Or. 305, 57 Pac. 637; *Turcott v. Yazoo, etc., R. Co.*, 101 Tenn. 102, 45 S. W. 1067, 70 Am. St. Rep. 661, 40 L. R. A. 768; *Thompson v. Texas Land, etc., Co.* (Tex. Civ. App. 1893) 24 S. W. 856; *Connecticut Mut. L. Ins. Co. v. Duerson*, 28 Grat. (Va.) 630.

This precise question was ruled by the Circuit Court of Northern District of Iowa in the case of *McCabe v. Illinois Cent. R. R. Co.*, 13 Fed. 827, wherein it is said:

"A foreign corporation that by the laws of a state within which it comes on business can sue and be sued is not a nonresident in the sense that would prevent it from setting up the statute of limitations as a defense in an action against it; and section 2533 of the Code of Iowa, that provides that 'the time during which a defendant is a nonresident of the state shall not be in-

cluded in computing the period of limitation,' has no reference to such a case."

The same question was before the Circuit Court of Appeals for the Fourth Circuit in construing section 162 of the Code of North Carolina of 1883 in *Southern Railway Co. v. Mayes*, 113 Fed. 84, 51 C. A. 70, and Judge Jackson, D. J., delivering the opinion, said:

"Code N. C. § 162, provides that, where a person is out of the state when an action accrues against him, it may be commenced within the time prescribed after his return, and if after such accrual he departs from and resides outside of the state, or remains continuously absent therefrom, for one year, the time of his absence shall not be computed. Held, that where a foreign railroad corporation was operating its road and doing business in North Carolina at the time of plaintiff's injury, and continued to do so during the entire period limited for commencing suit therefor, an action commenced thereafter was barred; the statute recited not being applicable to such case."

The case of *Williams v. Railway Co.* will be found annotated in 1 Am. & Eng. Ann. Cas. p. 9, and there commented on as follows:

"The doctrine announced in the reported case, to the effect that a foreign corporation is 'out of the state' within the meaning of the statute of limitations, and so cannot plead such statute in defense of an action brought against it, is the minority doctrine in this country. Besides Kansas, the only states wherein it is upheld are New York, Nevada, and Wisconsin."

The result of a contrary holding would be to permit a personal action to be brought against a foreign corporation transacting business in this state long years after the cause of action arose when witnesses are dead, departed, or cannot be found, and this notwithstanding the fact that at any time since the cause of action accrued it might have been brought, and valid, binding personal service have been obtained on the defendant within the state. In my opinion, such construction of the statute is contrary to the doctrine that it is a statute of repose and should not be adopted unless such intent is clearly expressed in the statute. Therefore, in my judgment, the defendant may plead the bar of the statute if applicable to the facts of this case.

Is the cause of action presented by the amended petition barred by the statute? The answer to this question involves the consideration of two propositions: (1) Did the original petition state any cause of action in favor of the husband plaintiff and against the defendant? If so, it is manifest it may by way of amendment, at any time, be bettered by a more concise, accurate, or detailed statement of the facts which constitute such cause of action. (2) If it did not state a cause of action, may it by amendment be made to state a cause of action, and will such cause of action, thus brought on the record by amendment, relate back to the date of the institution of the action and thus escape the bar of the statute now interposed by defendant?

[2] In regard to the first proposition, it will become quite clear, from a reading of the charging part of the original petition above set forth, the plaintiff therein did not rely in support of his cause of action on the fact that the fire set out by defendant caused any direct physical personal injury or violence to his wife; but, on the contrary, he placed his entire reliance on the fact that the near approach of a

violent fire, driven as it was by a strong wind, placed his wife in mental anguish and terror for the safety of herself in her enfeebled condition, her infant child, and her small children engaged in trying to arrest its progress to prevent herself and child from being physically injured thereby.

On this state of facts plaintiff contends a cause of action is presented by the original petition, and more especially in view of the peculiar language of the act under which the action was brought. The defendant insists to the contrary. The statute under which the act was brought reads as follows:

"Any railroad company operating any line in this territory shall be liable for all damages sustained by fire originating from operating their road." Wilson's St. p. 754, § 8 (section 3068).

In view of the language employed in this act, plaintiff contends the term "all damages" includes the right of plaintiff to demand and recover from defendant compensation for any and all injuries received by his wife which damaged him in consequence of his loss of her aid, comfort, and society, regardless of the fact as to whether or not the injuries so received by her were of such nature as in the absence of the statute would constitute actionable or recoverable damages at law. However, the word "damages" has a well-defined meaning. In Bouvier's Law Dict., Rawle's Revision, vol. 1, p. 491, the word "damages" is defined as follows:

"The indemnity recoverable by a person who has sustained an injury either in his person, property or relative rights through the act or default of another."

When this term was employed by the lawmaking power in the enactment of the above statute, it will be presumed to have been used to express such legal meaning, unless the contrary is clearly made to appear by its context. Hence the word "damages" employed in this act must be construed as applicable to such cases of invasion by one of the rights of another to their injury as will be compensated by the law, and not to those acts denominated in the law "damnum absque injuria."

The question remains: Did the original petition charge the defendant, by the act of setting out the fire with such resultant injuries to his wife as the law will recognize and compensate in what it denominates by the word "damages"? In other words, will the law, in cases of this character, recognize as actionable such acts of invasion of the rights of another as produce mere mental suffering and anguish when entirely disassociated from any and all acts of physical personal injury or violence. While there may be adjudicated cases to the contrary, it is quite certain the very great preponderance of authority denies relief in such case. Compensation is made by the law of mental anguish, suffering, terror, and other states of the mind in cases of this character only when associated with and as incident to physical injuries and sufferings. In the case of *Kyle v. Chicago, R. I. & P. Ry. Co.*, 182 Fed. 613, 105 C. C. A. 151, the Circuit Court of Appeals for this circuit held:

"It is a settled rule of the federal courts that mental anguish alone, not arising from some physical injury or pecuniary loss caused by the negligence or other wrongful act of another, is not a basis for an action for damages in the absence of a statute authorizing such recovery."

In *Rowan v. Western Union Tel. Co.* (C. C.) 149 Fed. 550, it is said:

"Damages for mental suffering are ordinarily allowed only (1) where there has been bodily injury causing physical pain and the mental suffering cannot be distinguished from the physical, in which case it may be considered with the physical pain in determining the amount of the recovery; (2) where there has been any malicious intention or willful invasion of the legal rights of another, though it may be without physical contact, the natural result of which is mental suffering, in which case damages may be allowed to the injured person, not alone as compensation for the injured feelings, but by way of punishment of the wrongdoer."

Mr. Thompson, in his work on Damages (volume 6, § 623), says:

"But for mere fright unaccompanied with physical injury there is a great unanimity of holding that there can be no recovery although such fright resulted finally in bodily ailment."

See, also, *Huston v. Freemansburg*, 212 Pa. 548, 61 Atl. 1022, 3 L. R. A. (N. S.) 49; *Ewing v. Railroad Co.*, 147 Pa. 40, 23 Atl. 340, 14 L. R. A. 666, 30 Am. St. Rep. 709; *Morse v. Chesapeake & O. R. Co.*, 117 Ky. 11, 77 S. W. 361.

[3] Hence, to my mind, it must be held the original petition in this case did not state a cause of action against defendant. As the original petition did not, and the amended petition does, state a cause of action against the defendant, it remains to consider whether the action now stated is barred by the statute.

As the fire occurred in the month of February 1906, more than four years prior to the filing of the amended petition in this case, it will be conceded (if, as held, defendant may plead the bar of the statute) the cause of action now stated would have been barred had it been the original commencement of the action. Does the fact that the amended petition which was filed, not as an original action, but as an amendment to a pending cause of action, wherein the petition stated no facts authorizing a recovery of the damages therein prayed, save the pending action from the bar of the statute?

The statute of this state relating to amendments provides:

"The court, may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding by adding or striking out the name of any party, or correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or conform the pleading or proceeding to the facts proved, when such amendment does not change substantially the claim or defense; and when any proceeding fails to conform, in any respect to the provisions of this Code, the court may permit the same to be made conformable thereto by amendment." Section 5679, Revised Stat. Okl. 1909.

This statute was considered by the Supreme Court of this state in the case of *Limerick v. Lee*, 17 Okl. 165, 87 Pac. 859, where it is said:

"In an action for material furnished and services rendered for the recovery of the contract price, it is proper to permit plaintiff to amend his petition, stating no new facts constituting a new cause of action, but seeking to re-

cover the value of the material actually furnished and work performed upon a quantum meruit."

This act is identical with that of Kansas. The Supreme Court of that state has repeatedly held the pendency of an action wherein the petition stated no cause of action does not permit of an amendment after the bar of the statute had fallen, which for the first time propounds a cause of action. *Atchison, T. & S. F. R. Co. v. Schroeder*, 56 Kan. 731, 44 Pac. 1093; *Missouri, K. & T. Ry. Co. v. Bagley*, 65 Kan. 188, 69 Pac. 189, 3 L. R. A. (N. S.) 259; *Elrod v. St. L. & S. F. R. R. Co.*, 84 Kan. 444, 113 Pac. 1046.

In *Union Pacific Railway Co. v. Wyler*, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983, a case in which the original petition declared on common-law grounds of negligence as the basis for recovery, and was subsequently amended after the bar of the statute had fallen, basing the right of recovery on a statute of Kansas, Mr. Chief Justice White, delivering the opinion of the court, declared the general rule as follows:

"The general rule is that an amendment relates back to the time of the filing of the original petition, so that the running of the statute of limitations against the amendment is arrested thereby. But this rule, from its very reason, applies only to an amendment which does not create a new cause of action. The principle is that, as the running of the statute is interrupted, by the suit and summons, so far as the cause of action then propounded is concerned, it interrupts as to all matters subsequently alleged, by way of amendment, which are part thereof. But where the cause of action relied upon in an amendment is different from that originally asserted, the reason for the rule ceases to exist, and hence the rule itself no longer applies."

This case was cited with approval in *Atlantic & Pacific Railroad v. Laird*, 164 U. S. 396, 17 Sup. Ct. 120, 41 L. Ed. 485, and has been many times referred to with approval. To like effect are the cases of *Nelson v. First National Bank*, 139 Ala. 578, 36 South. 707, 101 Am. St. Rep. 52; *Gorman v. Judge of Newaygc Circuit* 25 Mich. 138; *Grier v. Northern Assurance Co.*, 183 Pa. 334, 39 Atl. 10; *Mus-selman Grocer Co. v. Casler*, 138 Mich. 24, 100 N. W. 997; *Van de Haar v. Van Domseler*, 56 Iowa 671, 10 N. W. 227; *Eylenfeldt v. Illinois Steel Co.*, 165 Ill. 185, 46 N. E. 266; *Field v. French*, 80 Ill. App. 78.

Plaintiff contends the case of *McDonald v. State of Nebraska*, 101 Fed. 171, 41 C. C. A. 278, is decisive of the question presented. However, it was held in that case the substitution of the state of Nebraska as plaintiff in place of the Treasurer of the State, which many statutes in terms permit, did not change substantially the cause of action, as follows:

"The cause of action was not changed in the slightest degree by substituting the state of Nebraska as plaintiff in place of the Treasurer of State. The cause of action declared on was the same in the original and amended petitions. The petition of the Treasurer of State sought to recover of the bank and its receiver, for the state, the money of the state which had been deposited in the bank, and which the bank had never returned to the state. When the name of the state was substituted for that of her treasurer, precisely the same cause of action was counted on, and the same relief asked. The amendment merely substituted the name of the state, who was the real party in interest, for that of her fiscal agent. In the receipt and disbursement of the

public funds the state can only act by and through her officers and agents. The money, if any, recovered in this action, must be received and receipted for and deposited in the state treasury by the proper fiscal agent of the state, who is undoubtedly the State Treasurer; and the receipt of the Treasurer of State to the bank or its receiver for the money sued for in this action would be a good quietus for the same."

In the light of the foregoing authorities, it must be held the new matter introduced in this case substantially changes the cause of action declared upon by plaintiff in his original petition. That the original petition stated no cause of action against the defendant, and as the amendment in this case was made after the bar of the statute had fallen, the demurrer interposed must be sustained. It is so ordered.

THE THOMAS CRANAGE.

(District Court, W. D. New York. September 6, 1911.)

1. SHIPPING (§ 84*)—LIABILITY OF VESSELS—INJURY TO STEVEDORE—NEGLIGENCE OF FELLOW SERVANT.

A vessel which was seaworthy and properly equipped is not responsible for an injury to a stevedore, if such injury was caused by the negligence of himself or a fellow servant engaged in the same line of work.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 349-351; Dec. Dig. § 84.*]

2. SHIPPING (§ 84*)—LIABILITY OF VESSEL FOR INJURY TO STEVEDORE—NEGLIGENCE.

In an action by a stevedore to recover for an injury caused by the falling of a section of the hatch cover upon him while he was shoveling grain in the hold, evidence showing that the crew removed certain sections of the hatch cover which they piled on adjoining sections, left in place, without fastening the same in any way, that such sections were not moved by the stevedores, and that the machinery used in unloading caused the vessel to vibrate, is sufficient to establish that the vessel did not exercise proper care to provide a safe place for the stevedores to work, and that such negligence was the cause of the injury.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 349-351; Dec. Dig. § 84.*]

3. NEGLIGENCE (§ 121*)—EVIDENCE—DOCTRINE OF RES IPSA LOQUITUR.

The application of the principle of *res ipsa loquitur* is not confined to cases where the relation between the parties was a contractual one, or of carrier or bailee, or where the injury was sustained on a public highway.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 217-228; Dec. Dig. § 121.*]

4. NEGLIGENCE (§ 134*)—ACTIONS FOR NEGLIGENCE—EVIDENCE.

The facts and circumstances surrounding an occurrence from which personal injury results, and the nature of the act, not infrequently determines the rule by which the asserted negligence may be established.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 267-273; Dec. Dig. § 134.*]

5. DAMAGES (§ 131*)—PERSONAL INJURY.

A stevedore awarded \$1,000 damages for an injury which caused him considerable pain and suffering for four or five weeks, and loss of longer time from his work, but which was not likely to be permanent.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 357-371; Dec. Dig. § 131.*]

In Admiralty. Suit by Henry Gilbert against the steamer *Thomas Cranage*. Decree for libellant.

John J. Kane and Charles W. Strong, for libellant.

Brown, Ely & Richards and Hoyt, Dustin, Kelley, McKeehan & Andrews, for respondent.

HAZEL, District Judge. The libellant sustained injuries on June 13, 1910, at about half past 10 o'clock in the forenoon while at work shoveling grain in the lower hold of the vessel *Thomas Cranage* by the fall upon him of a section of a wooden hatch cover. At the time of the mishap the steamer was being unloaded with the assistance of a movable elevator, which had three legs and into which the grain was shoveled by steam shovel, the stevedores in the hold scooping the grain to the shovel from which it was drawn to the elevator. The libel alleges that the crew carelessly and negligently let fall through the hatchway into the hold a section of the hatch cover, which struck the libellant while at work therein. The testimony principally indicated that various sections of the hatch cover of hatch No. 9 had been improperly piled by the crew early in the morning before the unloading began, and the libellant at the hearing, over the respondent's objection, was permitted to amend the libel by adding thereto an allegation of negligent piling of the hatch covers on condition that the respondent, if it wished, might take further testimony to cover new matter.

Libellant's testimony shows that three or four sections of hatch cover No. 9 were piled in about the center of the hatch one on top of the other, the lower section remaining in position on the coamings; that the several sections overlapped the opening of the hatch, and, while the work of unloading was in progress, a section dropped into the hold and upon the libellant. It is not directly shown what primarily caused the hatch cover to fall. The testimony is conflicting as to whether it fell owing to negligent piling or to actual handling by the crew. The first and second mate and the watchman of the steamer testified that the various sections of the hatch cover were regularly and properly piled in series, one cover on another, each section being evenly placed on an adjoining section which rested on the coamings, and in no instance were more than two parts of the cover piled together. There was evidence showing that during the unloading, and about two hours before the accident, libellant's fellow stevedores rigged up a strongback consisting of a piece of timber eight feet long, and weighing about 175 pounds, and placed it lengthwise over the hatch opening, and fastened ropes and blocks thereto which were connected with the steam shovel in the hold. The strongback was placed a little to the starboard of the middle of the hatch, and the respondent claims that in putting it in place the stevedores shifted the pile of hatch covers, which had previously been properly and safely placed by the crew, or in some manner unknown displaced from the pile a section, which later dropped into the hold.

[1] If such was the fact, the libellant cannot recover, for the rule in admiralty is well settled that the owner of a vessel which was sea-

worthy and properly equipped is not responsible for injury to a stevedore if such injury was caused by the negligence of himself or a fellow servant engaged in the same line of work. *Bettis v. Frederick Leyland & Co., Ltd.*, 153 Fed. 571, 82 C. C. A. 525; *The Ranza* (D. C.) 156 Fed. 373.

[2] By libelant's testimony, however, it is satisfactorily shown that the stevedores who handled the strongback did not move or come in contact with any hatch covers, nor is there any evidence from which it may be inferred that the rigging during the unloading of the boat and before the accident came in contact with or in any way disturbed the pile of hatch covers which are the subject of this controversy, and a determination that libelant's fellow workmen displaced or interfered with them would be purely speculative. Concededly the hatch covers were not fastened together. It was the duty of the respondent to use diligence in providing the libelant with a reasonably safe place to work, and, in view of the testimony of the witness Jolly, the second mate of the steamer, that the swell from passing boats would slightly move the vessel, and that the machinery in operation during the unloading of the grain caused the vessel to vibrate, it would seem that due diligence had not been exercised, and that the respondent had failed in its duty by merely piling the parts of the hatch cover without securing them by a fastening device. That the hatch cover dropped from where it lay by reason of vibratory motion is not improbable in view of their length and narrow width, each section being 5 feet 6 inches long, and 2 feet 10½ inches wide, and 3 inches thick, and weighing about 100 pounds. Considering that they were unfastened, and that the vibrations of the machinery might shift them, they obviously became a menace to the safety of the scoopers working in the lower hold, and who were required to follow the steam shovel in its operations of scooping the grain to the elevator. The rapid manner in which the stevedores are obliged to perform their work does not permit them to pay any attention to the hatch covers, and therefore the respondent was bound to exercise such "vigilance as is proportional to the danger to be avoided, judged by the standard of common prudence and experience." *The Rheola* (C. C.) 19 Fed. 926. No one saw the hatch cover at the moment it fell, and respondent claims that the burden of proof rests upon the libelant to show what actually caused it to fall; but I think the situation and the circumstances are such that it may fairly be presumed that, if the sections had been properly piled and secured, they could not have been irregularly and unevenly placed either by the crew or the stevedores, nor could they have been displaced by the movement of the boat. The fact that the section dropped into the hold is persuasive evidence of improper and insecure piling, and consequent negligence on the part of the respondent.

[3] The application of the principle of *res ipsa loquitur* is not confined to cases where the relation between the parties was a contractual one, of carrier or bailee, or where the injury was sustained on a public highway (*Griffen v. Manice*, 166 N. Y. 193, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630), and where the source of the occurrence

which results in injury to another may reasonably be attributed to the plaintiff as well as to the defendant, or where the cause which induces the injury does not solely rest on the conduct or knowledge of the defendant, the rule of *res ipsa loquitur* ordinarily is not applied.

[4] The facts and circumstances surrounding an occurrence from which personal injury results and the nature of the act not infrequently determines the rule by which the asserted negligence may be established. But it is not necessary to decide that this is a case of *res ipsa loquitur*. The vessel and hatch cover were under the exclusive management and control of the officers and crew. The scoopers were not obliged to lift the covers from the hatches, or to remove them from where they were placed, or to pile them evenly and securely. The vessel retained the sole right to protect the men who were engaged in unloading the cargo while they were at work in the hold from the sudden falling of hatch covers or sections thereof or any insecurity in their position. The vessel's crew was the alter ego of the owner, who became responsible for its failure to furnish to the stevedore a safe place to work, and for its negligence and insecure piling of the hatch covers.

[5] As to damages: The libellant was struck on the back and hip by the cover in its fall of 21 feet. He was assisted from the hold and walked two miles to the Emergency Hospital for medical treatment, and then went home to bed, where he remained one week. He was then removed to the Sisters' Hospital, where he remained another week, during all of which time he was attended by his physician. He is 32 years old, and was disabled for a time from following his usual occupation. Dr. Haley, his physician, testified that his injuries consist of traumatic lumbago and traumatic sciatica. His earning capacity is about \$12 per week. While he was severely hurt by the blow, suffered pain and discomfort for four or five weeks, it is not satisfactorily shown that he is permanently injured. I think the probabilities are that he will recover within a short time his full strength and vigor, and will be able to pursue his usual work of stevedore. It does not appear what amount was expended by him for medicine or medical attendance. I think an allowance of \$100 for loss of wages and \$900 additional would adequately compensate him for the pain and suffering endured, and also defray his medical attendance.

A decree may be entered accordingly, with costs.

UNITED STATES v. PLAISTOW.

(District Court, W. D. New York. August 2, 1910.)

1. ALIENS (§ 65*)—NATURALIZATION—SERVICE IN MARINE CORPS—TERM.

Act July 26, 1894, c. 165, 28 Stat. 124 (U. S. Comp. St. 1901, p. 1332), provided that an alien 21 years of age and upwards, who had served one enlistment in the United States Marine Corps and had been honorably discharged, might become a citizen without prior declaration of his intention to become such, and Naval Appropriation Act March 3, 1901, c. 852, 31 Stat. 1132 (U. S. Comp. St. 1901, p. 1095), reduced the term of en-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

listment in the Marine Corps from five years to four. *Held*, that service of an entire term of enlistment was a jurisdictional prerequisite to citizenship by an alien who had enlisted in the Marine Corps and applied for citizenship without first declaring his intention to become a citizen, and he, having been discharged for a physical disability before the term of his enlistment expired, could not become a citizen by proving his good moral character and his honorable discharge.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 65.*]

2. ALIENS (§ 71½, * New, vol. 7, Key No. Series)—NATURALIZATION—CERTIFICATE OF CITIZENSHIP—CANCELLATION.

Naturalization Act June 29, 1906, c. 3592, § 15, 36 Stat. 601 (U. S. Comp. St. 1901, p. 485), provides that it shall be the duty of the United States district attorneys for the respective districts, on affidavits showing cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens, in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, to set aside and cancel a certificate of citizenship for fraud, or because the certificate was illegally procured. *Held*, that where a certificate of citizenship was issued by a state court to an alien who had not served a full term of enlistment in the Marine Corps, on a certificate of his honorable discharge and proof of good character, without his having previously declared his intention to become a citizen, such certificate was subject to vacation in a suit in a federal court at the instance of the United States.

Suit by the United States against Thomas Plaistow to cancel a certificate of citizenship. Application granted.

John Lord O'Brian, U. S. Atty.

J. L. Hurlbert, for defendant.

HAZEL, District Judge. [1] The facts in this case are not in dispute and only questions of law are in controversy. The government has filed its bill of complaint under section 15 of the naturalization act of June 29, 1906 (36 Stat. 601, c. 3592 [U. S. Comp. St. Supp. 1909, p. 485]), for decree canceling the certificate of citizenship of the defendant, Thomas Plaistow, who was born in England, and who, on June 23, 1903, enlisted in the United States Marine Corps, and subsequently, on July 2, 1906, at Mare Island Navy Yard, received his honorable discharge. During the period of his service, which continued for three years and eleven days, he was on duty in the Philippine Islands, in China, and in Japan, and his discharge was issued because of physical disability.

In the year 1909, he applied to the Supreme Court of the state of New York, in this judicial district, for citizenship, without having previously declared his intention to become a citizen. On the hearing at the regular term of court he offered in evidence his honorable discharge from the United States Marine Corps, asserting his right to citizenship upon giving evidence of his good moral character and without having previously obtained "first papers." The government objected to the issuance of an order of naturalization to him, on the ground that he had not served "one enlistment in the United States Marine Corps," and therefore he was not entitled to citizenship without first declaring his intention to become a citizen. Act July 26, 1894, c. 165, 28 Stat. 124 (U. S. Comp. St. 1901, p. 1332), provides as follows:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"Any alien of the age of twenty-one years and upwards who has enlisted or may enlist in the United States Navy or Marine Corps, and has served or may hereafter serve five consecutive years in the United States Navy or one enlistment in the United States Marine Corps, and has been or may hereafter be honorably discharged, shall be admitted to become a citizen of the United States upon his petition, without any previous declaration of his intention to become such; and the court admitting such alien shall, in addition to proof of good moral character, be satisfied by competent proof of such person's service in and honorable discharge from the United States Navy or Marine Corps."

The court overruled the objection of the government, holding as a matter of law that he had served one enlistment in the Marine Corps, and a certificate of naturalization was issued to him. The defendant here contends that this court is without power to cancel the certificate of naturalization granted by the state court, and, if an error of judgment or of law was committed by the court admitting him to citizenship, the remedy was by appeal or review, and not by action in equity for annulment or cancellation of the certificate of naturalization. The question submitted is important, and a conclusion has been reached adverse to the contention of the defendant, though not entirely without difficulty or doubt.

At the time the act of 1894 was passed the term of enlistment in the Marine Corps was five years, but later Naval Appropriation Act March 3, 1901, c. 852, 31 Stat. 1132 (U. S. Comp. St. 1901, p. 1095), enacted:

"That hereafter the enlistment into the Marine Corps shall be for a period of not less than four years."

Whether such act was drawn to the attention of the state court for interpretation does not appear. Whatever may be the commonly accepted or technical definition of the term "enlistment," certainly the statute makes it clear that the contract of the defendant to voluntarily serve the government in the Marine Corps was for a definite and positive term of four years. His right to naturalization without any previous declaration of his intention to become a citizen depends upon the interpretation of both provisions. His actual service of one enlistment of four years was a jurisdictional fact, and in my opinion he could not be legally naturalized without strict compliance with the conditions imposed by Congress. As said in *United States v. Spohrer* (C. C.) 175 Fed. 440:

"He may accept the offer and become a citizen upon compliance with the prescribed conditions, but not otherwise. His claim is of favor, not of right. He can only become a citizen upon and after a strict compliance with the acts of Congress. An applicant for this high privilege is bound, therefore, to conform to the terms upon which alone the right he seeks can be enforced. It is his province, and he is bound, to see that the jurisdictional facts upon which the grant is predicated actually exist, and if they do not he takes nothing by his paper grant."

On reading the act of July 26, 1894, it will be noticed that aliens enlisting in the navy and applying for citizenship were required to show that they had served an enlistment of five consecutive years, where they had not previously declared their intention to become citizens, and Congress undoubtedly made no distinction between enlist-

ments in the Navy and in the Marine Corps; but its subsequent action of lessening the term of enlistment in the Marine Corps to four years operates to enable such aliens to become naturalized at the end of their enlistment and before the expiration of five years. Certainly it did not intend that an alien who received an honorable discharge within the four-year period should be entitled to naturalization without having declared his intention to become a citizen.

[2] This brings me to the next question, namely: Has this court power to annul or cancel the certificate of naturalization issued by the state court? The statute provides:

"That it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured."

It is evident that Congress intended to provide procedure for the cancellation of certificates procured by fraud or illegally, irrespective of the statute of limitations on the fraudulent act, though it may be doubted whether the government is bound by the statute of limitations in actions for fraud, or whether the time to appeal or for review had expired. The doctrine that the decision of a court, even if erroneous, cannot be collaterally attacked, is not thought to have application to the facts under consideration; and, if we give effect to the present naturalization law, it must follow that the decision of the state court that the defendant was entitled to naturalization by virtue of his honorable discharge was a legal error, and the certificate was illegally procured by the defendant. *U. S. v. Simon* (C. C.) 170 Fed. 680.

There have been a number of decisions in the federal courts construing section 15 of the act of June 29, 1906, and save in one instance they have uniformly held that, where a certificate of naturalization is illegally granted by a state court, a District Court of the United States for the district in which the naturalized citizen resides has jurisdiction at the instance of the United States to cancel and vacate it. *U. S. v. Nisbit* (D. C.) 168 Fed. 1005; *U. S. v. Mansour* (D. C.) 170 Fed. 671; *U. S. v. Simon*, supra; *U. S. v. Meyer* (D. C.) 170 Fed. 983; *U. S. v. Spohrer*, supra; *U. S. v. Schurr* (D. C.) 163 Fed. 648; *U. S. v. Van Der Molen* (D. C.) 163 Fed. 650. All these cases, save two, relate to the personal fraud of the applicant; but the *Nisbit*, *Meyer*, and *Van Der Molen* Cases are directly in point.

In *United States v. Nisbit*, supra, the error related to the consideration by the court of depositions not taken in its presence and not given under the exception of section 10. In *United States v. Meyer*, supra, the state court held that the widow of an alien who had been honorably discharged as a soldier, but who died before naturalization, was entitled to admission as a citizen without declaring her intention; but Judge Whitson said:

"But clearly this was an erroneous construction. There was no authority of law for such procedure. It was void for want of it. The court exceeded

its jurisdiction, and, having done so, this court, by virtue of the act of Congress, is empowered to cancel the certificate for illegality."

In *United States v. Van Der Molen*, *supra*, the state court admitted to citizenship an alien before the two years had expired following the date of the declaration of intention. The court admitting the alien to citizenship, construing section 4 of the act, held that the two-year limitation applied to the date of admitting to citizenship and not to the time of filing application therefor. This construction in an action to cancel the certificate was held erroneous.

These cases, however, are not left entirely unchallenged (*U. S. v. Anderson* [D. C.] 169 Fed. 201); but the undoubted weight of authority is in favor of the holding that the act authorizes any court having jurisdiction to naturalize aliens to entertain jurisdiction of a suit of this description, and that an admission to citizenship through an erroneous construction of the act is an illegal procurement thereof. This court is naturally reluctant to hold that the judicial act admitting the defendant to citizenship by a court of equal jurisdiction may be nullified in an independent suit brought in this jurisdiction, for at first blush such an action would seem to present an anomalous situation. But Congress clearly intended to provide procedure for nullifying certificates fraudulently obtained, and for correcting misinterpretations or misapplications of the acts of the courts. The term "illegally procured" is not limited to irregularity of procedure, but also denotes the determination by the court contrary to law of the matter submitted to it. *Tiedt v. Carstensen*, 61 Iowa, 334, 16 N. W. 214.

It appearing herein that four years had not elapsed between the time when the defendant enlisted in the Marine Corps and his honorable discharge, the court is constrained to hold that the certificate of naturalization was unlawfully issued to him by the state court and must be canceled, as provided by section 15 of the naturalization act.

In re O'NEIL et al.

(District Court, N. D. New York. September 11, 1911.)

1. BANKRUPTCY (§ 340*)—PROVABLE DEBTS.

Evidence held to sustain the finding of a referee that a note made by a bankrupt to his wife prior to his bankruptcy, indorsed by her and discounted at a bank, and which was taken up by him after the bankruptcy by the substitution of another similar note, was thereby paid and satisfied in accordance with the intention of the parties, and could not be proved by his wife against the bankrupt estate.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 340.*]

2. BILLS AND NOTES (§ 499*)—RENEWAL OF NOTE—PRESUMPTION OF PAYMENT OF OLD NOTE.

There is a presumption, when a note is renewed in due course at a bank by the note of the same maker and indorser, that the old note is paid, if taken up; but such presumption may be rebutted by facts and circumstances showing a different intent on the part of all the parties.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1695-1697; Dec. Dig. § 499.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In the matter of John G. O'Neil and Robert B. Doubleday, as individuals and as copartners in the firm of J. G. O'Neil & Co. On review of order of referee disallowing claim of Eloise C. Doubleday for \$443.75 against the estate of Robert B. Doubleday, and also reducing another claim of said claimant from \$108.21 to \$61.20. Affirmed.

T. B. & L. M. Merchant, for trustee and creditors.

E. K. Clark, for claimant.

RAY, District Judge. The reduction of the claim of \$108.21 to \$61.20 is so clearly right that nothing further need be said.

[1] The correctness of the order disallowing the claim of Eloise C. Doubleday for \$443.75 depends on whether or not the evidence in favor of the claim so clearly preponderates in favor of the claimant that the referee was not justified in finding the crucial fact against her. There was a conflict of evidence, and the referee might have found the other way. He heard and saw the witnesses, and so far as their credibility is concerned was better able to arrive at the truth than this court can be.

Prior to April 3, 1906, Robert B. Doubleday had made certain notes for small amounts payable to the order of Eloise C. Doubleday, which were discounted at the Binghamton Trust Company, Binghamton, N. Y. On that day these small notes were aggregated as to amount, and Robert B. made a note of \$450.74, payable to the order of Eloise, due three months from date, and this was discounted by said trust company, and the small notes canceled and delivered to Robert B. July 3, 1906, this note was renewed at \$429.29, \$20 being paid, and the old note was surrendered to Robert B. October 3, 1906, this last note was renewed at \$430.74, and the old note surrendered to Robert B. January 3, 1907, this note, was renewed at \$437.19, and the old note surrendered to Robert B. April 3, 1907, this note was renewed, it is claimed, at \$443.75, and the old note delivered to Robert B. July 3, 1907, this note was renewed, it is claimed, at \$443.40 (due in three months), and the old note of \$443.75 was delivered to Robert B. The differences in amount arose from small payments; the interest sometimes being paid, and sometimes added to the new note.

All of these new notes were payable to the order of, and indorsed by, Eloise C. Doubleday; and the trustee and creditors contend that the old notes were paid by the new ones and that such was the intent of the parties. The claimant, Eloise C. Doubleday, asserts that she in fact, by Robert B., paid the note of April 3, 1907, on July 3, 1907, and took same up, and became the owner of same, and has held the same as owner since, and that the note of July 3, 1907, was in effect a new and an independent transaction. October 19, 1907, the note of \$443.40, dated July 3, 1907, past due, was in fact paid by the claimant. On that day she gave her individual note in payment thereof, secured by collateral. June 18, 1907, the firm of John G. O'Neil & Co. made a general assignment for the benefit of their creditors, and June 24, 1907, the petition in bankruptcy was filed, and followed by adjudica-

tion. The adjudication related back to the filing of the petition, and hence the note of July 3, 1907, is not provable in bankruptcy.

About July, 1908, the claimant procured from the Binghamton Trust Company an assignment to herself of the note of April 3, 1907, on which she bases her claim. In point of fact, July 3, 1907, the new note of \$443.40, dated that day, made by Robert B. Doubleday, and indorsed by Eloise C. Doubleday, the claimant, took the place of the note of April 3, 1907, for \$443.75, as the new note, or its proceeds, paid it to the trust company, if it was paid at all. The evidence from the officers of the trust company is that the note of April 3d was paid, so far as it was concerned, and absolutely surrendered by it to the maker. It is significant that nothing was said to the trust company by Doubleday that he was taking up the note of April 3d for his wife. The old note was surrendered by the trust company in exchange for the new one, as had been done before. Of course, the forms of discounting the new note and crediting the proceeds in payment of the old one were gone through with in due course of business. It is clear that the note of April 3d was paid and extinguished so far as the trust company was concerned.

The referee, in rejecting the claim of Eloise C. Doubleday on this note of April 3, 1907, for \$443.75, in effect finds that same was paid July 3, 1907, by Robert B. Doubleday, who gave his note, indorsed by Eloise, or its proceeds, in exchange for same, and that such note did not pass to Eloise, or become her property, but was surrendered to Robert B., the maker, and that the trust company had no interest in it thereafter, and no right or power to assign it, and that in fact Robert B. Doubleday canceled it when he took it from the trust company by tearing a piece of his name therefrom, as had been and was his custom.

It stands to reason that the indorser of a note may furnish the maker, who is primarily liable for the payment thereof, the money (directly or indirectly) to pay such note for such indorser, and the maker may make the payment, take up the note from the bank where discounted, and hold it for the indorser or deliver it to him. In such case there can be no question that the note so paid would become the property of the indorser, and a valid claim against the maker in the hands of the indorser, although the bank from which it was taken and to whom it was paid by the maker for the indorser had no knowledge of the arrangement between the maker and the indorser. But such is not this transaction. The note, if paid at all, was paid by the maker with his note, or the proceeds of his note, indorsed by the claimant here. The trust company had it. It was its property, and paid to it by the maker, and it ceased to exist so far as the trust company was concerned, and it could not assert it as a claim against either maker or indorser. The officers of the trust company say as to it the note was paid. It follows that the trust company could not transfer it a year later, as it did not own it, or any interest in it, or the debt represented by it originally. If Eloise had paid it, and it was hers, why did she take an assignment of it a year later from the trust company?

It was, of course, possible for Robert B. and his wife, Eloise C.,

to make an arrangement by which the note of April 3d should be purchased by Robert B. as agent for Eloise C., using his own note, indorsed by her, to raise the money for the purchase. In such case Eloise C. would become indebted to Robert B. in the amount of his note, given by him and indorsed by her, to raise the money, and in such case it would be her duty to pay such note. It would be for her to pay—her debt. In view of the fact that bankruptcy proceedings had been commenced June 24, 1907, is it probable that Mrs. Doubleday paid the note by that of her husband, indorsed by herself?

Under all the evidence and circumstances in the case, and in view of all that occurred, I think the referee was fully justified in refusing to find that Eloise purchased the note, or paid it, July 3, 1907, to the trust company, by or through her husband. I think he was justified in refusing to find that she ever became the owner of the note on which her claim is based. If, July 3, 1907, after the general assignment and the institution of the bankruptcy proceedings, Doubleday applied to his wife, the claimant, to take up the note of April 3d, why did she not make her own note, and pledge her stock as collateral, and substitute it for the old note? If, July 3, 1907, Mrs. Doubleday told her husband, the maker of the note, she wanted it kept alive, and that she would buy it, and the new note was made by him and indorsed by her for the purpose of being exchanged for the old note, or to be discounted and the proceeds used to take up the old note of April 3d, for Mrs. Doubleday, and was so used, and if this old note was taken up in that way, and not canceled by the maker, but delivered to Mrs. Doubleday, the claimant, her claim is good, and should be allowed.

But the referee has refused to find the facts that way, and as he saw the witnesses and heard them I am not justified in reversing his findings of fact. If the referee had found the arrangement or transaction between Mr. and Mrs. Doubleday when the note of April 3d was paid to have been as I have stated, and as the claimant's counsel contends it was, the legal effect would be plain enough, and it would be immaterial what the intent or purpose of the trust company was when it surrendered the note to Doubleday, or whether or not it was informed of such arrangement. Renewal notes do not always pay the note renewed—that is, taken up by the new note, which takes its place. It is often a question of intention, to be determined from all the facts and circumstances attending the transaction. If the maker, indorser, and holder all expressly agree that the new note shall not operate as a payment of the old one, there is no payment, and in such case the holder would be at liberty to sell it, or deliver it to the indorser, on receiving payment from him or her, or, if the indorser should pay it subsequently, it would belong to him for enforcement against the maker.

[2] There is a presumption, when a note is renewed in due course at a bank by the note of the same maker and indorser, that the old note is paid if taken up. This presumption is easily rebutted by facts and circumstances showing a different intent on the part of all the parties. See *Matter of Utica National Brewing Co.*, 154 N. Y. 268, 272, 48 N. E. 521, and cases cited; *McElwee v. Metropolitan Lumber Co.*, 69

Fed. 302, 310, 16 C. C. A. 232. Of course, I am not to be understood as holding that Doubleday, even though bankruptcy proceedings had been commenced against him, could not make his note payable to the order of his wife, and lend it to his wife for the purpose of being used by her to raise money on her own account with which to pay the prior note of the husband indorsed by her; but under all the facts and circumstances of the case it seems improbable that any such thing actually occurred. If the wife wanted money, she should have made her own note, with the husband for indorser. If her obligation in any form was to take the place of that of the husband, and she was to become the owner of his note, she should have made her own note, with the husband as indorser.

I think the order of the referee, disallowing the claim, should be affirmed.

JUDGE v. NORTHERN PAC. RY. CO.

(Circuit Court, D. Oregon. September 4, 1911.)

No. 3,705.

CARRIERS (§ 112*)—ACTION FOR LOSS OF PROPERTY IN TRANSIT—DEFENSES—ILLEGALITY OF CONTRACT.

When a carrier accepts and takes charge of property for transportation, it becomes the bailee thereof, and the law imposes upon it, in the absence of a binding contract limiting its liability, the duties of either a common or private carrier, according to the facts, for the violation of which it will be liable, regardless of the legal sufficiency of the contract of carriage.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 480, 484, 485; Dec. Dig. § 112.*]

At Law. Action by Charles Judge against the Northern Pacific Railway Company. On demurrer to portion of answer. Sustained.

Frank C. Hesse, for plaintiff.

George T. Reid, J. W. Quick, and L. B. da Ponte, for defendant.

BEAN, District Judge. Action to recover damages for the death of an animal belonging to the plaintiff while being carried on defendant's train between Seattle and Portland. It appears from the complaint that in May, 1910, the plaintiff, who was the owner of a chimpanzee trained to perform in theaters and vaudeville, was under contract with Sullivan & Considine, who were operating various vaudeville theaters in the Northwest, to exhibit the animal at such theaters, and particularly at Seattle and Portland, for a stipulated sum per week, including transportation for himself and the animal; that, in order to transport their artists, actors, and vaudevillians, together with their baggage and property, Sullivan & Considine purchased of the defendant 25 or more tickets for use between Seattle and Portland, which entitled them to the use of a special baggage car suitable for the transportation of all baggage, animals, paraphernalia, and scenery

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of any and all of their actors and performers, but when the plaintiff, who was entitled to transportation for himself and animal on such tickets, tendered the animal to the railway company, the special baggage car provided by it was not in suitable or proper condition to convey the same, and, by arrangement with the agents of the defendant, it was put in the general baggage car, and, while en route to Portland, was killed through the negligence of the defendant's agents in placing it against the radiator and carelessly and negligently turning on the steam.

The defendant, after denying many of the material allegations of the complaint, pleads as one of its separate defenses in substance that under its tariff, as filed with the Interstate Commerce Commission and in force at the time of the alleged shipment, it was unlawful for it to carry, as baggage, live animals as part of theatrical paraphernalia or property, except in a special car, and then only upon the execution of a release relieving the company from liability as a common carrier and from all claims or demands whatsoever which may arise or accrue by reason of any or all loss or damages in the transportation thereof, and that the contract of carriage alleged in the complaint was in violation of this provision, and consequently of the interstate commerce act, because it granted the plaintiff special rights and privileges not accorded to other shippers similarly situated.

The plaintiff has demurred, on the ground that this matter constitutes no defense, and in my opinion the demurrer should be sustained. If the animal was delivered to and accepted by the defendant for transportation, and it undertook the performance of such carriage, it thereby assumed the duties of either a common or private carrier—a question not necessary to consider at this time—in reference thereto, and cannot escape liability for a failure to discharge its duty while the animal was in its possession, on the ground that the initial contract of carriage was illegal. *Insurance Cos. v. Carriers' Co.*, 91 Tenn. 537, 19 S. W. 755; *Pond-Decker Lmbr. Co. v. Spencer*, 86 Fed. 846, 30 C. C. A. 430; *Merchants' Cotton Ex. v. N. A. Ins. Co.*, 151 U. S. 368, 14 Sup. Ct. 367, 38 L. Ed. 195. A contract of carriage in violation of the interstate commerce law is void and cannot be enforced, and probably the carrier, after having entered upon the performance, may withdraw therefrom without being liable for breach of the contract. *Melody v. Gt. Nt. Ry.*, 127 N. W. 543, 30 L. R. A. (N. S.) 568.

But when a carrier accepts and takes charge of property for transportation, it becomes the bailee thereof, and the law imposes upon it, in the absence of a binding contract limiting its liability, the duties of either a common or private carrier according to the facts, for a violation of which it will be liable, and this regardless of the legal sufficiency of the contract of carriage. The liability in such cases arises out of the possession of the property by the carrier under a contract of affreightment, and the duties and obligations which the law imposes upon it in reference thereto, and not wholly out of the agreement under which the property was delivered to and accepted by it. The Interstate Commerce Commission forbids rebates, special

rates, preferences, etc., and makes all agreements in reference thereto void, but it does not make the contract of affreightment otherwise void, and there is nothing in the law which will excuse the carrier from liability when it has accepted property for transportation under such a contract. The demurrer as to the third affirmative defense is therefore sustained, and in all other respects overruled.

Ex parte GLUCKSMAN.

(Circuit Court, S. D. New York. February 6. 1911.)

1. EXTRADITION (§ 14*)—PROCEEDINGS—FINDINGS BY COMMISSIONER—SUFFICIENCY OF EVIDENCE.

In extradition proceedings it is sufficient that there is some evidence to warrant the commissioner in holding the accused person; proof sufficient to sustain a conviction on trial of an indictment is not required.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. §§ 15, 16; Dec. Dig. § 14.*]

2. EXTRADITION (§ 14*)—PROCEEDINGS—EVIDENCE.

In proceedings to extradite one accused of forgery, the papers which were forged being sufficiently described, it was immaterial that they were referred to as "notes" and "bills of exchange."

[Ed. Note.—For other cases, see Extradition, Cent. Dig. §§ 15, 16; Dec. Dig. § 14.*]

3. EXTRADITION (§ 9*)—PROCEEDINGS—DESCRIPTION OF ACCUSED.

That the name of the person sought to be extradited was spelled differently in the Russian papers, and in the papers written in the English language, was immaterial; the person may be held under an alias without knowledge of his true name.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. §§ 9, 10; Dec. Dig. § 9.*]

4. EXTRADITION (§ 14*)—SUFFICIENCY OF EVIDENCE IN EXTRADITION PROCEEDINGS.

Evidence held to warrant the commissioner in holding a person as the guilty party in extradition proceedings.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. §§ 15, 16; Dec. Dig. § 14.*]

Fugitives from justice under extradition laws, see note to In re Strauss, 63 C. C. A. 104.]

Writs of habeas corpus and certiorari for the arrest of Leibel Pincusov Glucksman, brought pending application for extradition. Writs dismissed.

Coudert Bros. and Charles A. Conlon, for demanding government.
Charles Dushkind, for defendant.

COXE, Circuit Judge. In the Matter of Sternaman (D. C.) 77 Fed. 595, I had occasion to examine the law applicable to proceedings of this character and find it unnecessary to repeat what was there said. That case was subsequently carried to the Circuit Court of Appeals (80 Fed. 883, 26 C. C. A. 214) which court also examined and stated the rules applicable to a proceeding of this character. The court says:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"The facts and circumstances proved authorized conflicting presumptions and probabilities as to her guilt or innocence, and it was the province of the commissioner to determine their import, and whether they were such as to justify him in exercising his power to commit her to custody pending the action of the department of state. No useful purpose would be subserved by an analysis or discussion of the evidence."

[1] It will be seen that, from the very nature of the proceeding, it is often impossible to obtain evidence necessary to sustain a conviction upon the trial of an indictment. Such proof is not required. It is enough that there is some evidence to warrant the commissioner in holding the accused person.

A confused mass of papers, some competent and others incompetent, have been submitted, without index or systematic arrangement of any kind. I have read all having any bearing upon the controversy and think they contain some proof to establish the following propositions:

First. That in the summer of 1910 forged papers were uttered by a leather merchant residing at Lodz in Russia, named Leiba Gliksman.

Second. That these papers were given in exchange for merchandise, the name of Moschek-Leiba Tugendreich being forged thereon.

Third. That the person who committed the forgery disappeared from Lodz prior to July 24, 1910.

Fourth. That Leibel Pincusov Glucksman, a leather merchant formerly living at Lodz, Russia, arrived at the Port of New York early in August, 1910.

Fifth. That the person so arriving in New York, except in the matter of age, he being apparently less than forty-five years old, answers the description sent from Russia of the person who forged the instruments.

Sixth. That the photograph attached to the papers sent from Russia is a photograph of the prisoner.

[2] I do not overlook the argument of counsel that the commercial paper which was forged is referred to indiscriminately as "notes" and "bills of exchange." In my view this is wholly immaterial. Even in this country such papers are often referred to as notes or bills. Such exact nicety of description as is argued by the counsel for the prisoner is not required in a preliminary proceeding of this character.

[3] The papers which were forged being sufficiently described, it makes no difference what name is applied to them. It is a crime to forge and utter any piece of commercial paper, whether it be called a bill or a note and whether the sum named therein be large or small.

As before observed, this is not a trial upon an indictment, but a preliminary proceeding, the object of which is to bring the offender before a court having jurisdiction to try and punish him. Proof that the prisoner uttered a single forged note or bill of exchange is sufficient to justify his extradition. I also attach very little importance to the fact that the name of the prisoner is spelled differ-

ently in the various papers. In the Russian papers it is spelled Leiba Gliksman and in the papers written in the English language it is frequently spelled Lewek Glucksman, the difference, it is thought, being largely attributable to whether Polish, Russian or Yiddish is used. In any event, it is immaterial; if the prisoner be the person who committed the forgery he may be held under an alias, without any knowledge of his true name.

[4] The only question which causes me any difficulty is the question of identity. It would be more satisfactory if some one who knew the prisoner in Lodz could point him out as the forger or the person who passed the forged instruments. However, after examining all the relevant papers submitted, I am unable to say that the Commissioner was without proof in holding the prisoner as the guilty party.

Writs dismissed.

O'CONNELL et al. v. AMERICAN FIRE INS. CO. OF PHILADELPHIA.

(Circuit Court, N. D. California. August 24, 1911.)

INSURANCE (§ 579*)—IMPEACHMENT FOR FRAUD—ACTION AT LAW IN FEDERAL COURT.

Where plaintiffs surrendered an insurance policy after a loss, the amount of which, recoverable on the policy, was unliquidated, and executed a formal release of all claims thereunder, with full knowledge of its contents, on payment to them of 50 per cent. of the face of the policy, the transaction was a compromise and settlement, and, even though procured by the fraud of defendant, is a bar to an action at law on the policy in a federal court.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 579.*]

At Law. Action by John O'Connell and others, executors, against the American Fire Insurance Company of Philadelphia. Judgment for defendant.

Daniel O'Connell, for plaintiffs.

Goodfellow, Eells & Orrick, for defendant.

VAN FLEET, District Judge. The action is one at law, and proceeds upon the theory that an ascertained indebtedness under the policy sued on existed in favor of plaintiffs as against defendant, which was due and owing, and that plaintiffs were induced by the fraudulent representations of defendant's agent to give a receipt in full upon the payment of \$3,000, that this receipt was given without consideration, and that defendant remains indebted to plaintiffs in the balance of \$3,000, for which recovery is sought.

The evidence wholly fails to sustain this theory. It shows that the amount due on the policy, if anything, had never been determined between the parties, but that defendant, through its agent, represented to plaintiffs, in substance, that the company was "down and out" and unable to continue in business; that if the plaintiffs would accept 50

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

per cent. of their claim, or \$3,000—one-half the face of the policy—and give a release of all claim under the policy, defendant would pay that sum, but that it could not pay more to anybody, and that if plaintiffs did not accept that sum they might not get anything; that plaintiffs accepted this offer and were given a check for \$3,000, in consideration of which they executed and delivered to defendant, with full knowledge or opportunity to know the nature of the documents, a receipt wherein it was recited that the amount received was “in full of all claims for loss or damage by fire,” etc., and accompanied this receipt by a formal release, in which it was stated that the said sum was paid “in full satisfaction of all claims for loss or damage” under the policy, and that “in consideration of this payment the policy is hereby canceled in full and surrendered to the company,” and plaintiffs thereupon surrendered the policy to the defendant. These facts do not warrant a judgment for plaintiffs.

It is not an instance of the giving of a mere receipt in full on the payment of a part only of an established indebtedness, but is an instance of the compromise of an unliquidated demand, wherein for a stipulated payment the entire claim was settled, and a formal release of all further demand arising thereon given. As against such a transaction, even if induced by fraud, relief may not be had at law in the federal courts, wherein the distinction between legal and equitable remedies is still maintained, unaffected by any changes in the method of administering such remedies that may obtain under the legislation of the state.

The case disclosed by the facts is purely one of equitable cognizance. The only fraud which may be availed of in an action at law in a federal court to avoid a formally executed release of the claim sued on is misrepresentation, deceit, or trickery practised to induce the execution of a release, which the signer never intended to execute, and upon which the minds of the parties never met, and does not include any of those misrepresentations of fact which may have been resorted to in order to persuade the claimant to agree to the release as actually made.

The doctrine as stated is fully considered and declared by the Circuit Court of Appeals of the Eighth Circuit in *Pacific Mutual Life Insurance Co. v. Webb*, 157 Fed. 155, 84 C. C. A. 603, wherein the authorities are carefully collated, and where the contrary view, taken by the Circuit Court of Appeals for the Sixth Circuit in *Lumley v. Railway Co.*, 76 Fed. 66, 22 C. C. A. 60, and *Wagner v. National Life Insurance Co.*, 90 Fed. 395, 33 C. C. A. 121, is denied recognition. See, also, *Cook v. Fidelity & Deposit Co.*, 167 Fed. 95, 101, 92 C. C. A. 547, decided by the Circuit Court of Appeals of this Circuit, wherein the rule announced in the first-mentioned case is approved of and followed.

As this conclusion disposes of the case, it is unnecessary to consider the other questions discussed by counsel.

The suggestion at the argument, that plaintiffs be permitted to amend their complaint to conform to the facts developed, cannot be entertained, since this would be to sanction under the guise of an

amendment an entire and fundamental change in the nature of the cause of action by transforming it from one at law to one in equity. While the rule of the statute authorizing amendments is a liberal one, it is not sufficiently so to justify such a course.

The judgment must go for defendant for its costs.

STEAMSHIP DEN OF OGIL CO., Limited, v. STANDARD OIL CO.
OF NEW YORK.

(District Court, S. D. New York. August 8, 1911.)

1. SHIPPING (§ 147*)—FREIGHT—SHORT DELIVERY.

Under a provision in a charter party of a vessel as a private carrier of oil in cases that the cargo should be received and delivered alongside within reach of the vessel's tackles, and that the ship should receive a stated sum for each case delivered whether full, part full or empty, proof that the vessel received the number of cases stated in the bills of lading, that none were stolen during the voyage, and that all on board were delivered alongside by her tackles into lighters, entitles her to freight on all shown by the bills of lading, although there may have been a shortage when the oil reached its destination.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 147.*]

2. SHIPPING (§ 148*)—FREIGHT—DEDUCTION FOR DAMAGE TO CARGO BY STEVEDORE.

Where such charter provided that the vessel's stevedore for loading and unloading should be approved by the charterer, and his agent refused to permit the master to discharge a stevedore for rough handling of the cargo in unloading, the charterer was not entitled to make a deduction from freight on account of breakage by such stevedore.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 148.*]

Deductions and offsets from charter hire of vessel, see note to Tweedie Trading Co. v. George D. Emery Co., 84 C. C. A. 254.]

In Admiralty. Suit by the Steamship Den of Ogil Company, Limited, against the Standard Oil Company of New York. Decree for libelant.

Convers & Kirlin (Charles R. Hickox and Russell T. Mount, of counsel), for libelant.

Burlingham, Montgomery & Beecher (Charles C. Burlingham and Robinson Leech, of counsel), for respondent.

HOLT, District Judge. This suit is brought by the owner of the steamship Den of Ogil to recover an amount deducted by the respondent from the amount claimed by the libelant to be due for charter hire. The steamer was chartered to the respondent to carry a cargo of oil on a voyage from New York to Penang, Singapore, Macassar, and one port on the north coast of Java. The respondent owned the cargo, and was both consignor and consignee. The steamer, therefore, was a private, and not a common, carrier. The charter party provided that the charterer should pay for the use of the vessel "20½ cents on each and every case delivered, whether full, part full or empty," and that the cargo was "to be received and delivered alongside, within reach of the vessel's tackles." It also contained the following pro-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

vision: "The vessel's stevedore, for loading and discharging, to be approved by the charterer or his agents." The oil was carried in wooden cases, each inclosing two tins containing five gallons each. Two bills of lading were issued, one for 68,045 cases consigned to Penang and Singapore, and one for 103,000 cases consigned to Macassar and Sourabaya. The steamer proceeded to the four ports in turn, discharged its entire cargo, and claimed compensation at the rate of 20½ cents for each of 171,045 cases, the number stated in the bills of lading. The respondent deducted \$6.48 for alleged shortage of 2½ cases at Singapore, \$314.68 for alleged shortage of 163 cases at Sourabaya, and \$172.25 for alleged damage from breakage of cases while discharging at Macassar, making in the aggregate \$493.41, which this suit is brought to recover.

[1] The respondent has offered no evidence in this case. There is no affirmative proof, either of shortage or damage in delivery. As, however, the charter hire agreed on was 20½ cents for each case delivered, the libelant must establish that the number of cases mentioned in the bills of lading were delivered. The evidence satisfies me that the number of cases stated in the bills of lading were taken on board at New York, that none of them were stolen or abstracted from the steamer on the voyage, and that all the cases in the ship were delivered alongside by the vessel's tackles. It follows, therefore, that the number of cases stated in the bills of lading were delivered over the vessel's side. If that number did not reach the go-downs, the steamer was not responsible. There were opportunities for stealing during the transportation on the lighters and bullock carts from the steamer to the go-downs, and in my opinion any shortage which occurred was caused by thefts at that time.

[2] In respect to the respondent's deduction for damage from breakage of cases at Macassar, in the first place, there is no evidence on the subject in the case, except that of the captain, who admits that the stevedore at Macassar did some damage from rough handling of cases in unloading. By the terms of the charter party the stevedore for loading and unloading is spoken of as the vessel's stevedore, but it is provided that he is to be approved by the charterer. The stevedores, in fact, at the first three ports were selected by the respondent's agents there. But they were paid by the vessel, and are to be regarded, I think, as in the employ of the vessel. The evidence shows, however, that the captain, as soon as he noticed the rough handling of cases by the Macassar stevedore, proposed to the respondent's agents to discharge him; but they objected, stating he had the contract to transport the oil by bullock carts from the shore to the go-down, and that his discharge as stevedore would make trouble. As the stevedore by the terms of the charter was to be approved by the charterer or his agents, no new stevedore could be appointed by the captain against the objection of the respondent's agents. I cannot see, therefore, how the vessel is responsible for any damage caused by the negligence of the stevedore at Macassar in handling the cases.

My conclusion is that the libelant is entitled to a decree for the amount demanded in the libel.

In re FREEZE.

(District Court, D. Oregon. September 4, 1911.)

ALIENS (§ 68*)—NATURALIZATION—SUFFICIENCY OF PETITION—VERIFICATION.

Where a petition for naturalization is properly verified by the requisite number of competent witnesses in conformity with the requirement of Naturalization Act June 29, 1906, c. 3592, § 4, 34 Stat. 596 (U. S. Comp. St. Supp. 1909, p. 478), prior to the posting of notice, its sufficiency is not affected by the fact that the witnesses verified the same on different days.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138-146; Dec. Dig. § 68.*]

Petition of Harvey Walter Freeze for naturalization. On objection to sufficiency of petition. Overruled.

Walter H. Evans, Asst. U. S. Atty.

BEAN, District Judge. Harvey Walter Freeze, an alien, has applied to be admitted to citizenship. His petition for admission was signed and verified by himself and by one competent witness on March 27, 1911, and by another competent witness on the following day. On the 28th, and after the petition had been thus verified by both witnesses, the clerk posted the notice required by section 5 of the naturalization act. The proof submitted at the hearing as to the residence, character, and general qualifications of the applicant is entirely satisfactory. Objection is made, however, to his admission on the ground that his petition is a nullity and void, because not verified by each witness on the same day.

Admission to naturalization is a privilege, not a right. Every state and nation must determine for itself who shall be entitled to become members of its body politic and the terms and conditions upon which such rights may be acquired. Congress could therefore have provided that applications for admission should be verified by two witnesses on the same date; but I do not think it has done so. The law requires the petition to be verified by at least two competent witnesses, and presumably it contemplates that it shall be so verified at the time of its filing; but, if this is so, the application of the petitioner, signed by himself and verified by one witness, was not complete nor entitled to be filed until the 28th, when it was verified by the other witness, and in contemplation of law it was not filed until that date, so that at the time of filing it was, in fact, verified by both witnesses.

I can conceive of no theory in law or in reason why a petition may not be partly filled out on one day and completed on the next, provided requisite notice of the application is immediately given. It is no doubt the better practice for both witnesses to sign and verify at the same time, and such should ordinarily be required; but circumstances may arise where it is impossible or impracticable to do so.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Where a petition in due form, purporting to be verified by two witnesses, is filed, one of whom is in fact incompetent, it has been held that it cannot be amended by being verified by another witness, and should be dismissed. *U. S. v. Martorana*, 171 Fed. 397, 96 C. C. A. 353. But where the petition is properly verified by the requisite number of competent witnesses prior to the posting of notice, there is no occasion for amendment; for the petition is complete and conformable to the law before any official action is taken thereon.

The provisions of section 14 of the naturalization act providing that declarations of intention and petitions for naturalization shall be bound in chronological order merely define the duties of the officers having such matters in charge, and if they have so prepared and bound the applications that the provisions of the section cannot be observed it should not affect the right of the applicant, who has complied with all the formalities of law and has shown himself entitled to admission. The privileges given him by statute should not be made subservient to mere matters of form.

ELECTRIC RENOVATOR MFG. CO. v. VACUUM CLEANER CO. et al.

(Circuit Court, W. D. Pennsylvania. October 7, 1911.)

No. 96.

On rehearing.

For former opinion, see 189 Fed. 754.

ORR, District Judge. A rehearing was had this 9th day of October, 1911, upon the motion on the part of the defendant to dissolve and vacate the preliminary injunction heretofore granted. The argument on the part of the defendant indicated that it thought the injunction was originally issued by the court upon the theory that the defendant had no right to assert title to its patent or to charge infringement on the part of those using the patent. This was not the intent of the injunction, but it was to restrain the defendant from making threats or warnings against users when the defendant had not complied with the plaintiff's request that a proceeding to test the validity of the patent should be instituted. The notices sent out contained such language as the following:

"You may suggest that your contract with the manufacturers protects you from any ultimate damages that we might claim. We only ask you to look into the standing of the people from whom you are buying. We think you will find that 90 per cent. of all of the unlicensed manufacturers are not strong enough to afford any real protection."

It appears that recently the defendant has eliminated that language from a circular letter which had been prepared and which it was accustomed to send out. The court believes that the injunction, as modified, in accordance with the opinion heretofore filed upon this question, should stand.